

**Baker  
McKenzie.**

**A GLOBAL GUIDE TO  
TAKE-PRIVATE  
TRANSACTIONS**

**AUGUST 2020**

**TRANSACTIONAL  
POWERHOUSE**

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# INTRODUCTION



**Recent falls in equity markets will mean that many listed companies may appear attractively priced, for a period at least. With significant levels of dry powder available to financial investors and potential delays to at least some private M&A processes, we expect the focus on “take-private” to increase during the next phase of the cycle.**

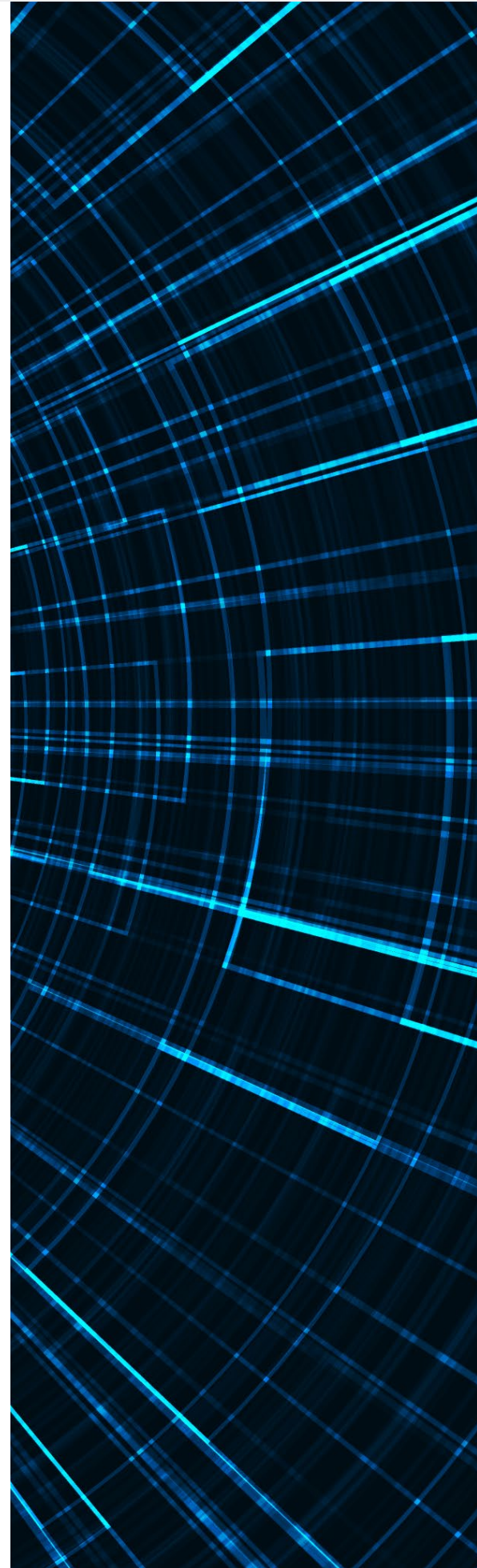
Take-private transactions are transactions where companies whose shares are publicly listed on one or more listing venues are acquired and de-listed.

There are a number of reasons why we are likely to see a prevalence in take-private transactions over the coming months, including:

- share prices of listed companies – particularly those in some of the worst affected sectors – have fallen significantly from their pre- Covid-19 highs;
- the speed of any recovery in many economies is difficult to predict but there seems to be growing consensus that it will be slower than previously thought;
- owners of private companies who may be contemplating a sale process will in many cases prefer to delay running such a process until market conditions improve, meaning fewer quality private company assets are likely to come to market in the short term and, in turn, prompting some acquirers to widen their focus to encompass listed company targets;
- founders, management teams and/or majority shareholders of listed companies may feel that “their” companies are intrinsically worth much more than the valuation placed on them by the public markets and they can unlock the true value of these assets by buying them back at attractive prices, often in conjunction with financial sponsors;
- listed companies may face pressure from shareholders, and campaigns from activists, focused on driving fundamental changes, sometimes including agitating for take-private transactions; and
- private equity, traditionally a major protagonist in take-private transactions, is sitting on record levels of dry powder and, when debt markets, stabilise, will look to deploy it.

All of these, and other, factors will likely catalyse the market for de-listings and take-private transactions in 2020 as companies and management seek to earn respite from the market, re-organise and restructure, retire existing debt, raise fresh capital and build value for the long term – all without the scrutiny of the public markets and the pressure of public reporting cycles.

Take-private transactions that involve financial sponsors invariably require the buyer to raise new debt to fund a proportion of the purchase price. Such transactions often require the buyer to retain the existing management teams of the target companies, and to put in place management incentivisation plans. As such, these transactions tend to throw up a different set of challenges for buyers more accustomed to transacting in the private context, they typically require more time to plan and implement and usually involve a greater number of parties to the deal. These factors mean that these transactions, as well as being more complex than private M&A transactions, are often more complex than other public M&A.



# INTRODUCTION



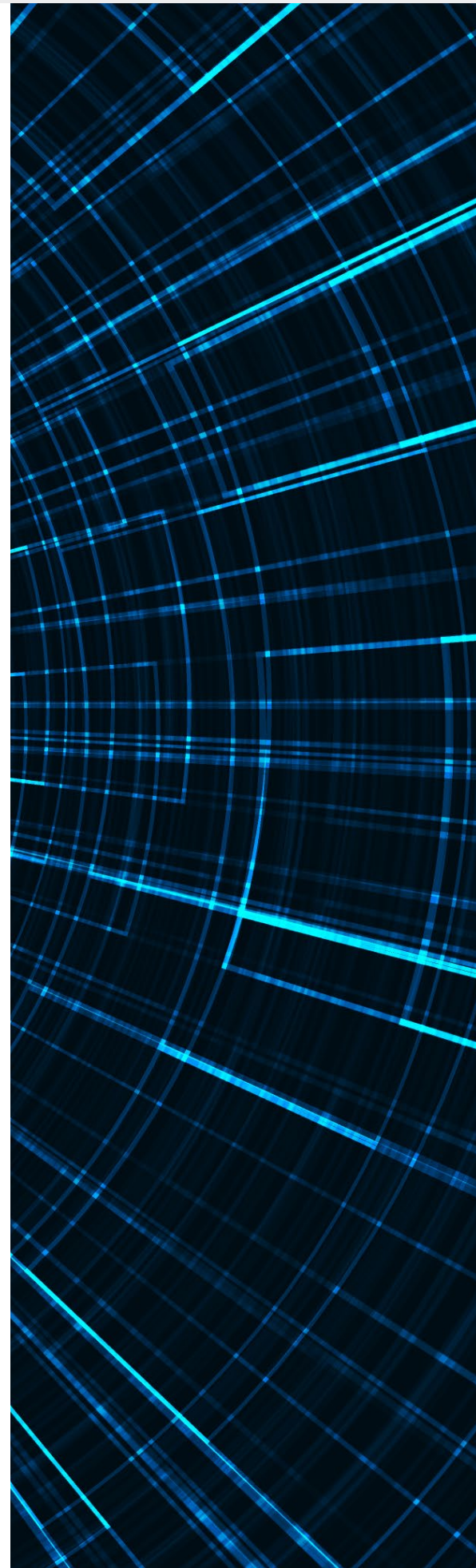
At Baker McKenzie, we are a transactional powerhouse with extensive experience of leading public deals across multiple borders and legal frameworks including deep knowledge and experience of take-private transactions. We have the market knowledge, legal expertise and creativity needed to execute complex and high profile transactions successfully. Our experience of leading these deals, combined with our deep sector knowledge and our ability to work seamlessly across borders on these deals, has allowed us to produce this guide, which sets out a comparison of some of the noteworthy features and requirements applicable to take-private transactions in a number of jurisdictions around the globe.

In this guide, Baker McKenzie lawyers share their high-level views on these key questions:

1. What are the thresholds for: (a) when a mandatory takeover offer obligation (if any) is triggered; (b) minority squeeze-out by the bidder?
2. What are the requirements as to offer price: (a) in relation to minimum offer price; (b) form of offer consideration?
3. What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?
4. What conditions may be attached to the offer?
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8. Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?
9. Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?
10. Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?
11. Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?

You may also wish to refer to [Baker McKenzie's Global Public M&A Guide](#), which provides an overview of some of the key legal considerations associated with public M&A transactions in 42 jurisdictions across the globe.

We will be happy to provide more details of the rules and practice in any of these jurisdictions. The content of this guide is current as of 6 August 2020 and does not constitute legal advice. For further information or assistance regarding take-private transactions, please reach out to the contacts listed in the Guide or to your usual Baker McKenzie contact.










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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** A mandatory takeover offer obligation is triggered when a shareholder, individually, or acting jointly in a coordinated manner with other shareholders, reaches a participation of control in a listed company as a result of (i) the acquisition, directly or indirectly, of a participation of 50% or more of voting rights, or (ii) having a control participation<sup>1</sup>, even if the 50% threshold is not met. For example, the execution of voting agreements with other shareholders may result in a control participation without the 50% threshold being reached.

Notwithstanding the above, a mandatory takeover offer is not triggered in certain situations (e.g., in case of the merger of publicly listed entities).

**B.** A minority squeeze-out by the bidder could be mandatory when the bidder, directly or indirectly, reaches 95% control of the publicly listed company. This squeeze-out may be triggered by the request of a minority shareholder or a voluntary takeover by the majority shareholder.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** The offer price shall be at an equitable price. The “equitable price” offered must be the greater than:

- i. the highest price that the bidder would have paid or agreed to pay for the securities during the 12 months prior to the date of the agreement or date of payment on which the bidder reached the control participation, excluding trading volumes that are not significant (i.e., 5% or less of the total traded volume in the trading day of acquisition) and purchased at trading price (including any other additional consideration paid or agreed with respect to such securities); or
- ii. the average price of the securities subject to the offer during the semester immediately prior to the date on which the bidder is obliged to publish notice of the announcement of the transaction by which the change in the controlling interest was agreed upon. The change in the controlling interest occurs when the percentage of shares listed on a market authorized by the Securities Commission (“**CNV**”) represents at least 25% of the capital stock of the issuer.

**B.** In mandatory public offerings, the bidder will generally offer cash consideration. However, the bidder may also offer as consideration an exchange of shares or other securities based on the investor’s choice. There is no obligation to accept non-cash consideration and any acceptance of non-cash consideration is voluntary.

Any securities offered as consideration shall only be securities admitted to the public offering and listed in a market authorized by the CNV and the exchange ratio and the guidelines established for its determination shall be sufficiently described.



## 3

### **What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

Prior to the publication of the prospectus, the bidder must describe the guarantees obtained by the bidder to ensure compliance with the obligations contained in the offer. The guarantees must be issued by one or more local or foreign financial entities (with a branch or permanent representation in Argentina), or by solvent insurance companies duly licensed in their country of origin and with a recognized track record.

The bidder must provide the following information:

- i. Information on the possible future indebtedness affecting the financing of the offer, a description of the financing of the offer, the origin of said financing, and the main lenders or negotiating agents involved in the financing. The bidder must also indicate whether the payment, the refinancing or the guarantee depends on —to a significant degree— the business of the affected company.
- ii. Information on the nature of the bidder's activity and businesses and on the economic and financial situation of the offering company over the last two years, including identification of its assets, turnover, total assets, indebtedness, results and express reference to any qualifications or relevant indications that appear in the external audit reports. In addition, the bidder must provide information regarding its financial and business prospects.

## 4

### **What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

The bidder will indicate (i) if the result of the offer is conditioned or affected by Antitrust Law No. 27,442, (ii) if any regulatory authority has given approval or if such is needed and, (iii) any actions that the bidder intends to or should initiate before the competent authorities in accordance with said law, if appropriate, with an indication of its possible consequences. The prospectus must also contain other information that is relevant for the investors to make an informed decision regarding the offer.

## 5

### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

A notice to the CNV will be given as soon as a control participation is met, followed by a public announcement of the offer. In case of minority squeeze-out rights, the controlling entity has 60 days to prepare an offer counted from the date of the first claim made by a minority shareholder.





## 6

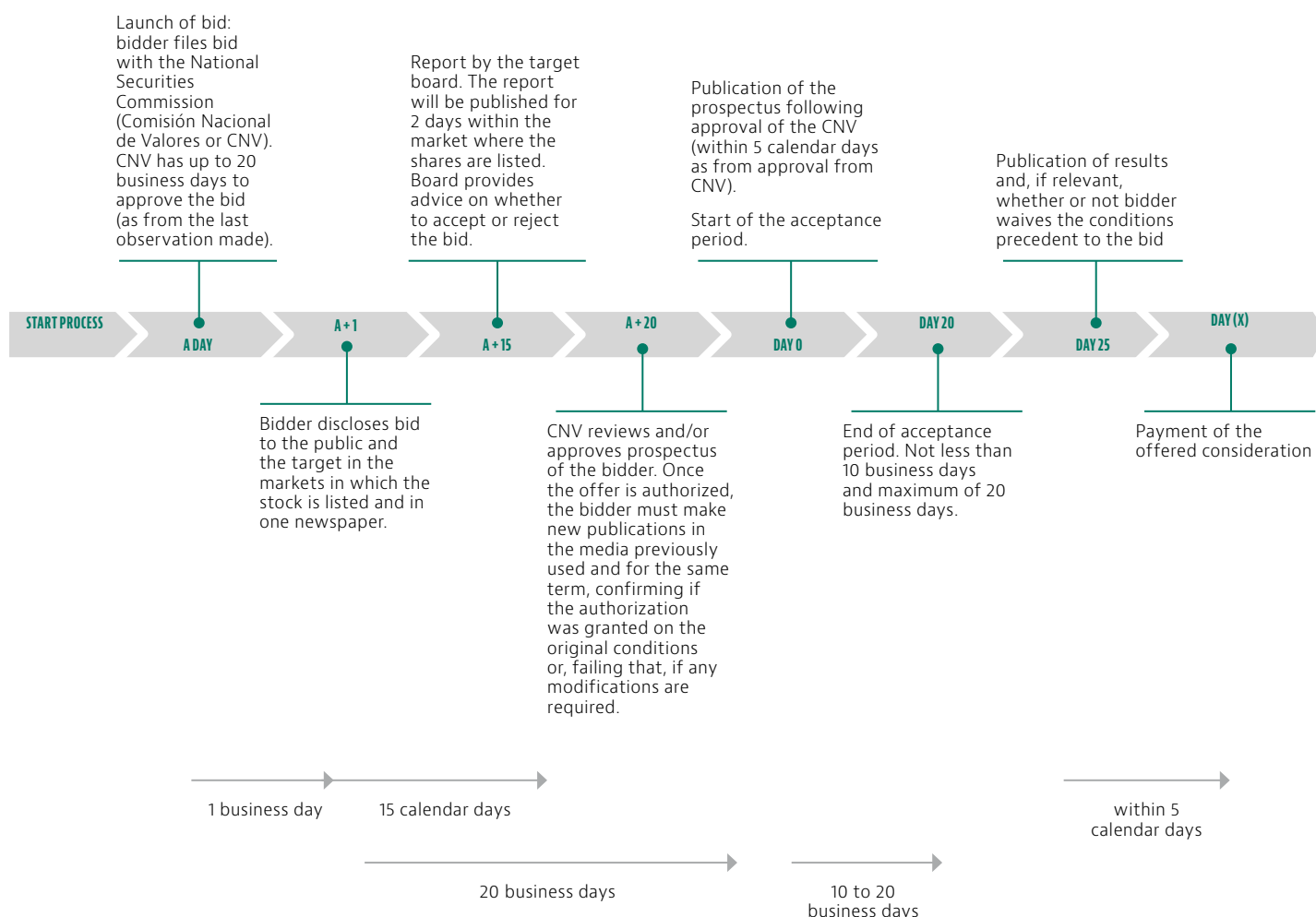
### What is the typical basic timeline for a takeover offer?

Whoever reaches participation of control must immediately inform the CNV. After that, the terms of the offer will be publicly announced. The bidder will, as soon as possible and within a maximum term of one month from the control participation being reached, publish the announcement through the online system managed by the CNV, in the information system of the markets where the shares are listed for at least one day and in one newspaper.

The CNV has 20 business days to review the public offer. Once the offer is authorized by the CNV, the bidder must make new publications in the previously used media and for the same period, indicating if the authorization was granted under the original conditions or, failing that, if any modifications were introduced. Within five calendar days as of the notification of the approval of the offer by the CNV, the bidder must publicly announce the prospectus containing the offer.

The term granted to investors to accept or reject the offer cannot be less than 10 business days and cannot exceed 20 business days. The board of directors of the company affected by the offer will publish a report on the reasonableness of the offered price within 15 calendar days of receipt of the notification of the bidder. The supervisory body will do the same once such body receives the report of the board of directors.

### Indicative timeline for a friendly public offer







## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

A take-private transaction where a private equity group purchases or acquires the stock of a publicly traded corporation will follow the rules applicable to mandatory takeover offer obligation described above.

When a company decides to delist, it must follow these guidelines:

- i. Within 2 business days after the delisting decision, the company shall request authorization from the CNV and comply with the timeline applicable to mandatory take overs (i.e., as soon as possible and within a maximum term of one month from the decision, the company must publish the announcement through the online system managed by the CNV, in the information system of the markets where the shares are listed for at least one day and in one newspaper).
- ii. Within 5 calendar days as of the notification of the resolution of the CNV, the company must publish notices during 3 days announcing the delisting.
- iii. The company or, where appropriate, the controlling shareholder, must make a public offer (mandatory takeover bid). If the takeover bid is not extended to shareholders who vote in favor of delisting (i.e., is only extended to those shareholders who voted against delisting), such shareholders must immobilize their securities until the term for acceptance of the offer has elapsed.
- iv. Special financial statements shall be prepared.

There are certain limited exceptions. For example, foreign companies originally listed abroad but also listed in Argentina are not subject to these guidelines. Delisting will be effective within a term that may not be less than 10 business days from the date of the resolution of the CNV approving the delisting, to enable shareholders to sell their shares in the Argentine market.

The delisting will be decided in an extraordinary shareholders' meeting, complying with the quorum and majorities required by General Companies Law No. 19,550. The equitable price consideration applicable to a mandatory takeover will also apply to a delisting.

## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

At all times, the bidder must respect the principles of transparency, protection of the investors, publicity and equal treatment of investors, both in economic and financial conditions and in any other condition of the acquisition and/or exchange, for all shares with voting rights (within each category or class). From the announcement of the offer and until the publication of the result, the board of directors of the company cannot conduct operations that are not typical of the ordinary activity of the company or that disrupt the consideration of the offer (the shareholders' interests will prevail at all times over the management's own interests).

In particular, the board will not:

- a. approve the issuance of new shares;
- b. distribute extraordinary dividends in any way that does not follow the customary policy; or
- c. transfer, encumber or lease real estate or other assets which frustrates or disrupts the offer.



**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Yes. Each shareholder holding a specific class of shares will receive the same treatment as other shareholders holding the same class of shares, taking into consideration the general principles of equal treatment and transparency. If any management benefits/incentives are given, such benefits/incentives shall be described to all shareholders.

**10**

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

In principle, no.

**11**

**Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

In principle, no.





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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

#### **A.** A mandatory offer is triggered in three circumstances:

- First, when a person (or a group of people acting together) acquires from a controlling shareholder an interest in a company's shares which gives that person, or group, a power to control the company (the tag-along offer);
- Second, when a controlling shareholder (or a person related to the controlling shareholder) acquires an additional interest in shares [which combined with an existing holding will] equal one-third of the outstanding shares (free-float) of the company (the free-float reduction mandatory tender offer); and/or
- Third, if the company, or its controlling shareholder, intends to take the company private (the public-to-private transaction).

In addition to the legal and regulated mandatory tender offer rules there are additional provisions which may be applicable, for example:

- A 'contractual' tender offer may be required pursuant to the B3 (the Brazilian stock exchange) segments' rules (like the tender offers for delisting from Novo Mercado, Nível 2 and Nível 1); and
- The bylaws of some Brazilian public companies require a person to launch a tender offer if it acquires an interest in shares equal to a certain percentage of the company's capital stock (a 'poison pill clause').

**B.** In a public-to-private tender offer, if less than 5% of all shares issued by the company are outstanding after the term for tender offers expires, these shares may be redeemed at the same price as the price established in the tender offer, adjusted by the SELIC rate (Brazilian basic interest rate), provided that the general meeting approves the redemption.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** The minimum offer price requirements depends on the type of mandatory tender offer:

- In mandatory tender offers for the transfer of control of a company, the offer price must be at least 80% of the price paid to the controlling shareholder and if the company's shares are admitted to trading at Novo Mercado's and Nível 2's segments, the offer price must be equal to the price paid to the controlling shareholder as required under the Rules of the mentioned segments.
- In a public-to-private tender offer, the offer price must be at least equal to the fair value of the company, based on one or more of the following criteria: net assets appraised at market value, discounted cash flow, comparison by multiples and share quotation in the securities market. The value must be calculated by an appraiser with proven expertise in appraisal of publicly held companies.
- In a free-float reduction mandatory tender offer, the offer price must be at least equal to the fair value of the company, based on the same criteria above.

The price offered must be uniform for every shareholder.

**B.** The form of consideration must be either cash or securities of a company listed on the Brazilian stock exchange. In a tag-along offer, where the consideration paid to the controlling shareholder comprised of other types of assets or securities, the regulator may authorize a tender offer for assets and securities.

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

The offeror must engage a broker-dealer or investment bank to act as intermediary and provide settlement services. The intermediary must guarantee the financial settlement of the tender offer. This information must be disclosed at the tender offer notice but additional funding documents are not required to be made public.

## 4

### What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.

The offer may be subject to conditions, provided the fulfillment of conditions is not subject to direct or indirect actions of the offeror or related people. Brazilian securities regulators differentiate the treatment of mandatory and voluntary tender offers:

- Voluntary tender offers (for example, a takeover tender offer) may be subject to a broader range of conditions, for example, third-party consents and absence of material adverse changes, provided the general rule stated above is complied with.
- Brazilian securities regulator will refuse to register mandatory tender offers (for example, tag-along, public-to-private or free-float reduction mandatory tender offers) that are subject to conditions not imposed by law or regulation. Additional conditions require a specific waiver from the regulator which is reluctant to grant such waivers.



## 5

### When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?

For voluntary tender offers, the offeror must keep the offer confidential until the release of the offer document to the public, unless there is a leakage. If there is a leakage, the offeror must either promptly release the offer document or inform the public of its intention to make the offer. If prior to releasing an offer, the offeror reaches a 5% ownership threshold by acquiring shares of the target in the market, it may be obligated to disclose an intention to make a tender offer to the public due to early-warning regulations.

Mandatory tender offers are subject to registration with the Brazilian securities regulator and will be disclosed upon filing of the registration request or approval to launch the offer by the shareholders or directors.

Until the offer is made public, insider trading rules prevent target management and controlling shareholders from trading with shares of the target if they have knowledge that an offer is pending or is expected.

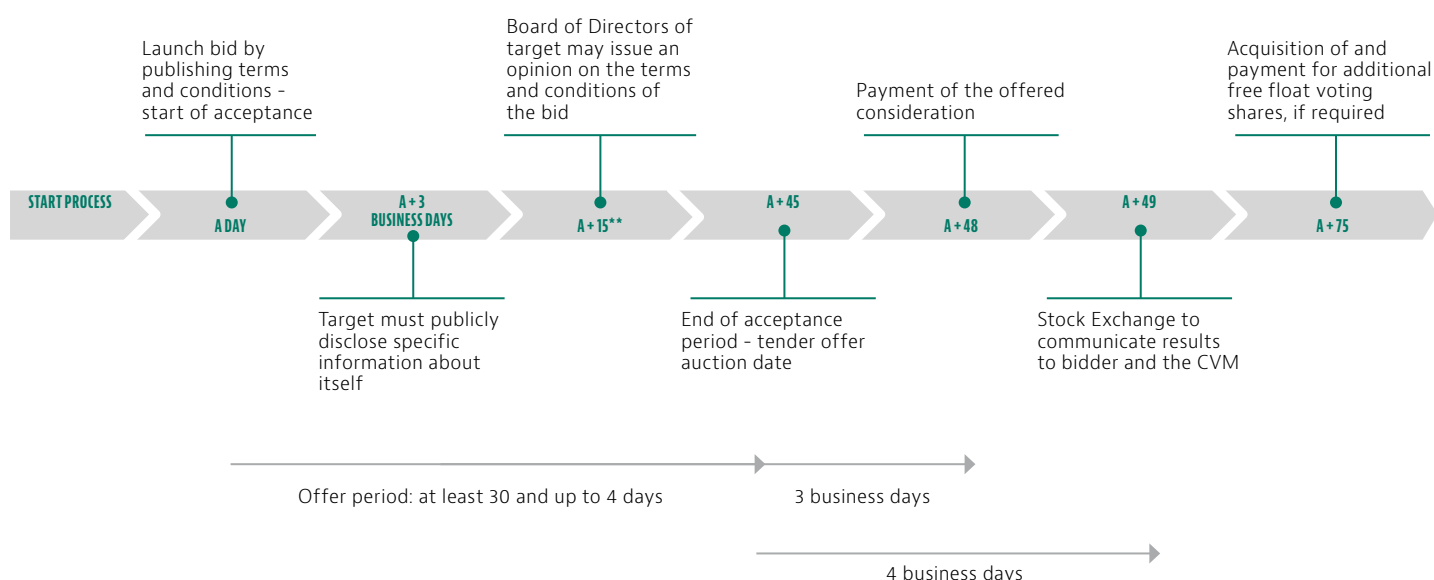
## 6

### What is the typical basic timeline for a takeover offer?

In Brazil, an offer must stay opened for at least 30 but no more than 45 days from the date on which the offer document is released to the public.

For tender offers subject to registration with the Brazilian securities regulator (i.e., mandatory tender offers and offers whose consideration consists of securities of another company), the offer document can only be released after the regulator has granted the registration. The registration process can take from one to four months, depending on the feedback received from the regulator and the need for any specific relief.

#### Voluntary public takeover (indicative timeline for cash offer)\*



\* If the offer involves payment with securities, it will be subject to prior registration with the Brazilian Securities and Exchange Commission (Comissao de Valores Mobiliarios - "CVM").

\*\* According to the rules of the Novo Mercado and the Nivel 2 listing segments of B3, the board of directors has 15 days to issue its opinion, counted from the bid launch. The board of directors do not have this obligation if the company is listed in other segments of B3, unless otherwise provided in its bylaws

**7**

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

There are different kinds of segments with diverse levels of corporate governance rules. Some segment rules require a tender offer for changing of segments (the delisting from a segment). The mandatory tender offer for delisting from a segment is different from the mandatory tender offer in a public-to-private transaction, as delisting from a segment is possible without becoming a private company.

Under the Novo Mercado regulation, a tender offer is a precedent condition for a company to delist from the Novo Mercado segment. It is possible to delist from the Novo Mercado segment without launching a tender offer, provided that the company's general meeting approves the waiver of the tender offer, in a shareholders' meeting with the attendance of at least two-thirds of the company's outstanding shares (free-float). The resolution must be taken by the majority of the attending minority shareholders.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Yes, it is possible to secure undertakings from shareholders to support the transaction. Generally, the offeror will engage in discussions with certain relevant shareholders prior to releasing the offer document, in order to be able to disclose such support in the offer document. It is not common to secure support undertakings from management.

If the offeror decides to pursue such support, it is required to take appropriate measures to ensure the confidentiality of the discussions until the offer document is released or the offer is publicly announced by the target company.

Other protective measures are not generally permitted or used. The offeror may consider disclosing its plans for management and employees of the target in the offer document as a way to promote support. Management is generally not able to block a tender offer or to prevent the offer from being submitted for shareholders' approval. For example, management does not have the authority to change the bylaws without shareholder approval or to waive restrictions already included in the bylaws to a competitive bid. Tender offers that require any type of corporate resolution, waiver or approval are submitted to a shareholders' meeting and the management's role is to issue an opinion on the fairness of the offer and advise the shareholders accordingly.

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

All offerees must be treated equally and the consideration offered must be uniform across all shareholders, unless the offer is for different classes of securities, for example, common and preferred shares. In these cases, different consideration is permitted but must be justified either by a valuation report (where one is required) or representations included in the offer document. It is not possible to differentiate between shareholders.

It is possible to offer alternative considerations based on on-the-spot or installment payments, provided that the offerees have the right to choose between them. These alternatives must not affect the independence of the offerees' decision-making process as to whether to tender their securities (e.g., be subject to early acceptance or the number of securities already tendered).



**10****Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

The preparation and disclosure of an appraisal by an independent expert is mandatory in every tender offer launched by the company, the controlling shareholders or the **management**. Although the applicable regulation requires other special procedures to be followed when the transaction involves the particular interest of any management member, these procedures do not represent major challenges in the process. However, the management will be required to disclose in the offering document any material information it has on the company in order to provide the shareholders with sufficient information. Statutory conflict of interest rules may require special disclosure and/or prevent the management from participating in the board meetings related to the offer.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

There are three kinds of mandatory offers and other cases when an offer is mandatory for a company listed in the respective segment, pursuant to the B3 segment rules.

The tender offer for delisting from a segment is different from a tender offer for a public-to-private transaction, as it is possible to delist from a segment without becoming a private company. There is also the traditional segment of the stock exchange, where listed shares are not subject to enhanced governance rules.

In addition to the legal and regulated mandatory tender offer rules a 'contractual' tender may be required pursuant to the B3 segment rules and the bylaws of companies may require mandatory tender offers under poison pill clauses.

These tender offer regimes may add complexity and create challenges for an offeror as it is often necessary to combine two or more tender offer regimes in a single transaction.

In a public-to-private transaction, the tender offer must be accepted by at least two-thirds of the outstanding shares (free-float) qualified to participate in the bid. If an offer fails to reach this threshold, the company will be prohibited from becoming a private company.

In any tender offer where less than two-thirds of the outstanding shares qualified to participate in the bid have been tendered, the offeror is prohibited from purchasing more than one-third of the outstanding shares. In addition, in any offer where the company, its controlling shareholder or any related person acquire more than two-thirds of the outstanding shares, the offeror is obliged, for a period of three months after the closing of the tender offer, to acquire the shares of any shareholder that has failed to tender its shares in the tender offer.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** If one or more persons in a group, acting in concert, acquire voting securities, as a result of which the group in the aggregate would pass the 20% threshold, the members of the group will have a joint obligation to carry out a formal takeover bid, even though the individual group members do not pass the 20% threshold.

**B.** If, within 120 days of the commencement of the bid, at least 90% of the shares of the target are tendered to the bid, an offeror may acquire the remaining shares of the target at the same price offered under the bid.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** Except where the bidder or anyone acting in concert with the bidder acquires or has acquired any interest in the securities of the target, there are no restrictions on the nature of consideration or price at which the bid can be made. An acquisition of securities may affect the nature and level of consideration that the bidder may then offer in a takeover bid, as follows:

- Certain pre-bid integration rules apply with respect to any shares of the target acquired by the offeror within 90 calendar days prior to the making of a bid. For example, the offeror must offer consideration in the same form and that is at least equal to the highest consideration paid under any of the pre-bid transactions, or must offer at least the cash equivalent of such consideration.
- The offeror must offer to acquire, under the bid, that percentage of the securities of the class subject to the bid, that is at least equal to the highest percentage that the number of securities acquired from a seller in that prior transaction was, of the total number of securities of that class, beneficially owned by that seller at the time of that prior transaction.

**B.** Except as noted above, if no prior offer was made, there are no requirements with respect to the form of offer consideration.



**3****What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

Takeover bid legislation requires an offeror to have made adequate arrangements prior to the bid to ensure that funds are available to acquire all of the securities subject to the bid. Such financing arrangements may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes that there is a remote possibility that, if all other bid conditions are satisfied or waived, the offeror will be unable to pay for the securities deposited under the bid due to a financing condition not being satisfied.

The offeror's circular must identify the source of the funds and, if the funds are to be borrowed, must also identify: the name of the lender; the terms and financing conditions of the loan; the circumstances under which the loan must be repaid; and the proposed method of repayment.

**4****What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

An offeror may attach almost any condition to its obligation to complete a takeover bid, e.g., minimum tender condition, receipt of requisite government consents and absence of material change. In the case of cash consideration, takeover bid legislation requires an offeror to have made adequate arrangements prior to the bid to ensure that funds are available to acquire all of the securities subject to the bid. Such financing arrangements may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes that there is a remote possibility that, if all other bid conditions are satisfied or waived, the offeror will be unable to pay for the securities deposited under the bid due to a financing condition not being satisfied.

**5****When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

Canadian regulatory authorities do not have the right to request a person, who could be involved in a possible public takeover bid, to make an announcement without delay, until such ownership threshold exceeds 10% of the voting securities. The facts surrounding the receipt of a public takeover bid may constitute a material change for the target. If so, the target company must announce this. However, the board of the target company can delay the announcement in certain circumstances.

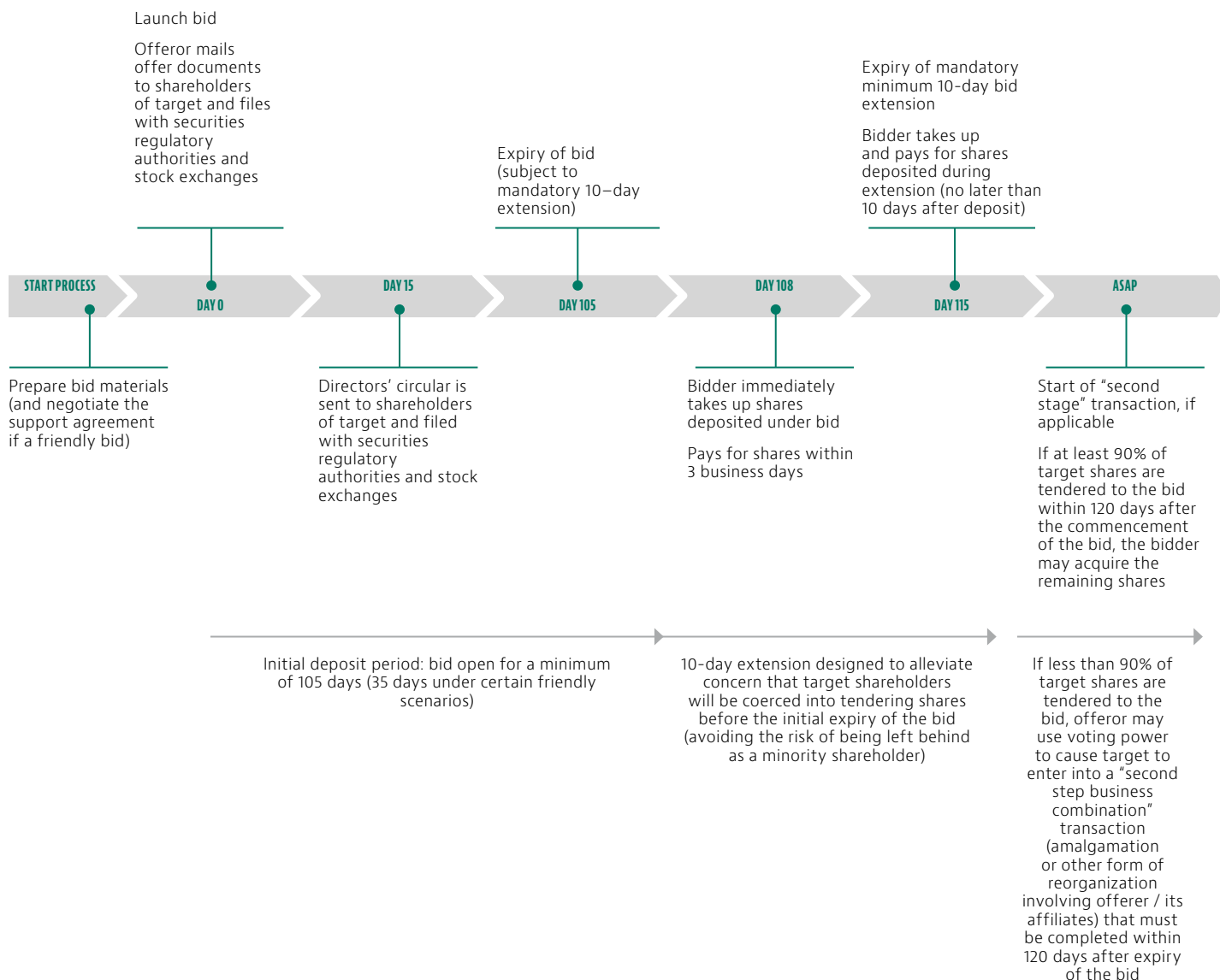
Other obligations include the obligation not to provide information to a party that may trade on such information.

The acquisition of a toehold position in the target's securities (up to 19.99%) is permitted, subject to compliance with the disclosure regime.

## 6

### What is the typical basic timeline for a takeover offer?

#### Public takeover bid (indicative timeline)



## 7

### Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.

Friendly acquisitions in Canada are typically structured as corporate transactions under the target's corporate statute as amalgamations, reorganizations and, most often, plans of arrangement or arrangements. Arrangements are court approved mergers. They permit the parties to structure a combination in ways that are not contemplated by corporate statutes. They are often used to address tax issues relating to the merger and usually combine many steps into one transaction in a specified order.



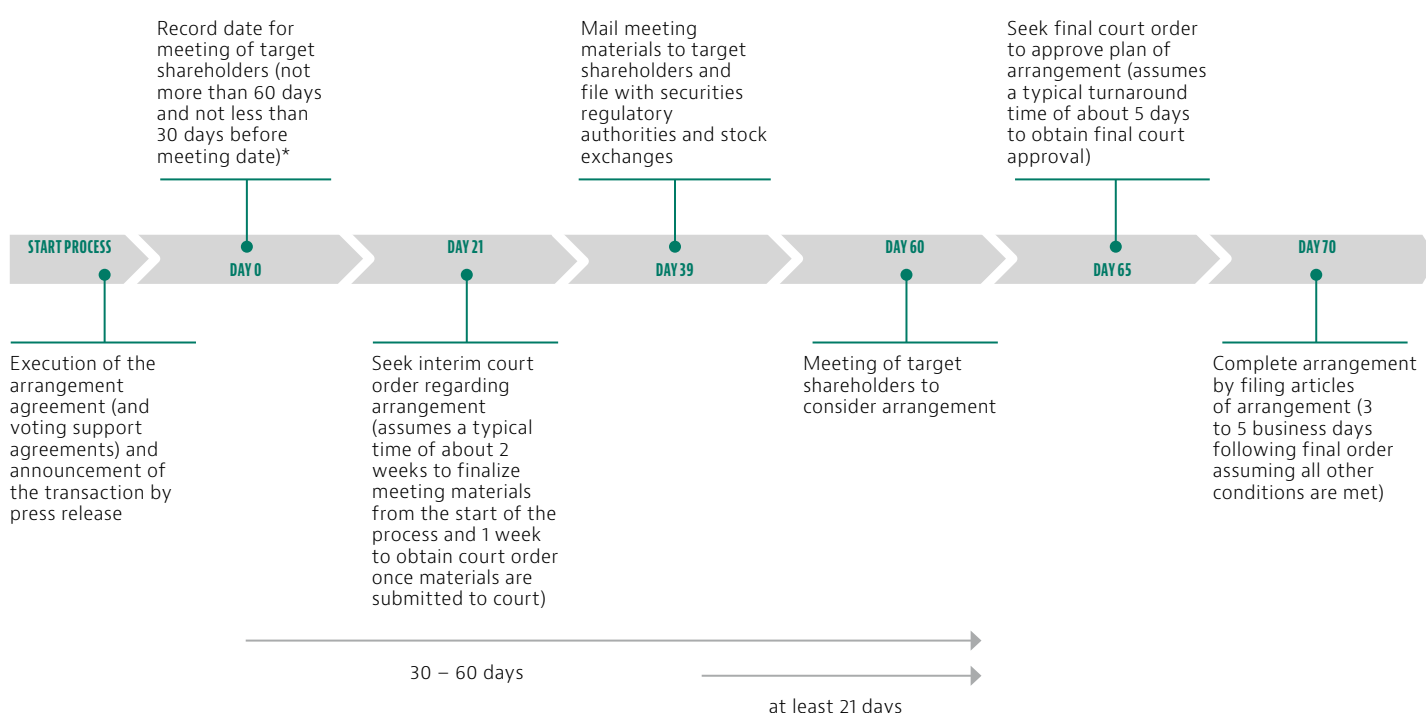
As an arrangement is a negotiated transaction, a common step is the entering into an arrangement agreement between the offeror and the target. The arrangement agreement usually covers issues such as (i) the terms and conditions of the transaction (including the amount and form of consideration to be exchanged for the securities of the target), (ii) mutual representations, warranties and covenants, (iii) break fees, (iv) “no shop” provisions, and (v) the calling of a shareholders’ meeting to vote on the arrangement.

Once the arrangement agreement has been entered into, the parties apply for court approval. In the first of two applications, the court is asked to direct that a shareholders’ meeting be held to consider the arrangement and to prescribe the level of voting required to approve the arrangement. The court will usually require the approval of at least 66⅔% of shareholder votes and may, if appropriate, also require that the arrangement be approved by a majority of the target’s disinterested shareholders. The court will typically expect the offeror to grant rights of dissent to shareholders that do not approve of the transaction and wish to be paid fair value for their shares instead of the consideration being offered under the arrangement.

The target’s directors are required to prepare and mail an information circular to its shareholders in connection with the special meeting called to consider the transaction. If the approval of the shareholders of the offeror is required because of the structure of the transaction, the offeror also sends an information circular to its shareholders. The target and offeror circulars can be combined into one. The information circular will contain certain prescribed disclosure about the offer and the offeror (including prospectus level disclosure about the offeror where share consideration is involved). In addition, the circular usually contains a copy of a fairness opinion from a financial adviser stating that the consideration to be received by the target’s shareholders in the transaction is fair, from a financial point of view, to the shareholders.

If the required levels of shareholder approval are obtained at the shareholders’ meeting, the court will be asked to give its final approval for the arrangement in a hearing which all affected security holders are entitled to attend. In sanctioning the arrangement, a court will consider whether the statutory requirements were strictly complied with and whether the arrangement is fair and reasonable to all classes of affected security holders.

### Plan of arrangement (indicative timeline)



\*Some issuers are comfortable with calling the meeting before the interim court order. Others prefer to wait until the court order is obtained before setting the record and calling the meeting to ensure that the meeting materials can be finalized on the initial timeline.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

In a negotiated transaction, it is customary for the offeror and the target to enter into a support agreement. The support agreement usually covers issues such as (i) the terms and conditions of the transaction (including the amount and form of consideration to be exchanged for the securities of the target), (ii) management's support of the transaction, (iii) break fees, (iv) "no-shop" provisions and (v) representations, warranties and covenants. Similarly, directors and shareholders of the target can be approached to enter into lock-up agreements. Before (or after) making an offer, the offeror is free to seek lock-up agreements from shareholders of the target. Lock-up agreements can be "hard" (where the shareholder's undertaking to tender into the bid is irrevocable) or "soft" (where the shareholder agrees to tender but is free to withdraw if a higher competing bid is made).

To avoid making the locked-up shareholder a "joint actor" of the offeror, no collateral benefit, i.e., a benefit not offered to other shareholders, may be offered and the locked-up shareholder cannot actively participate in the strategy of the bid.

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

All shareholders of the target must be offered identical consideration. Accordingly, agreements that have the effect of paying an indirect premium to certain shareholders are prohibited. Certain collateral agreements are permitted in limited circumstances (such as a specified employment agreement with a senior officer of the target who is also a shareholder).

**10**

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

As long as management is not provided an unpermitted collateral benefit, they can participate in a transaction.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

If fewer than 90% of the shares of the target are tendered to the bid (other than shares held by or on behalf of the offeror or its affiliates or associates), the offeror may requisition a meeting of the target's shareholders and use its voting power to cause the target to enter into a "second step business combination" transaction, which is completed no later than 120 days after the expiry of the bid. The second step business combination might take the form of an amalgamation, plan of arrangement or some other form of reorganization involving the offeror or one of its affiliates.

All nonexempt takeover bids must:

- a. remain open for a minimum of 105 days, subject to a target board's ability to reduce the bid period;
- b. be subject to a mandatory tender condition that a minimum of more than 50% of all outstanding target securities, owned or held by persons other than the bidder and its joint actors, be tendered and not withdrawn before the bidder can take up any securities under the takeover bid. The purpose of this requirement is to ensure that the acquisition of control of a target through a takeover bid will only occur if a majority of independent shareholders supports the transaction; and
- c. be extended by the bidder for at least 10 days after the bidder achieves the mandatory minimum tender condition and all other terms and conditions of the bid have been complied with or waived. This requirement is aimed at alleviating the concern that target shareholders will be coerced into tendering their shares before the initial expiry of the bid (for example, to avoid the risk of being left behind as a minority shareholder of an issuer with a controlling shareholder).





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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A. 1.** Except for the situation referred to in section a.4. below, there is no specific threshold under Chilean law that triggers a mandatory take-over obligation for the controller of a listed company.

2. Subject to the following exceptions, a mandatory tender offer is required in order to consummate any acquisition that would allow the purchaser to obtain, either directly or indirectly, the “control” of a Chilean listed corporation. The exceptions are the following:

- a.** control obtained by subscribing for newly issued shares of the target company;
- b.** the acquisition of shares transferred by the controller of the target company in circumstances where:
  - the shares have “market presence” (meaning that have reached a minimum daily trading volume during at least 45 days during the last 180 exchange business days),
  - the price is payable in cash, and
  - the price is not “substantially” higher than “market price” (currently, this means no more than a 10% premium over market average price);
- c.** acquisitions that result from a merger;
- d.** acquisitions that are a result of inheritance; and
- e.** acquisitions resulting from judicial non-voluntary enforcement.

3. An individual or entity, or group of individuals and/or entities with a collaboration agreement (acting in concert), would be considered to be controllers of a company if they, directly or indirectly through other individuals or entities, own shares issued by such company and have the power to: (i) secure the majority of votes in shareholders’ meetings and elect the majority of the members of the board; or (ii) decisively influence the administration of the company.

4. If, after an acquisition, the controlling shareholder reaches a two-thirds voting stake in the target company, it must launch a tender offer for the remaining shares.

5. If an individual or entity intends to take control over a company that in turn controls a listed company that represents more than 75% of its consolidated assets, the bidder must first launch a tender offer for the shares of the listed company for a number of shares that allow the bidder to take control over that entity.

**B.** Minority squeeze-out by the bidder is only allowed under a specific event and to the extent that it is expressly considered in the bylaws of a listed company. Specifically, Chilean law provides that the bylaws of a listed company may establish that if certain conditions are met, the controller shall have the right to force the remaining shareholders to sell to the controller all the shares such shareholders acquired after such provision was included in the bylaws ("**Squeeze-Out Right**"). If such provision is included in the bylaws of the publicly held corporation as provided above, the controller would be entitled to exercise the Squeeze-Out Right, provided the following conditions are met: (i) the controller has conducted a tender offer for all of the company's shares; (ii) the controller has acquired through such a tender offer at least 15% of the issued shares from shareholders that were non-related parties to the controller; and (iii) upon completion of the tender offer, the controller has increased its ownership to more than 95% of the issued shares of the company.

The price for the shares will be the same as that offered in the tender offer, duly adjusted for inflation purposes, plus ordinary interest (average interest paid by banks and financial institutions in similar amount operations).

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** Generally, there is no minimum price. An exception to this is in the case of a mandatory tender offer where, after the acquisition, the controlling shareholder reaches a two-thirds voting stake in the target company, which triggers withdrawal rights to non-tendering shareholders. In this case, the price should not be lower than the weighted average price of the shares in case the shares have market presence (*presencia bursátil*), or the book value of the shares in case they do not have market presence.

Additionally, if within 30 days prior the commencement of any tender offer and 90 days after the publication of the notice of results, the bidder has, directly or indirectly, acquired or acquires shares subject to the tender offer at a different price than offered during the tender offer, the shareholders who sold their shares to the bidder have the right to require the bidder to pay them the difference. Therefore, in case the price of the tender offer was higher, the shareholders who sold outside the tender offer have the right to be paid the difference. Likewise, if the tender offer price was lower, the shareholders who tendered their shares have the right to be paid the difference.

**B.** The offer price must be clearly determined, and it must be payable in cash or with securities that have been duly registered and can be publicly offered as consideration payable for the offered shares.

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

In the offering memorandum or prospectus, which is a public document, must contain the terms and sources of financing of the tender offer by the bidder, including all relevant information evidencing that the bidder has or will have the funds required for the acquisition. Furthermore, if the bidder has obtained loans or capital contributions in connection with the offer, the bidder shall refer to such loans or capital contributions in the prospectus.

Additionally, the bidder must include in the prospectus detailed corporate, legal and business information of the bidder and the bidders related companies and ultimate controllers.

## 4

**What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

The offer may contain any objective and specific conditions that may trigger the right to revoke the offer. Such conditions normally refer to material adverse changes, but as the revocation conditions must be specific and objective, no general or standard material adverse change clauses are allowed. Thus, if any third-party, regulatory, corporate or other clearance or approval is required, revocation conditions can be included to address them. However, the conditions to the tender offer will need to be verified before the date the notice of results is to be published. Therefore, considering that the maximum term of a tender offer, including potential extensions, is 45 days, it is not possible to make a tender offer conditional on clearances that are expected to take longer than the applicable period of the offer. In such cases (e.g., any approval from antitrust authorities), the only alternative is to postpone the tender offer so that it is initiated after the applicable approvals have been obtained.

Except as for any of the above referenced conditions established by the bidder, the tender offer is irrevocable for the bidder.

## 5

**When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

### **A. Announcement and/or notification to the securities regulator:**

There are no specific legal provisions imposing a bidder the obligation to announce publicly and/or notify in advance to the securities regulator ("**Financial Markets Commission**" or the "**Commission**") its intention to launch a tender offer.

Notwithstanding the above, listed companies and issuers registered with the Commission are required to disclose to the public and to the Commission any relevant fact or material information with respect to themselves, their businesses and/or their securities immediately after they become aware of such a relevant fact. However, the board of a listed company or registered issuer can approve with the affirmative vote of at least 3/4 of its members to treat said information as confidential or reserved information ("**Reserved Information**"). Reserved Information is information: (i) that relates to ongoing negotiations; and (ii) if disclosed, could harm the issuer's interests. If the board approves treating the information as Reserved Information, it will be required to report it to the Commission on a confidential basis. However, the Commission is entitled to make it public if, given the circumstances, it deems it appropriate (e.g., leaks, unexpected trading volumes of the shares and others).

Therefore, the bidder is generally not required to announce publicly its intention to launch a tender offer and/or to notify said intention in advance to the Commission, unless the bidder (or its controller) is itself a listed company or a registered securities issuer. If the bidder (or its controller) is a listed company or registered issuer, it is entitled to treat the information as Reserved Information and to report it on a confidential basis to the Commission.

On the other hand, if the target company becomes aware of the bidder's intention to launch a tender offer, the company is required to disclose said information (which qualifies as material information for the company) to the public and to the Commission. If the board of the company treats this information as Reserved Information, it will be allowed to report it on a confidential basis to the Commission.

In accordance with the above, it is common that the announcement is made on the date the offer is officially initiated by means of a notice of commencement which is required to be published in a local newspaper and the filing of a prospectus or offering memorandum with the Commission (the information to be included in the notice of commencement and on the prospectus is established under a regulation issued by the Commission). However, it is also possible to announce the offer in advance, before the official notice of commencement is published. A pre-announcement is not regulated under Chilean law but it has become a common practice. In the case of a pre-announcement, it is advisable that it refers at least to the basic terms of the offer that will be made, including the purchase price and expected date for the starting date of the offer.



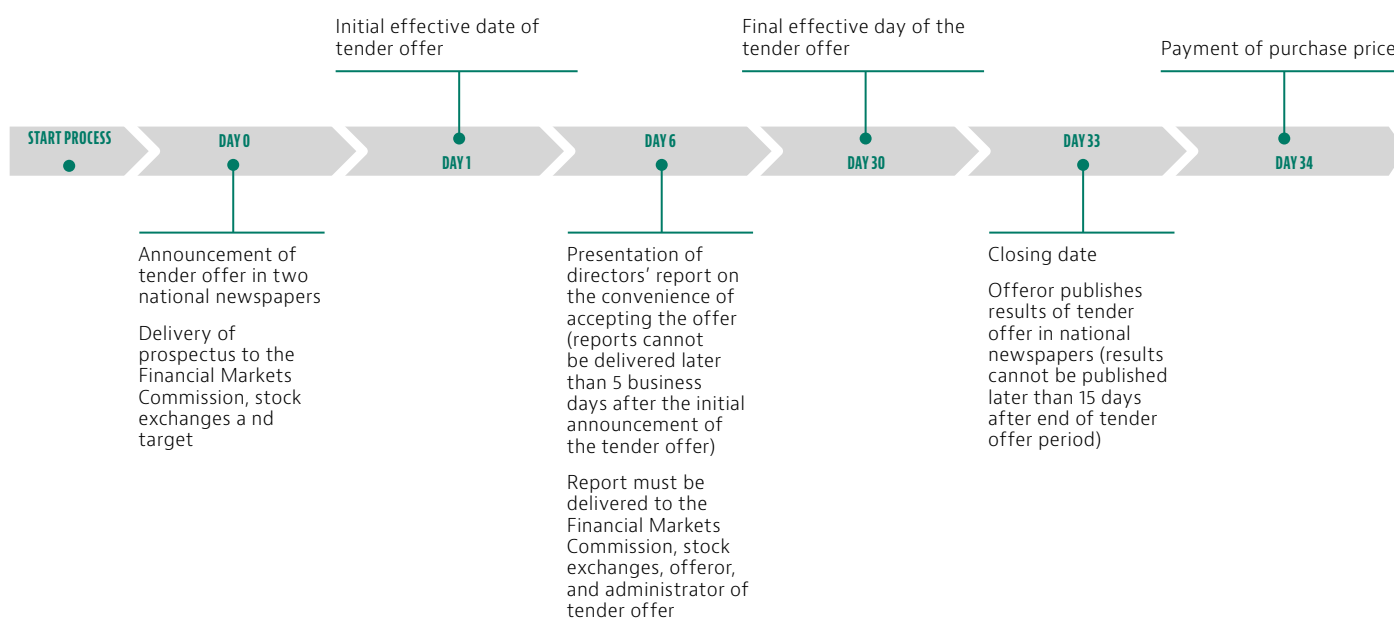
## B. Non-disclosure obligations and insider dealing restrictions:

- a. Chilean law considers as **"Privileged Information"** any information relating to an issuer or several issuers, their business or securities issued by them, not revealed to the market, which by its nature can affect the trading of securities, including any Reserved Information. Thus, the bidder's plan to launch a tender offer qualifies as Privileged Information.
- b. Any party in possession of Privileged Information (which has not been made public) is forbidden to trade based on it (including, for example, board members, managers, third party advisers, etc. of the issuer). Such a party has a 'duty to abstain' from trading on such securities from the time it becomes aware of the Privileged Information until the time such information has been made publicly available or 'gone stale' (i.e., no longer meets the test of being privileged information).
- c. Furthermore, any party in possession of Privileged Information has the obligation to refrain from disclosing the Privileged Information to third parties and from recommending the acquisition or sale of the corresponding securities by third parties. In addition, individuals in possession of privileged information have the obligation to take appropriate measures so that similar obligations are complied with by their subordinates.
- d. Therefore, while the plan to launch a tender offer has not been publicly disclosed, the issuer and any persons aware of said plan will be holding Privileged Information and therefore subject to the above-mentioned obligations.
- e. A breach of the obligations referred above is considered a criminal offense and the offender is subject to a potential punishment that can range from 61 to 500 days of imprisonment. In addition, the offender is subject to the obligation to pay, as a fine for fiscal benefit, all profits it may have made and to indemnify all third parties that may have been adversely affected by the breach.

## 6

### What is the typical basic timeline for a takeover offer?

#### Tender offer (indicative timeline)



**7**

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Considering the obligation to conduct mandatory tender offers for the events referred to under subsections a.2 and a.4 of section 1 above, tender offers are generally the route available to achieve the basic requirements that allow the delisting or conversion of a listed company into a private one. These basic requirements are: (a) that the company has less than 500 shareholders; and (b) in case minority shareholders (shareholders owning less than 10% of the shares) are 100 or more, that they considered as a whole, own in the aggregate less than 10% of the issued shares.

However, it is also possible for a controller that already owns more than two-thirds of the shares of a listed company to purchase additional shares, either privately or through the stock exchanges, in order to achieve a similar result.

The delisting of listed entities in Chile is subject to the approval of two-thirds of the issued voting shares at an extraordinary shareholders meeting of the company. This decision triggers withdrawal rights to the dissenting shareholders.

In order for the shareholders meeting to take place and the delisting decision to be valid, the company must not meet any of the requirements that make it mandatory to be a listed entity for at least six consecutive months, namely:

- 500 or more shareholders
- companies in which 100 or more shareholders own at least 10% of the company, excluding the ones who directly or indirectly own 10% or more

Once the shareholders have approved proceeding with the delisting and the period to exercise the withdrawal rights established in favor of dissenting shareholders has expired, the company will be entitled to request to be delisted with the Commission, which will be approved if all the requirements have been met.

The delisting process usually takes between 60 and 120 days from the date of the filing, depending on the timing of the regulatory approval and observations made by the Commission.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

In the context of a tender offer, acceptance of the offer by each shareholder is essentially revocable (i.e., such right to revoke the acceptance cannot be waived) at any time during the term of the tender offer. This is especially important in the event a competing tender offer is launched at a higher price.

However, it is acceptable and very common to enter into one or more agreements to tender with the controller and/or a group of shareholders before the tender offer is made, whereby the shareholders commit to indemnify the bidder in the event they were to breach the obligation to sell their shares. Shareholders that are parties to these agreements may refuse to accept the offer and/or accept a competing offer anyway. In such a case, specific performance is not available for the bidder. However, in such events, the bidder is entitled to claim damages against said shareholders based on the indemnity provisions that have been agreed under the contract (it is common practice to agree on a specific fine or liquidated damages clause for this purpose).

**9****Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Chilean laws governing public takeovers are designed, among other purposes, to protect minority shareholders. The primary rule being that all holders of the securities of an offeree company of the same class must be given equal treatment.

Although there is no specific prohibition or restriction regarding offering incentives to board members, such incentives would breach the duty of loyalty each board member has with the company and with all of its shareholders.

**10****Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

The involvement of the board of the target company before the launching of the tender offer, if any, will depend on the stage in which non-public information is requested for due diligence purposes. The main considerations to be taken into account in a public-to-private transaction when dealing with the target company's management are the following:

- a. Due diligence: Members of the board of directors and officers of the target company have a legal duty not to disclose any information with respect to the business of the target company, and the target company in general, that they may have access to based on their position and that has not been officially disclosed by the target company. In order for a bidder to conduct due diligence on the non-public information of the target company, the board of the target company has to approve the disclosure of information and adopt the necessary measures to maintain the confidentiality of such information. Generally, shareholders of a listed company (whether controlling or not) do not have the right to access the non-public information of a listed company. Therefore, even in the case where negotiations are being conducted between the controlling shareholder and the potential bidder (or when the controlling shareholder is the potential bidder), the board has to approve the disclosure of information for due diligence purposes first and should only do so if it considers that doing so is in the best interest of the company as a whole.
- b. Confidentiality: As discussed earlier, the fact that there is a plan of launching a public takeover bid constitutes material information of the listed company, which, if known by the company itself, would trigger its obligation to disclose it to the public and to the Commission (or only to the Commission if the board approves treating it as Reserved Information).
- c. Opinion on the tender offer: During a tender offer, each member of the board of directors of the target company must provide a written report, which is made publicly available, reflecting their individual opinion with respect to the convenience (or inconvenience) of the offer to the shareholders of the company.



**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

Chilean law contains a number of rules that already apply before a public takeover bid is announced. These rules impose restrictions and requirements 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 candidate bidder. The main restrictions and requirements have been summarized above. Some careful planning is necessary if a candidate bidder or target company intends to start the process that is to lead to a public takeover bid.

The rules regarding the disclosure of shareholdings and transparency apply before, during and after a public takeover bid. Generally, any person or entity who directly or indirectly owns 10% or more of the share capital of a listed company, or acquires such a percentage, is required to make a public disclosure and inform the Commission and each stock exchange in Chile in which the company has listed its shares of all acquisitions and transfers of shares of the company it makes. They are also required to disclose if such an acquisition has been made with the intention to acquire control over the company or, otherwise, if the acquisition is only a financial investment. Lastly, such shareholders are also required to disclose any transaction involving agreements or securities in which the transaction price or result depends on or is significantly conditioned by the variation or evolution of the price of the shares of the company.



# UNITED STATES



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** US federal securities laws and state corporate laws do not require a bidder to commence a tender offer for the shares of a company as a consequence of acquiring a specified percentage of a public company's outstanding shares.

Three states (Maine, Pennsylvania and South Dakota) have "control share cash-out" requirements under which a bidder that acquires a specified percentage of voting power must notify remaining shareholders, who can then require that the bidder purchase their shares.



The acquisition of specified percentage ownership amounts of the voting securities of a public company can trigger certain disclosure obligations and other consequences. In particular, an acquirer making its initial investment as a first step to acquiring or influencing control of the target company must report its beneficial ownership on a long-form Schedule 13D. Schedule 13D must be filed within 10 days after a person's beneficial ownership exceeds 5%, but the triggering of the filing obligation does not require that the acquirer discontinue purchasing shares. An acquirer can use this "10-day window" to continue to increase its initial stake in a listed company during the 10-day period between the day on which it crosses the 5% threshold and the deadline for public disclosure of its beneficial ownership (subject to possible acquisition limits under state anti-takeover statutes and poison pill plans). In addition, a party filing a Schedule 13D is obligated to disclose its "plans and proposals" regarding the subject company and amend its Schedule 13D for "material changes" in the information in the schedule.

**B.** Under the laws of Delaware and most other states, an acquiring party may merge a target company with or into itself or an acquisition subsidiary without a vote of the target company's shareholders if the acquirer holds 90% or more of the voting securities of the target company (usually achieved through a tender offer). In addition, under Section 251(h) of the Delaware General Corporation Law, a merger agreement between an acquirer and a listed target company may provide that the acquirer conduct a tender offer for any and all of the target company's shares, and if following the tender offer the acquirer holds a majority of the target company's outstanding shares entitled to vote on a merger (or any higher percentage required by the target company's charter), the acquirer may merge the target company into or with the acquirer or an acquisition subsidiary without a vote of the target company's remaining shareholders. The merger must be effected as soon as practicable following completion of the tender offer and non-tendering shareholders must receive the same merger consideration as was offered to shareholders in the tender offer.

## 2

### **What are the requirements as to offer price:**

- A. in relation to minimum offer price**
- B. form of offer consideration**

US federal securities laws and state corporate laws do not prescribe the form or amount of the consideration to be paid in a tender offer or merger (other than in second-step squeeze-out mergers after a tender offer, in which both exemption from the Securities and Exchange Commission's (SEC) going private rule and the Delaware law provision permitting a squeeze-out with less than 90% ownership of the target company require that the consideration in the squeeze-out be at least equal to the highest consideration paid in the tender offer). In addition, SEC Rule 14d-10 requires that the consideration paid to any target company shareholder for tendered shares equals the highest consideration paid to any other security holder for such shares.

## 3

### **What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

US federal securities laws and state corporate laws do not expressly require that an acquirer have financing available or committed at the commencement of a tender offer. However, it is fraudulent for a person to announce its intention to conduct a tender offer if the person does not have a reasonable belief that it will have the means available to purchase securities to complete the tender offer. Schedule TO requires that an acquirer provide information regarding the source and amount of funds it will use to acquire the target company. The offer to purchase (or a definitive proxy statement for a long-form merger) will include a description of the acquirer's financing arrangements, including the terms of the financing documents. The financing agreements will typically be filed as exhibits to the acquirer's Schedule TO. In addition, the SEC rules dispense with the need to provide financial information for the acquirer in an all-cash tender offer for all of the outstanding shares of the target company if the offer is not subject to a financing condition.





## 4

**What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

US tender offer law and practice does not provide for tender offers to become “unconditional” after the passage of a specified interval after commencement or another event. In a non-hostile transaction, the conditions to an acquirer’s obligation to accept and pay for tendered shares are generally negotiated between the acquirer and the target company. In a hostile bid, the acquirer determines such conditions. The party whose obligations are subject to satisfaction of the condition may waive conditions. Typical conditions to an acquirer’s obligation are:

- Number of shares tendered — receipt of tenders of a number of shares that, when added to any shares owned by the acquirer, equal the shares required for the acquirer to effect a short-form merger.
- Availability or completion of financing — receipt of financing to complete the purchase and payment for the target company’s shares (obviously, an acquirer that includes this condition in its offer can be at a serious disadvantage if a competing bid is commenced by an acquirer with available or committed financing.)
- Receipt of governmental consents — receipt of pre-merger clearance (or early termination of the waiting period) under the Hart–Scott–Rodino Antitrust Improvements Act and receipt of other required governmental consents, permits or approvals, such as Committee on Foreign Investment in the United States (CFIUS) clearance.
- Absence of legislative or judicial impediments — there must be no enactment of any legislation that would prevent or interfere with the transactions or commencement of any judicial or administrative proceedings seeking to prevent consummation of the transaction.
- Compliance with debt instruments and other contracts — this includes satisfaction or waiver of any conditions to or limitations on mergers or changes of control of the target company under its debt instruments, modification or removal of financial covenants in the target company’s debt instruments to enable the merger to proceed and receipt of any consents under “change of control” or similar clauses in the target company’s material contracts.
- No material adverse changes — this involves the absence of material adverse changes in the business, financial condition or results of operations of the target company.
- Effectiveness of registration statement — where the consideration consists of or includes shares, the effectiveness of a registration statement must be filed with the SEC to register such shares.
- Elimination of takeover defenses — approval of the acquisition by the target company’s board under any applicable “interested shareholder” statutes and waiver or amendment of any “poison pill” to enable the transaction to proceed. The target company’s agreement on these points will be necessary conditions to any hostile bid. In a friendly acquisition, they will generally be provided for in the merger agreement and described to shareholders in the offer to purchase or the definitive proxy statement.



## 5

### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

Announcements prior to formal commencement, e.g., an announcement that a bidder is considering or has determined to make a tender offer, or the bidder is in discussions with the target company regarding a possible bid, are permitted. Such announcements do not constitute a “commencement” of the offer if they are filed with the SEC under the cover of Schedule TO on the date of first use and designated as pre-commencement communications. Such communications may not include the means to tender shares and must contain cautionary language advising target company shareholders where to obtain the tender offer statement and to read it when it is available. These requirements also apply to a joint press release issued by an acquirer and a target company announcing their execution of a merger agreement prior to the commencement of the tender offer for the target company’s shares pursuant to the merger agreement. In exchange offers (tender offers in which the consideration will consist in whole or in part of securities of the acquirer), such announcements constitute “offers” of such securities. Ordinarily, securities may not be offered publicly unless a registration statement relating to the offered securities has been filed under the Securities Act. However, SEC Rule 165 permits such announcements prior to the filing of a registration statement for the securities to be offered in an exchange offer, provided that the announcements are filed with the SEC and they comply with informational limitations on such pre-offer announcements.

An affiliate seeking to acquire the remaining outstanding equity securities of the target company in a transaction that would result in the delisting of the target company, termination of the target company’s Exchange Act registration or termination of its Exchange Act reporting obligations must generally comply with SEC Rule 13e-3 — the going private rule. Under SEC Rule 13e-3 and Schedule 13E-3, the acquirer-affiliate in a going private transaction must provide extensive disclosure (in addition to the disclosure usually required under the SEC’s tender offer rules or proxy rules) regarding the proponent’s belief as to the fairness of the transaction to unaffiliated shareholders of the target company and the basis for that belief. That discussion will generally include various price-related and other factors. An exception is available for a second-step merger to squeeze out non-tendering shareholders effected within one year following a tender offer by a party that became an affiliate only as a result of the tender offer. If a potential acquirer has a stake in the target company that has been disclosed in a Schedule 13D, executing a confidentiality agreement and conducting due diligence entails a significant risk that the parties’ discussions — even at this preliminary stage — must be disclosed as such a material change, particularly if the acquirer’s initial filing stated simply that it acquired its stake “for investment,” without any reference to seeking a possible business combination or other transaction with the target company.

For a transaction structured as a one-step merger, the target company must solicit the approval of its stockholders by using a proxy statement that complies with Regulation 14A and Schedule 14A under the Exchange Act (or, if proxies are not solicited, the equivalent disclosures in an information statement that complies with Regulation 14C and Schedule 14C under the Exchange Act).

For a transaction structured as a two-step merger, the acquirer must file a tender offer statement on Schedule TO. A Schedule TO requires the acquirer to provide certain disclosures required by Regulation M-A under the Exchange Act. In addition, the target company must file a Schedule 14D-9 within 10 business days after the commencement of the tender offer to disclose either that it recommends that stockholders accept or reject the tender offer or that it expresses no opinion. If securities are being offered as all or part of the consideration, those securities must be offered pursuant to a registration statement on Form S-4.

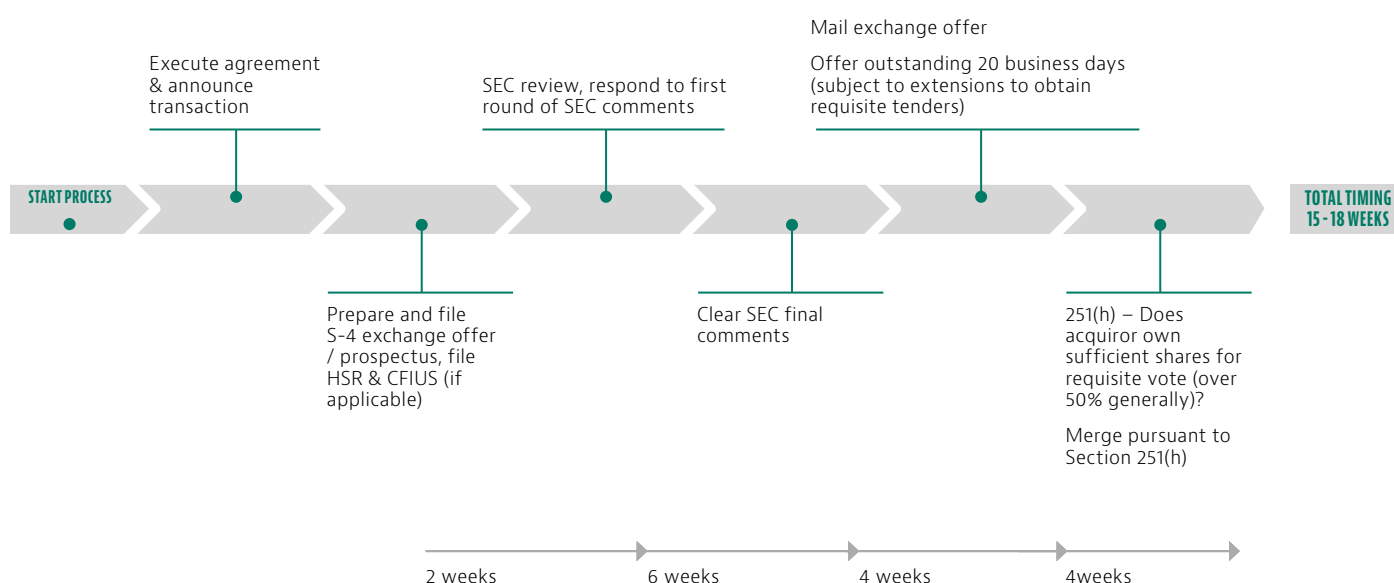
## 6

### What is the typical basic timeline for a takeover offer?

For any SEC Rule 13e-3 transaction, SEC Rule 13e-3(f) requires that the information required in Schedule 13E-3 must be provided to stockholders no later than 20 days before any one of the following:

- any purchase of equity securities in the Rule 13e-3 transaction
- any vote, consent or authorization concerning the Rule 13e-3 transaction
- the date of the meeting held to consider the Rule 13e-3 transaction
- the date of any corporate action taken concerning any Rule 13e-3 transaction that involves an information statement

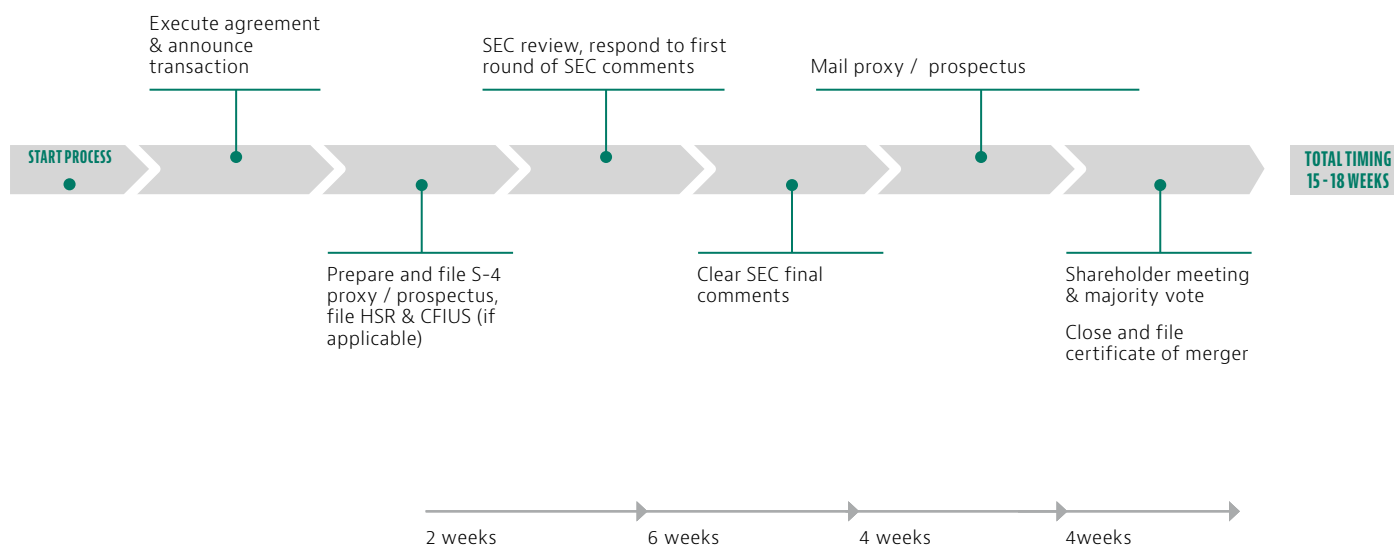
### Public stock transactions – two-step merger (indicative timeline)



#### Timeline Considerations

- SEC tender offer rules require that a tender offer (which includes stock for stock exchange offers) be kept open for a minimum of 20 business days; generally, no express minimum time period for distributing merger proxy materials under SEC rules; stock exchange rules recommend at least 30 days to permit stockholders adequate time to review proxy materials; for S-3 eligible target companies, the proxy statement/prospectus must be sent to shareholders at least 20 business days prior to meeting date if information about registrant or target is incorporated by reference into proxy statement
- Timeline may be extended depending on the nature and scope of SEC comments, delays caused by HSR (including HSR "second requests" for information) or CFIUS clearance and shareholder litigation
- NYSE and NASDAQ listing rules require shareholder approval before a buyer listed company may issue 20% or more of their stock as consideration

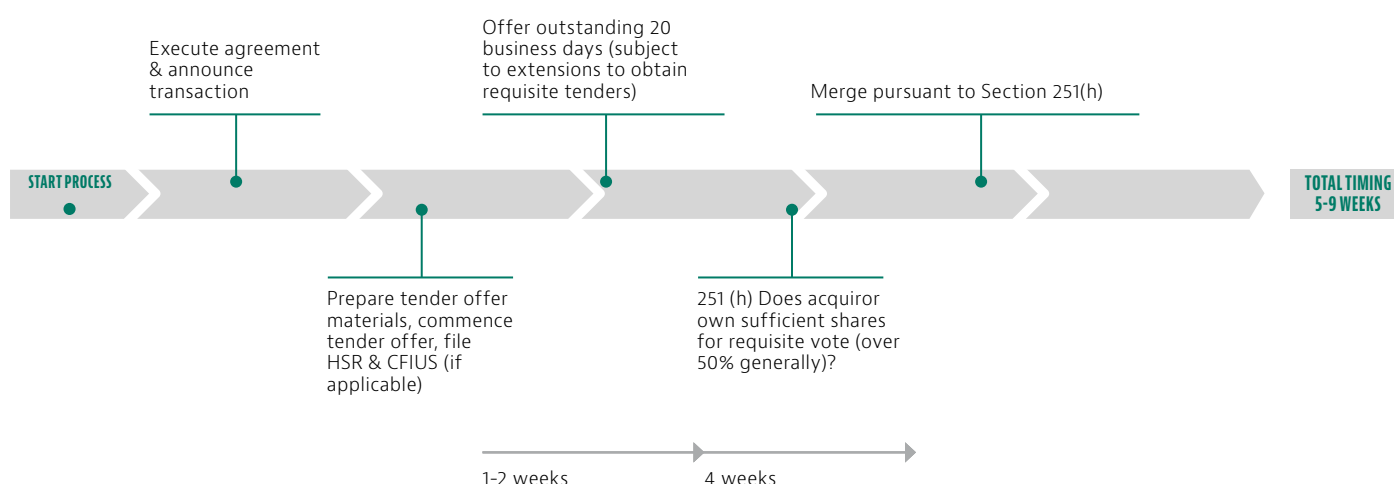
## Public stock transactions – one-step merger (indicative timeline)



### Timeline Considerations

- SEC tender offer rules require that a tender offer (which includes stock for stock exchange offers) be kept open for a minimum of 20 business days; generally, no express minimum time period for distributing merger proxy materials under SEC rules; stock exchange rules recommend at least 30 days to permit stockholders adequate time to review proxy materials; for S-3 eligible target companies, the proxy statement/prospectus must be sent to shareholders at least 20 business days prior to meeting date if information about registrant or target is incorporated by reference into proxy statement
- Timeline may be extended depending on the nature and scope of SEC comments, delays caused by HSR (including HSR "second requests" for information) or CFIS clearance and shareholder litigation
- NYSE and NASDAQ listing rules require shareholder approval before a buyer listed company may issue 20% or more of their stock as consideration

## Two-step, all cash tender offer/merger (indicative timeline)

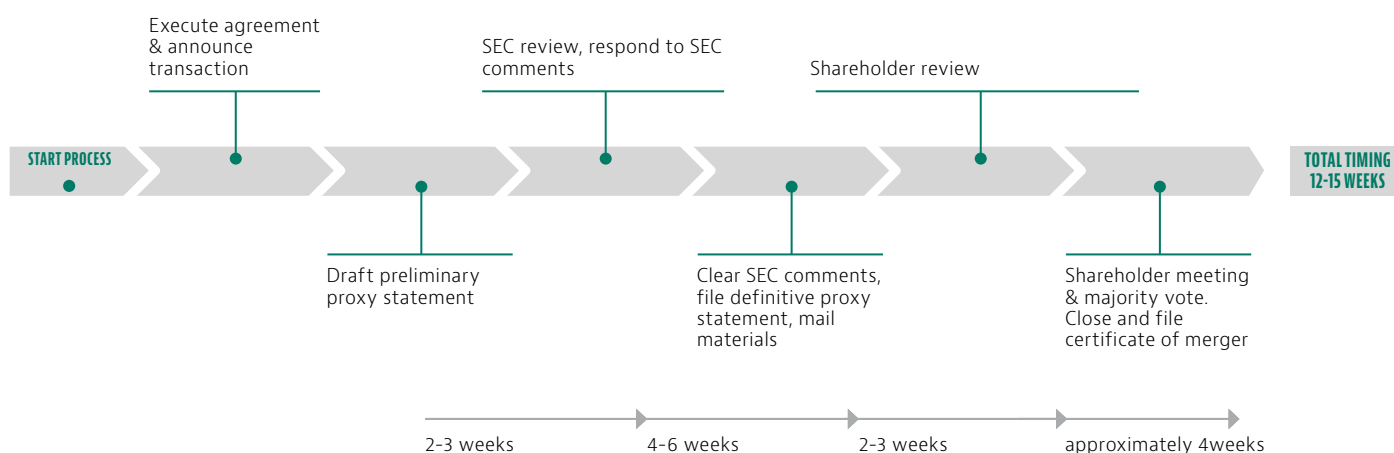


### Timeline Considerations

- U.S. HSR expedited (15 days) for all-cash tender offers; 30 days for merger (unless, in either case, second request received)
- Tender offer materials are filed with the SEC at the same time that they are mailed to stockholders; review of tender offers by the SEC is generally done on an expedited basis and must be sent during the 20 business day period that the tender offer is open
- Timeline may be extended depending on the nature and scope of SEC comments, delays caused by HSR (including HSR "second requests" for information) or CFIS clearance and shareholder litigation



## One-step, all cash merger (indicative timeline)



### Timeline Considerations

- U.S. HSR expedited (15 days) for all-cash tender offers; 30 days for merger (unless, in either case, second request received)
- SEC tender offer rules require that a tender offer (which includes stock for stock exchange offers) be kept open for a minimum of 20 business days; generally, no express minimum time period for distributing merger proxy materials under SEC rules; stock exchange rules recommend at least 30 days to permit stockholders adequate time to review proxy materials; for S-3 eligible target companies, the proxy statement/prospectus must be sent to shareholders at least 20 business days prior to meeting date if information about registrant or target is incorporated by reference into proxy statement
- Timeline may be extended depending on the nature and scope of SEC comments, delays caused by HSR (including HSR "second requests" for information) or CFIUS clearance and shareholder litigation

## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

In addition to a tender offer structure, the acquisition of a public company can also be structured as a reverse triangular merger (a one-step transaction). Assuming the target company does not have any special super-majority approval requirements, the typical approval thresholds would be a majority of the target company's target shareholders.

The expected timing of a one-step transaction is typically 15-18 weeks to closing. At the closing, in order to delist the target company, the target company must file a Form 25 with the SEC. The delisting will become effective 10 days after the filing of the Form 25.



8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

It is possible to obtain tender and support agreements from shareholders to support the transaction. Such agreements require the shareholder to, among other things: (a) not transfer or sell their shares; (b) tender their shares into the offer; (c) vote against or not tender into a competing proposal; and (d) not solicit any competing proposals. Bidders will approach shareholders prior to the signing of the acquisition agreement and negotiate the tender and support agreements concurrently with the acquisition agreement.

Other deal protections include the non-solicitation provision in the acquisition agreement. The target company will typically agree to cause its representatives not to solicit any competing proposals. "Representatives" are generally defined to include the target company's directors, officers and employees, but not shareholders.

9

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Rule 14D-10 under the Securities Exchange Act of 1934, also known as the best price rule, requires that the consideration offered to any security holder in a tender offer must be equal to the highest consideration paid to any other security holder. Rule 14D-10 was amended in 2006 to clarify that the best price rule will not apply to a consideration offered and paid pursuant to employee compensatory and benefit arrangements, so long as such amounts: (a) are being paid or granted as compensation for past services performed, future services to be performed or future services to be refrained from being performed by the shareholder; and (b) are not calculated based upon the number of securities tendered or to be tendered in the tender offer by the shareholder.

Furthermore, to account for rollover arrangements, the rule was modified to clarify that the best price rule only applies to "securities tendered in the tender offer." As long as the target company's management does not tender its shares in the tender offer (and waits to be cashed out in the second-step merger), rollover arrangements would not be subject to liability under the best price rule.

10

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Aside from the issues raised above regarding SEC Rule 13e-3, there are no other particular challenges in the process.












11

**Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

Aside from the issues raised above, there are no other particular challenges.



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# AUSTRALIA



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** A person is prohibited from acquiring a relevant interest in issued voting shares in a target if, because of the transaction, either that person's or someone else's voting power in the target increases from 20% or below to more than 20%, or from a starting point that is already between 20% and 90%, unless the acquisition is made under one of the permitted exceptions.

There is no "follow-on" or "mandatory bid" rule that would allow a bidder to acquire shares above the 20% limit if it then immediately makes a general offer to all other shareholders in the target. Instead, a bidder must stop at the 20% limit, and then make its takeover bid from that point. This 20% rule is strictly enforced and the Australian Takeovers Panel (**Takeovers Panel**) and the Australian Securities & Investments' Commission (ASIC) have broad powers to take enforcement actions where there are contraventions of the rule.

**B.** A bidder that has made either an off-market or an on-market takeover bid for a class of shares in the target has the right to compulsorily acquire the shares held by the remaining shareholders, at the bid price if the bidder satisfies both of the following thresholds by the end of the offer period:

- The bidder and its associates have a relevant interest in at least 90% (by number) of the shares in that class and;
- The bidder and its associates acquired at least 75% (by number) of the shares in that class that were held by offerees. Shares held at the start of the bid by the bidder and its associates are excluded from this calculation.

In most cases, the 75% test will not impose an additional requirement over and above the 90% test. The 75% test will only be relevant if the bidder and its associates hold more than 60% of the target's shares before the bid is commenced. This post-bid compulsory acquisition procedure can only be used if it is commenced within one month after the end of the offer period.

A bidder may achieve 100% without using a squeeze-out mechanism by using a scheme of arrangement (see answer to 7 below).





## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

In a scheme of arrangement, there is no formal requirement regarding a minimum offer price or form of offer consideration. There is more flexibility in proceeding with a scheme of arrangement compared to a takeover. If the change of control occurs by way of a takeover, the following applies:

**A.** A takeover bid must offer at least the highest price paid for target shares by the bidder (or its associates) in the four months before the bid ("Minimum Bid Price Rule").

**B.** The consideration for an off-market takeover bid may be cash, securities (shares, debentures, options, etc.), or any combination. All target shareholders must be offered the same choices. The consideration for an on-market takeover bid can be cash only. If two or more alternatives are offered (for example, cash or scrip) then the value of each alternative must comply with the Minimum Bid Price Rule.

Where the price paid for a pre-bid acquisition, or the price offered under the bid, involves non-cash consideration (such as shares in the bidder), a comparative valuation will be required to determine whether the bidder has complied with the Minimum Bid Price Rule. The value of the bid price is assessed shortly before the offers are mailed out, rather than at an earlier date (such as announcement of the bid). This can expose a bidder that is offering scrip to the risk of a decrease in its own share price, even if the same quantity of the bidder's scrip is offered under the bid as was paid under a pre-bid acquisition. If the price paid in a pre-bid acquisition was neither cash nor quoted shares, the bidder's statement must include an independent expert's report on the value of that pre-bid price so as to enable a proper comparison with the bid price.

Where a bidder exercises its compulsory acquisition right, the consideration to be paid for the target shares being compulsorily acquired must be the same as the bid price.

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

The funding capability principles for a scheme of arrangement are similar to those described below in relation to a takeover.

In a change of control by way of a takeover, the Takeovers Panel has issued guidance that a bidder must, at all relevant times, either have sufficient funding to satisfy the offers or a reasonable basis to expect such funding will be in place when required. Whether a bidder has a reasonable basis to expect it will have sufficient funding in place will depend on the circumstances of each case. The Takeovers Panel has issued guidance that a bidder is unlikely to have a reasonable basis where its funding arrangements are informal, unenforceable or on a "best endeavors" basis.

When the bidder sends its bidders statement to target shareholders, details of the bidder's arrangements for funding the bid must be included.

## 4

### What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.

The conditions and approvals/clearances principles for a scheme of arrangement are similar to those described below in relation to a takeover. There is more flexibility with the scheme of arrangement bid conditions than in the case of a takeover, as the scheme of arrangement bid conditions are essentially a matter of negotiation between the bidder and the target.

While on-market takeover bids must be unconditional, off-market takeover bids may be subject to defeating conditions. Some common conditions include:

- minimum acceptance condition (generally either 50.1% if the bidder wants to control the target or 90% if the bidder wants to proceed to compulsory acquisition and own 100% of the target)
- no material adverse change occurs to the financial position, business or assets of the target
- all necessary regulatory approvals are obtained, for example, foreign investment or competition approvals
- no "prescribed occurrence" occurs, which covers matters such as the target making changes to its capital structure or becoming insolvent

Off-market bids can also be conditional on external events, such as a fall in a specified market index. The following kind of conditions cannot be included:

- a maximum acceptance condition (for example, a condition where the bidder is not obliged to proceed if acceptances are received for more than a specified percentage of shares)
- a condition that allows the bidder to acquire shares from some, but not all, of the target shareholders who accept the bid
- a condition that target shareholders approve or consent to a retirement payment being made by the target to any officer of the target
- a condition that is dependent upon the opinion, belief or other state of mind of, or an event that is within the sole control of, the bidder or any of its associates, e.g., a condition where the bidder is "satisfied" with the results of its due diligence on the company could not be included

A "no regulatory intervention" condition will generally be unacceptable unless the condition expressly carves out remedial orders that may be made by the Takeovers Panel. A condition that technically meets the above requirements, but could be triggered by immaterial events (sometimes referred to as a "hair trigger" condition), would generally be considered unacceptable on the basis that it offends the policy of certainty in bids. For example, a market fall condition that is triggered by a very small percentage movement is likely to be unacceptable. Broadly, bid condition triggers should be based only on actions that materially affect the financial or business position of the target.

Where the bidder is listed on ASX and the bid would, if successful, result in the issue of more than 100% of the bidder's current issued shares, the offer must be conditional on approval by the bidder's own shareholders in general meeting.

## 5

### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

The principles for announcements for a scheme of arrangement are similar to those described below in relation to a takeover. As a scheme of arrangement is a consensual negotiated transaction, the bidder and target will usually agree a mechanism for announcing the transaction. Potential bidders and potential targets may also make a consensual announcement that they are contemplating a potential transaction.

In a takeover, a bidder is required to make a public announcement to the market of its intention to make a takeover offer. Prior to that time, any non-binding dealings between the bidder and the target must be kept strictly confidential (subject to a small number of limited exceptions).

Listed entities that are the subject of a confidential takeover approach need to consider their continuous disclosure obligations. Whether a listed target entity is required or elects to announce a confidential takeover approach depends on a range of legal and commercial factors and will vary.

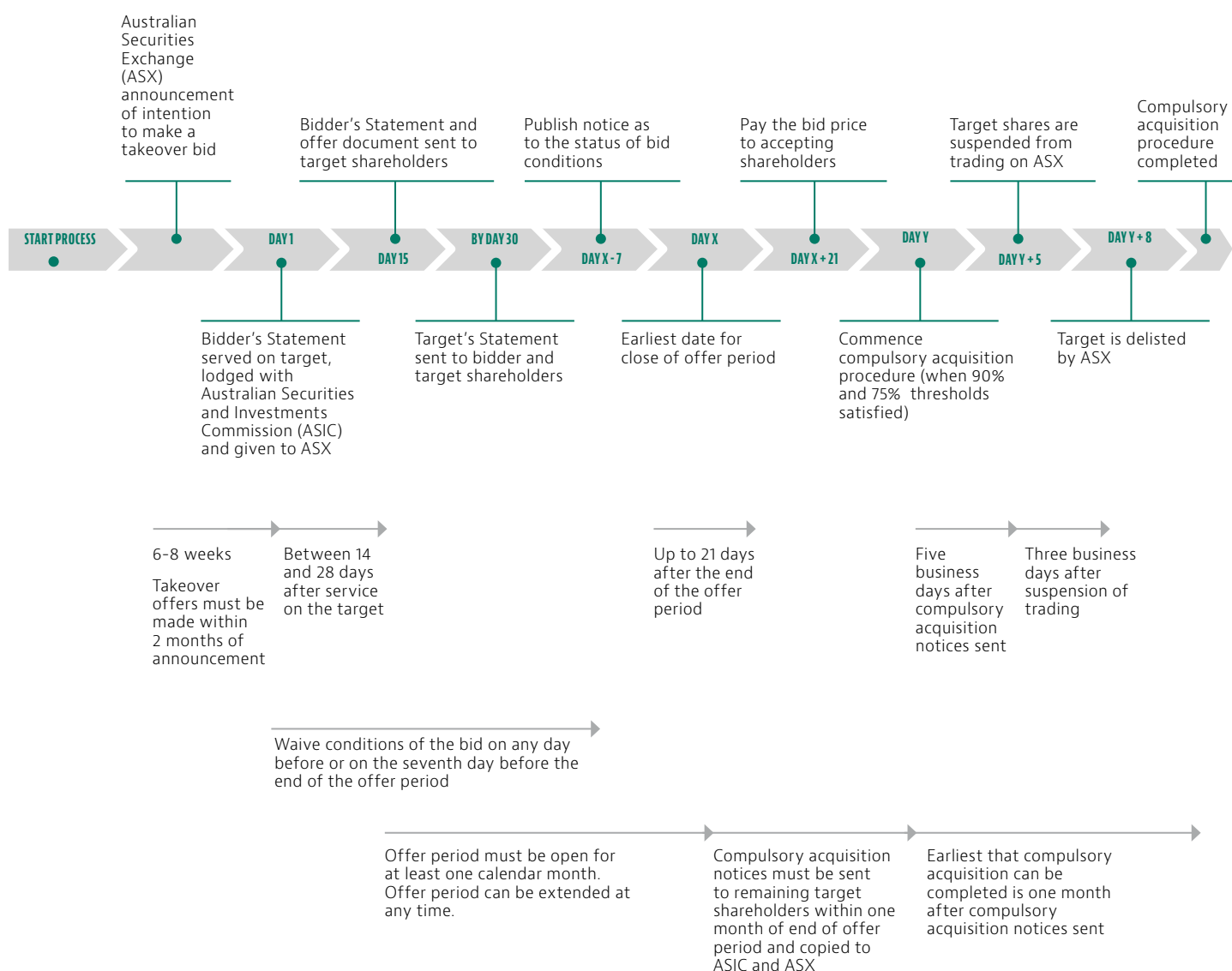


## 6

### What is the typical basic timeline for a takeover offer?

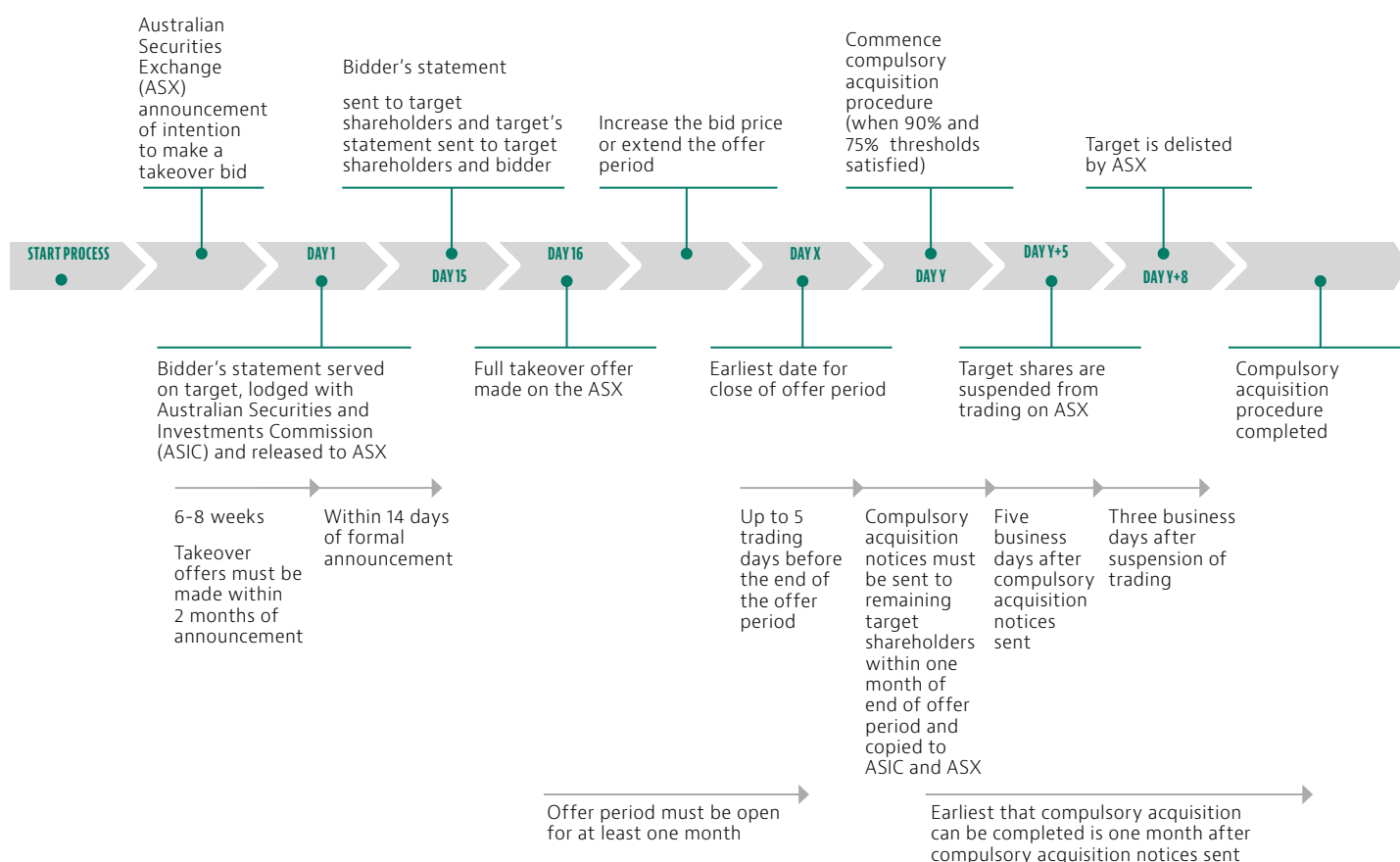
The timelines for an Australian change of control transaction vary depending on whether it is a scheme of arrangement, on-market takeover bid or off-market takeover bid.

#### Off-market takeover offer (indicative timeline)

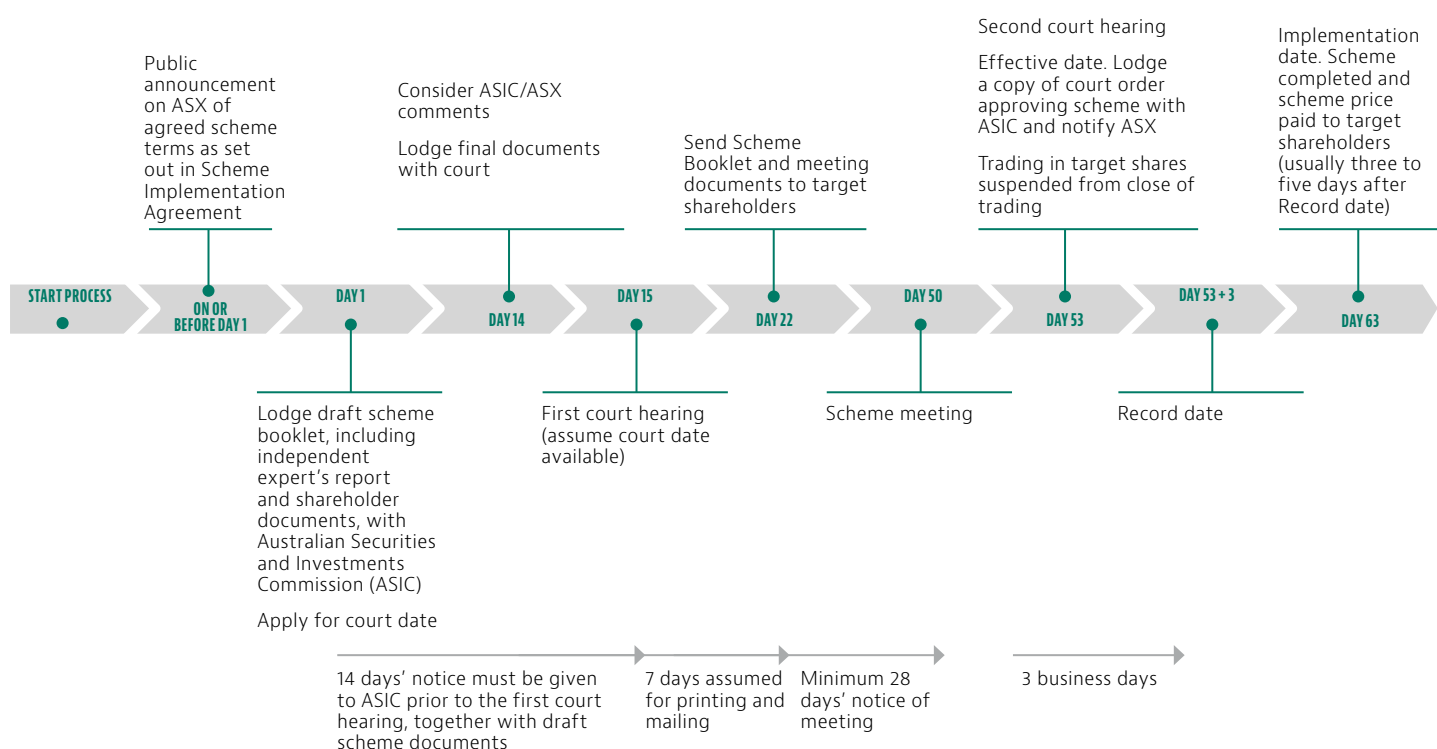




## On-market takeover offer (indicative timeline)



## Scheme of arrangement (indicative timetable)







## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

A bidder may seek to take control over a public company via an on-market or off-market takeover bid. A bidder may also take control via a scheme of arrangement, which is a court-approved arrangement between a company and its shareholders whereby a bidder acquires all of the shares in the target.

For a scheme of arrangement to become effective, it requires approval from both the court and target company shareholders in general meeting. The two shareholder voting thresholds (both of which must be satisfied) are:

- a special resolution of shareholders, which requires that at least 75% of the number of votes cast on the resolution are in favor of the scheme. This vote is taken on a poll and will be based on the number of shares voted.
- approval from more than 50% of the number of shareholders who vote at the meeting, regardless of how many shares they hold

Schemes arguably have a lower threshold than takeover bids for obtaining 100% control of the target, due to the 75% special resolution requirement being lower than the 90% shareholding threshold for compulsory acquisition under a takeover bid. It will ultimately depend on the number of shares that are voted. If the bidder has a significant existing shareholding (which it cannot vote), or if there is a low proportion of shareholder participation at the scheme meeting, a relatively small shareholding could be enough to defeat a scheme.

Care needs to be taken to ensure that shareholders who are supportive of voting in favor of the transaction in a scheme are not precluded from voting on the scheme as a consequence of falling into a different bid class due to being an associated party of the bidder.

See attached detailed timelines for a takeover offer and a scheme of arrangement (refer response to question 6 above).

## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

In some overseas jurisdictions, it is common practice to enter into a pre-bid voting agreement with major shareholders to guarantee their support for a bid. However, in an Australian takeover, any agreement between a bidder and a target shareholder to accept a bid, or to vote in favor of a scheme, will give the bidder a relevant interest in the shareholder's shares, and would be strictly prohibited where the bidder and the relevant target shareholder(s) have an aggregate shareholding in excess of 20%.

In an Australian takeover, it is common to obtain the support for a change of control transaction from a target shareholder by using shareholder intention statements. These are public statements of a shareholder's intentions in relation to a bid or scheme, and when made with the shareholder's consent, would generally be binding under ASIC's "truth in takeovers" policy. These statements are usually expressed to be subject to no superior proposal, so that the shareholder can accept or vote in favor of a superior proposal if one is made. Care needs to be taken to ensure that a statement is not akin to an agreement, arrangement or understanding that is prohibited.

In a friendly or recommended takeover bid, the bidder and the target will often enter into an implementation agreement to record the terms of the transaction. This document sets out the terms of the bidder's proposed offer, as well as each party's obligations in relation to the transaction. In return for the bidder's commitment in an implementation agreement, the target will usually grant the bidder:

- **exclusivity:** where the target gives the bidder certain exclusive negotiation and dealing rights before and after the bid is announced (e.g., no-shop, no-talk, notification obligations of any other third-party approaches, matching rights, no due diligence for any third parties)
- **break fee:** where the target agrees to pay a specific amount to the bidder if the bid fails in certain circumstances. Where there is a break fee there may also be a reverse break fee, where the bidder agrees to pay an amount to the target in certain circumstances.



## 9

### **Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

The principles for management incentivization for a scheme of arrangement are similar to those described below in relation to a takeover. There is more flexibility in the case of a scheme compared to a takeover where it is possible to treat different categories of shareholders to fit into different voting classes.

In a takeover offer, all target shareholders must be offered the same consideration and they cannot be treated differently. Where a scheme of arrangement is the acquisition structure, separate and different offers are allowed and equity in the bid vehicle may be offered only to target management, with cash offered to other shareholders. This may create separate classes of shareholders for voting purposes, each of which will have to approve the scheme.

If management incentivization is unrelated to their holding of target securities and such incentivizations are fully disclosed, then it may be possible for such incentivizations to be provided. The distinction between these two categories is not always clear and particular advice will need to be sought on a case-by-case basis.

## 10

### **Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

The principles for treatment of target management for a scheme of arrangement are similar to those described below in relation to a takeover.

As soon as the target becomes aware of a bid (or potential bid) in which there are, or are likely to be, participating insiders involved in the bid, it is Takeovers Panel policy that appropriate protocols should be established to ensure that other target shareholders are not disadvantaged.

An "insider" is a director, officer or adviser (including an external adviser) who is in a position to influence the target's consideration of the bid, or who possesses significant inside information as a result of their role with the target. The insider will be a "participating insider" if they will obtain a special benefit if the bid is successful, such as being offered equity in the bid vehicle or having an arrangement for a significant new employment or other agreement that is conditional on the success of the bid. Normally the protocol will involve immediately establishing an independent board committee (IBC), consisting of those directors who are not participating insiders, to oversee the bid response. The IBC will then adopt protocols to ensure that participating insiders do not have an advantage over other bidders or over target shareholders generally.

These protocols should address matters including:

- regulating the flow of the target's information, such as requiring that participating insiders do not have direct contact with bidders or potential bidders, employees, suppliers or customers (or that they do so only if a representative of the IBC is present)
- making the insider's own knowledge of the target's business available to the IBC, such as by obtaining information from the participating insider to assist with preparation of the Target's Statement and due diligence, and in particular to inform the IBC of any non-public information that was given to the bidder
- ensuring that a bidder who is involved with participating insiders does not have an advantage over other potential bidders in relation to material information about the target
- if necessary, requiring the participating insider to stand aside from their management or board position in order to pursue the bid. In this case, the insider would still be subject to obligations of confidentiality and assistance as noted above.



## 11

### **Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

The 20% rule referred to in question 1 above and the associated restrictions on bidders accumulating pre-bid stakes often come as a particular surprise to offshore bidders who are accustomed to different rules in different jurisdictions. In assessing voting power, bidders must take into account relevant interests held by the bidder and any of the bidder's associates. Bidders must also have regard to their disclosure obligations with respect to any pre-bid stakes and the impact of these disclosure obligations on any pre-bid strategy. These rules are vigorously enforced by ASIC and the Takeovers Panel and care must be taken by any potential bidder in developing and executing its pre-bid strategy.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** Generally, a mandatory takeover offer obligation will be triggered if: (1) the purchaser continues to acquire the shares of a listed company after holding 30% of the listed company's shares; or (2) the purchaser acquires more than 30% of the company's shares at one time.

The mandatory takeover offer obligation of the bidder can be waived where statutory criteria are satisfied. The most common circumstances are as follows:

- Shareholders holding 30% to 50% of shares will not increase their holdings by more than 2% every 12 months.
- The increase in shareholding of shareholders whose shareholding exceeds 50% will not result in the listed company failing to meet the listing requirements due to low public shareholding.

Other exemption conditions shall be analyzed on a case-by-case basis.

**B.** There is no squeeze-out mechanism and bidders cannot compulsorily purchase the shares held by minority shareholders, no matter how many shares they hold.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** The offer price shall not be lower than the highest price paid by the bidder for the same type of shares proposed to be acquired within the six-month period preceding the date of the indicative announcement on the takeover offer.

In addition, where the offer price is less than the mathematical average value of daily weighted average prices for such shares over 30 trading days before the date of the indicative announcement, the financial adviser engaged by the bidder shall analyze the trading of such shares within the latest six-month period and explain whether the share prices are being manipulated, whether the bidder has omitted to disclose persons acting in concert with the bidder, whether the bidder has obtained the shares of the company by way of other payment arrangements during the past six months and the reasonableness of the offer price.

**B.** For a takeover offer aiming at the termination of the listing, the bidder shall pay the consideration by either of the following two methods:

- entirely pay by cash
- provide transferable securities (e.g., shares or bonds) or cash for shareholders to choose

**3****What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

The bidder shall provide at least one arrangement for performance guarantee when the indicative announcement on the takeover offer is disclosed:

- (1) In the event of paying the offer price by cash, not less than 20% of the total amount of the offer price shall be deposited into the bank designated by the securities registration and clearing institution as performance guarantee. In the event of paying the acquisition price by way of the securities listed in the securities exchange, the bidder shall place all the securities for the payment in the custody of the securities registration and clearing institution, except for new shares issued by a listed company.
- (2) Letter of guarantee for the price required for the takeover offer issued by a bank
- (3) Written undertaking issued by the financial adviser for taking joint and several guarantee liability

These arrangements shall be disclosed to the public in the report on the takeover offer. The relevant documents are only required to be submitted to the stock exchange and the listed company but are not required to be fully disclosed.

**4****What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

There is no restriction on the conditions attached to the offer by law. However, each of the conditions contained in the offer shall apply to all of the shareholders of the target company.

Approval by the securities regulatory authorities is not required for the takeover offer, provided that the termination of listing upon completion of the takeover shall be subject to approval by the stock exchange. If the permits of shareholders' qualifications for special industries (such as the banking industry), state-owned equities of listed companies or anti-monopoly review are involved, the approvals or clearances from the relevant governmental authorities shall be applied as the case may be.

Where there is any clause in the contracts currently performed by a listed company which requires the listed company to obtain the consent of a third party in advance for a change of control or termination of listing status, the listed company shall obtain such consents prior to the takeover to avoid default.

The bidder may make material negative changes to the acquisition terms, but should not include the following negative changes:

- reducing the price
- reducing the number of shares proposed to be acquired
- shortening the acquisition period
- other circumstances specified by the China Securities Regulatory Commission (CSRC)

**5****When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

An indicative announcement for a takeover offer shall be disclosed prior to the formal announcement of the offer (i.e., the report on the takeover offer).

Where the takeover offer is made voluntarily, the timing of the issuance of the reminder announcement shall be determined by the bidder.



Where the bidder's shareholding of the listed company exceeds 30% due to the execution of a share transfer agreement between the bidder and other shareholders and, as a result, the takeover must be carried out in the form of a takeover offer, the bidder shall make an indicative announcement within three days from the conclusion of the takeover agreement.

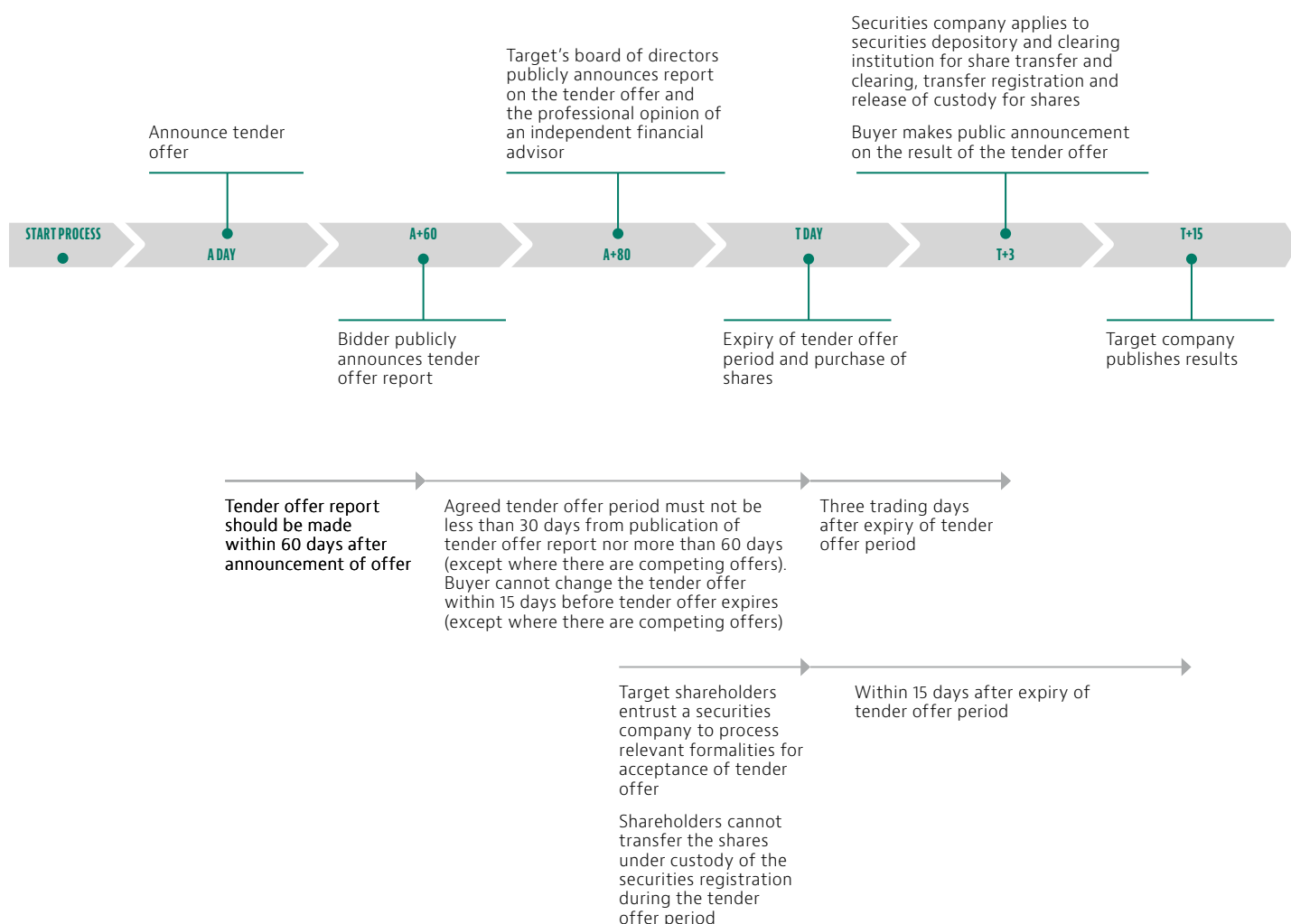
Where the bidder does not announce the report on the offer within 60 days from making the indicative announcement for offer, the bidder shall notify the target company on the working day following the expiry of the period and shall make an announcement; an announcement should be made every 30 days thereafter up to making the announcement of the report on the takeover offer.

After making the indicative announcement for the takeover offer and before announcing the report on the offer, if the bidder intends to cancel the offer plan, the reason shall be disclosed; the bidder shall not initiate a takeover of the same listed company again within 12 months as of the date of the announcement on the cancellation of the offer.

## 6

### What is the typical basic timeline for a takeover offer?

#### Tender offer (indicative timeline)



**7**

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

China usually completes the privatization of listed companies by means of general offer. In addition, listed companies are also likely to complete their privatization via stock-for-stock mergers. Stock-for-stock merger requires the acquiring party to issue shares to the shareholders of the listed company in a public manner. Thus, the acquiring party shall be a listed company within the territory of China, or the acquiring party shall be listed within the territory of China (or become a non-listed public company) through a stock-for-stock merger. In this process, the approval or registration from the CSRC is required, which is estimated to take about 12 to 18 months (the time limit may be affected by the regulatory policies). Upon the completion of the stock-for-stock merger, the original listed company becomes a subsidiary of the acquiring party and completes the privatization.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

**Prior to the disclosure of the indicative announcement of the takeover offer**

**A. Shareholders signing the purchase agreement with the bidder**

Where the bidder and the shareholders of a listed company have entered into a purchase agreement that triggers a mandatory takeover offer, the shareholder who is a party to the purchase agreement may agree in the purchase agreement that the shareholder shall transfer 30% or more of the shares of the listed company to the bidder pursuant to the conditions agreed in the purchase agreement upon completion of takeover offer procedures by the bidder.

**B. Shareholders not signing the purchase agreement with the bidder**

Prior to the issuance of the indicative announcement on the takeover offer by the bidder, the takeover offer falls within the scope of insider information. The bidder is an insider and is obliged to protect the insider information from being divulged. There are risks of insider information leakage in the communication with other shareholders in advance. Unless there are necessary reasons, it is not recommended that the bidder contact other shareholders before the issuance of the indicative announcement of the takeover offer.

Shareholders that hold the same type of shares in the takeover offer must be treated equally. Communicating with some of the shareholders in advance will enable some of the shareholders to possess information advantages in advance, violating the requirements of equal treatment.

**After the disclosure of the indicative announcement of the takeover offer**

After the indicative announcement of the takeover offer, the takeover offer matter is public information, and the bidder may contact the other shareholders of the listed company and sign an agreement on pre-acceptance of the takeover offer. It should be noted that:

- The full text of the agreement on pre-acceptance of the takeover offer may be required to be disclosed upon the request of the stock exchange.
- The agreement on pre-acceptance of the takeover offer should not violate the principle requirements of equal treatment to give more preferential conditions to individual shareholders.

**9****Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

There is no specific restriction on management incentives.

Shareholders holding the same type of shares should be treated equally.

**10****Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

The board of directors of the target company shall investigate the entity qualifications, creditworthiness and takeover intent of the bidder, analyze the terms of the offer, make a recommendation to shareholders on whether to accept the offer and engage an independent financial adviser to issue a professional opinion. The board of directors of the target company shall announce the report of the board of directors of the target company and the professional opinion of the independent financial adviser within 20 days from the announcement of the report on the takeover offer by the bidder. Where a bidder makes substantial changes to the terms of a takeover offer, the board of directors of the target company shall announce a supplementary opinion issued by the board of directors and the independent financial adviser in respect of the changes to the terms of the offer within three working days.

During the period from the bidder making an indicative announcement to the completion of the takeover by offer, the target company shall continue to engage in normal business activities and perform resolutions passed by shareholders' general meetings, but the board of directors of the target company shall not, without the approval of a shareholders' general meeting, dispose of company assets, make investments, make adjustments to the principal business of the company, provide guarantees or loans, or perform other activities that will have a significant impact on the assets, liabilities, interests or business results of the company.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

There is no squeeze-out mechanism and minority shareholders may continue to hold shares after a takeover offer.

It is necessary to fully consider the rights and interests held by persons acting in concert. Persons acting in concert shall compute their shareholding on a consolidated basis. The shareholding computed by an investor shall include shares registered under its name as well as shares registered under the names of persons acting in concert with the investor.

There may be a competitive offer. During the takeover offer period, and 15 days prior to the expiration of the takeover offer, other bidders may send out competitive takeover offers, and the shareholders pre-accepting such takeover offer may withdraw the pre-acceptance and accept a takeover offer made by a new bidder. The original bidder may change the price, quantity and other conditions of the takeover offer. Where the date of making changes is later than 15 days from the expiration of the acquisition period, the acquisition period by offer shall be extended to at least 15 days. Where the increase in offer price by the original bidder results in an increase in funds required for the takeover, the original bidder shall also increase the performance guarantee correspondingly.

A competitive offer may have an impact on the time and funds required for the takeover.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

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

- i. a bidder acquires shares that, 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
- ii. a bidder holding not less than 30% and not more than 50% of the voting rights of the target company acquires (whether alone or in concert with others), in any 12-month period, additional shares carrying more than 2% of the voting rights of the target company. This is commonly known as the “creeper rule.”

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 Hong Kong Code on Takeovers and Mergers (“**HK 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.

Please refer to Section 4.1 of the Hong Kong chapter of our [Global Public M&A Guide](#) for further details on the mandatory general offer.

**B.** If, within four months following a takeover offer, the bidder (either alone or in concert with others) acquires 90% in number of the shares in the Hong Kong incorporated target company to which the takeover offer relates, the bidder can give a squeeze-out notice to compel shareholders who have not accepted the takeover offer to sell the remaining shares to the bidder.

Please refer to Section 7 of the Hong Kong chapter of our [Global Public M&A Guide](#) for further details on the squeeze-out.



## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

#### A. Mandatory general offer

The offer price must not be less than the highest price paid by the bidder or its party for shares of that class during the offer period (starting from the date of announcement of a proposed or possible offer) and within six months before the commencement of the offer period.

#### Voluntary general offer

The offer price must not be less than the highest price paid by the bidder or its party for shares of that class during the offer period (starting from the date of announcement of a proposed or possible offer) and within three months before the commencement of the offer period.

Further, 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 day before the announcement of a firm intention to make an offer under the HK Takeovers Code and the five-day average closing price prior to such date).

Please refer to Sections 4.1 and 4.2 of the Hong Kong chapter of our [Global Public M&A Guide](#) for further details on the mandatory general offer and voluntary general offer, respectively.

#### B. Mandatory general offer

A mandatory general offer must be made in cash or be accompanied by a cash alternative.

#### Voluntary general offer

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

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

Where the offer consists of cash or any other assets, except new securities to be issued by the bidder, the bidder's financial adviser must provide written confirmation to the Hong Kong Securities and Futures Commission (SFC) stating it is satisfied that there are sufficient resources available to satisfy the bidder's obligations in respect of the offer. The evidence required by the financial adviser for issuing such confirmation to the SFC will vary from adviser to adviser, and will also be dependent on the adviser's level of comfort with the financial strength of the bidder.

If the funding documents fall under the definition of a "material contract" under the HK Takeovers Code (i.e., a contract entered into by the bidder or its subsidiary not in the ordinary course of business carried on by the bidder within two years prior to the commencement of the offer period), they will need to be made available for public inspection on the websites of the SFC and of the issuer of the offer document or target board circular.





## 4

**What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

### **Mandatory general offer**

Except with the consent of the SFC, all general offers must be conditional upon the bidder having received acceptances that 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, a mandatory general offer must be unconditional.

A bidder may attach conditions to the share purchase agreement and announce a possible offer where the mandatory offer obligation is subject to the fulfillment of such condition precedent provided under the share purchase agreement, including but not limited to regulatory and other third-party approvals/clearances and where no material adverse change has occurred. Those conditions precedent are considered as preconditions and the SFC should be consulted in advance. It must be clear from the announcement whether or not the preconditions must be satisfied before an offer can be made, or whether they are effectively waivable. Such preconditions may, depending on the specific circumstances of the case, be subjective in form, in contrast to conditions to an offer that should normally be objective.

### **Voluntary general offer**

A voluntary general offer may be made subject to any conditions, including but not limited to regulatory and other third-party approvals/clearances, and where no material adverse change has occurred. Similar to a mandatory general offer, any such condition must be objective, i.e., not depend on judgments by the bidder of the target company or the fulfillment of which is in their respective hands. The bidder should not invoke any condition, other than the acceptance condition, in order to cause the offer to lapse unless the circumstances that give rise to the right to invoke the condition are of material significance to the bidder in the context of the offer.

Except with the consent of the SFC, all general offers must be conditional upon the bidder having received acceptances that 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.

Preconditions (including but not limited to regulatory and other third-party approvals/clearances and where no material adverse change has occurred) are permitted. The discussion on precondition relating to mandatory offer similarly applies to voluntary general offer.

## 5

**When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

No one is permitted to announce the launch of a public takeover bid until the SFC has approved the announcement.

The bidder makes an announcement of a firm intention to make an offer setting out the terms of the offer and other details required under the HK Takeovers Code. Once such an announcement is made, the bidder can no longer withdraw the bid (except with the consent of the SFC and in certain limited circumstances, such as in the event of a competing offer).

Before an announcement of a firm intention to make an offer is made, there may be circumstances where the bidder/potential bidder, the target company or the potential vendor must make an announcement of a possible offer when, e.g.:

- (i) the target company is the subject of rumor or speculation about a possible offer
- (ii) there is undue movement in the target company's share price or volume of share turnover
- (iii) negotiations or discussions are about to be extended to include more than a very restricted number of people

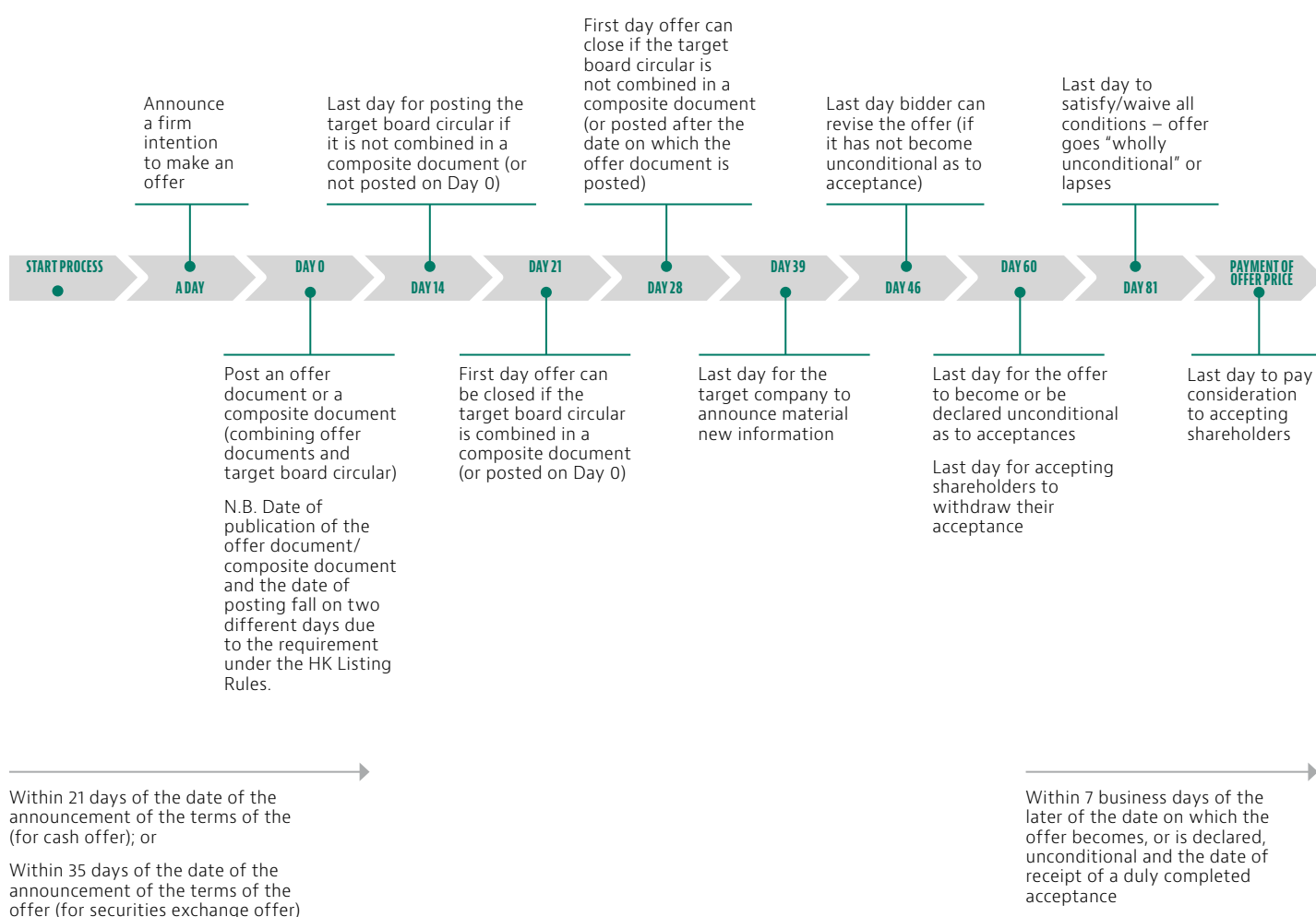
Please refer to Sections 3.9 to 3.10 and 5 of the Hong Kong chapter of our [Global Public M&A Guide](#) for further details on the announcement of the offer.

## 6 What is the typical basic timeline for a takeover offer?

The HK Takeovers Code sets out a timeline for takeover offers.

Please refer to Section 5 of the Hong Kong chapter of our [Global Public M&A Guide](#) for further details on the timeline for general offers.

### Mandatory general offer (indicative timetable)





## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

The scheme of arrangement is the most commonly seen privatization method in Hong Kong.

A scheme of arrangement is a court-sanctioned arrangement with shareholders to cancel or transfer to a bidder all the shares in the target company. The court may sanction and permit the scheme of a Hong Kong-incorporated listed company if a 75% majority of the voting rights of the shareholders voting at the court-directed shareholders' meeting vote in favor of the scheme at the meeting (and not more than 10% of the total voting rights of all "disinterested shares" vote against the scheme at the meeting). If the listed company concerned is not a Hong Kong-incorporated company, local laws may also require the scheme to be approved by a majority in number of the shareholders voting at the shareholders' meeting (commonly referred to as the "headcount test").

Once the order takes effect, the scheme binds all shareholders, including those who had voted against it at the scheme meeting.

In Hong Kong, following a successful privatization through a scheme of arrangement, a Hong Kong-listed company can voluntarily withdraw its listing on the stock exchange.

All schemes of arrangement must comply with the HK Takeovers Code. A scheme will typically require three to four months to implement.

Please refer to Section 8 of the Hong Kong chapter of our [Global Public M&A Guide](#) for further details on delisting.

## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Yes, a bidder may seek irrevocable commitments from shareholders of the target company, with significant or controlling stakes, to accept the offer or to vote in favor of the resolution approving the scheme of arrangement.

Under the HK Takeovers Code, a bidder may approach up to six sophisticated investors that have a controlling stake in the target company, to obtain an irrevocable commitment to accept the offer within a limited period to be agreed with the SFC, before an announcement of a firm intention to make an offer is published. The bidder can only reveal the information that will be set out in such an announcement.

A bidder and the target company may agree an inducement or break fee (normally no more than 1% of the offer value) payable by the target company upon the occurrence of specified events that prevent the offer from proceeding or causing it to fail, e.g., if the target board recommends a higher competing offer.

Please refer to Section 6.2 of the Hong Kong chapter of our [Global Public M&A Guide](#) for further details on such undertakings.

**9****Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Under the HK Takeovers Code, except with the SFC's consent, the bidder (or its concert parties) may not make any arrangements with shareholders if there are favorable conditions attached that are not extended to all shareholders, either when an offer is reasonably in contemplation, during an offer or for six months after the close of such offer.

The SFC's consent must be obtained if the management of the target company is to remain financially involved in the business after the offer is completed. The principle applied is that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. For example, the SFC would not normally find acceptable an option arrangement that guaranteed the original offer price as a minimum. The SFC will normally require, as a condition of its consent, the independent adviser to the target company to publicly state that in their opinion the arrangements with the management of the target company are fair and reasonable. In addition, where the bidder and the management of the target company together hold more than 5% of the equity share capital of the target company, the SFC will also normally require such arrangements to be approved by independent shareholders at a general meeting of the target company.

**10****Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

If the offer is a management buyout or similar transaction, a director will normally be regarded as having a conflict of interest where it is intended that they should have any continuing role (whether in an executive or non-executive capacity) in either the bidder or target company in the event of the offer being successful.

The information required to be given to competing bidders is at least the information generated by the target company (including the management of the target company acting in their capacity as such) that is passed to the financier (whether equity or debt) to the bidder. The directors of the target company, who are involved in making an offer, must cooperate with the independent board committee of the target company and its advisers in the collating of this information. The bidder must, on request, promptly furnish the independent board committee of the target company (or its advisers) with at least all information that has been furnished by the bidder to the financier (whether equity or debt) for the buy-out.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

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.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered
- B. minority squeeze-out by the bidder

**A.** A mandatory takeover offer is usually called a mandatory tender offer (MTO). The MTO obligation is triggered upon a takeover (change of control) of an Indonesian public company (by a new controller). A controller is defined as either (i) owning more than 50% shares or (b) having the ability to determine, directly or indirectly, in whatsoever manner, the management and/or the policy of the public company. Upon a takeover, except for shares owned by certain types of shareholders, the new controller is obliged to offer to purchase the remaining shares owned by public shareholders. The Indonesian Takeover Rule provides some exemptions for doing an MTO (e.g., change of control due to marriage, inheritance, merger, separation, consolidation or grant).

Mandatory sell-down requirements upon completion of the MTO are as follows:

- If the MTO causes the new controller to own more than 80% of the paid-up capital of the public company, the new controller must, within two years after the MTO is completed, transfer some of its shares to public shareholders so that at least 20% of the shares of the public company are owned by public shareholders.
- If the change of control itself causes the new controller to own more than 80% of the paid-up capital of the public company, the new controller must, within two years after the MTO is completed, transfer to the public at least the same amount of shares as it purchased during the MTO, so that these shares are owned by public shareholders.

**The above-mentioned sell-down requirements were implemented to prevent public companies from taking private after the occurrence of the change of control and the MTO.** Separately from those sell-down requirements, public companies that are listed on the Indonesia Stock Exchange (IDX) also need to comply with the IDX free float requirement, i.e., requirements (a) for the shares of the publicly listed company that are owned by non-controlling shareholders and non-principal shareholders<sup>1</sup> to be at least 50 million shares and at least 7.5% of the total paid-up capital and (b) to have at least 300 shareholders.

Please see the taking private mechanism in Indonesia details in section 7 below. If a new controller expects to make the public company that it just acquired private after completing the MTO, the taking private process cannot be initiated until the sell-down requirements mentioned above have been completed.

**B.** There are no squeeze-out provisions in Indonesia.





## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

A. For this purpose, we assume that the shares are listed and traded (and not currently being suspended) on the IDX. In this circumstance, the minimum offer price is the higher of (a) the takeover/acquisition price and (b) the average of the highest daily traded price during the 90-day period prior to the takeover announcement<sup>2</sup> or the negotiation announcement<sup>3</sup>.

B. In the context of an MTO, the consideration must be cash.

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

In order to launch an MTO, the disclosure for the MTO ("**MTO Statement**") and its supporting documents must be submitted to the Indonesia Financial Services Authority (OJK). One of the documents that needs to be submitted to OJK is a statement from the new controller stating that it has sufficient funds to complete the MTO. The evidence for this funds sufficiency will also need to be submitted to OJK but will not be available to the public. In our experience, OJK will expect a bank statement evidencing that the funds (in the full amount of the MTO consideration) are already deposited in the new controller's bank account.

## 4

### What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.

The MTO must be done unconditionally. Any conditions required to complete the deals (e.g., regulatory or third-party approvals, MAC clause) need to be addressed during the takeover process itself (when the new controller purchases the shares from the previous controller).

## 5

### When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?

The MTO Statement can only be announced after the MTO is declared effective by OJK. Please see the detailed timeline below.

<sup>2</sup> This announcement occurs after completion of the takeover.

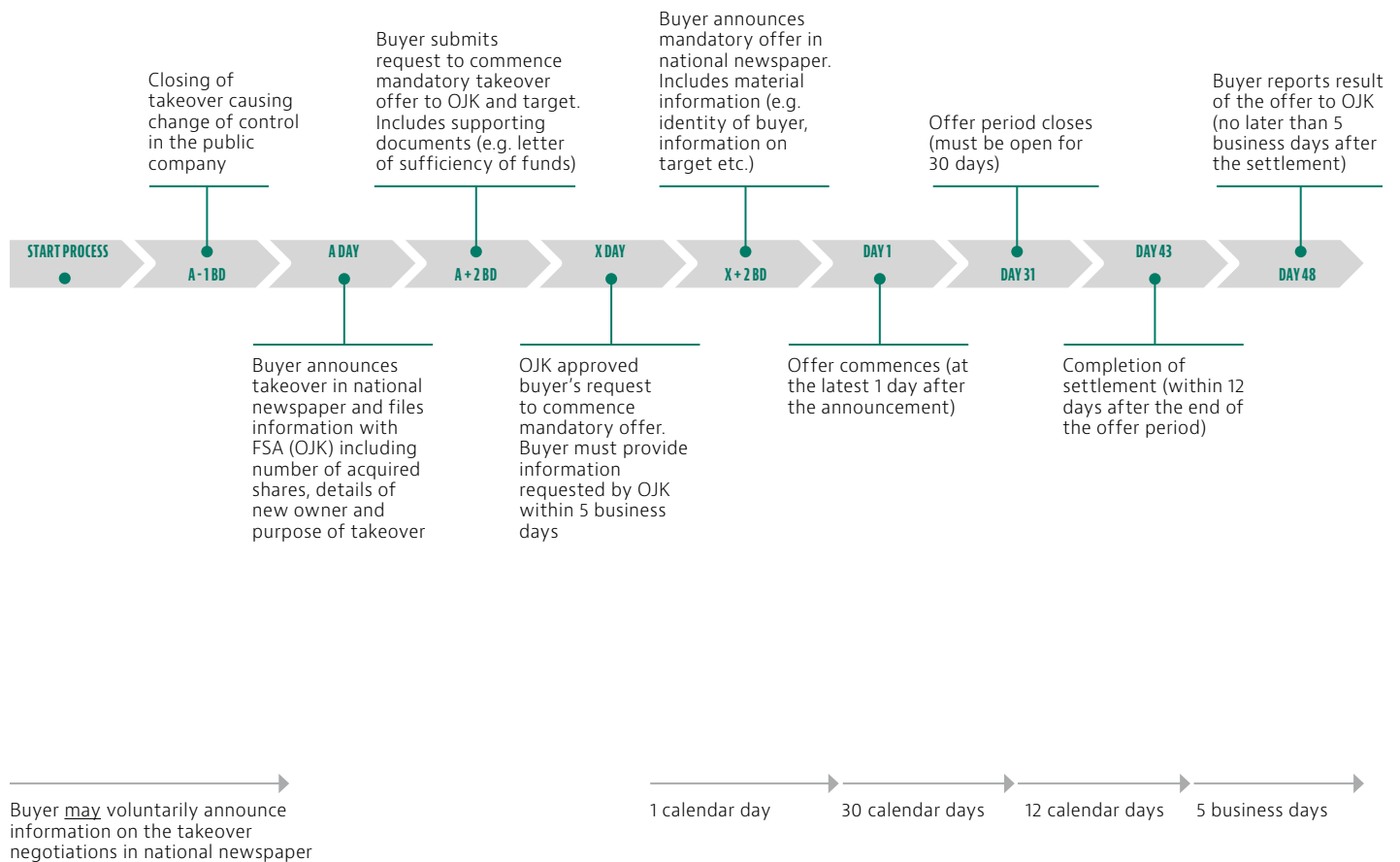
<sup>3</sup> This is a voluntarily announcement made before the completion of the takeover (intended to lock the calculation of the MTO price), which is typically done after signing the shares purchase agreement.



## 6

### What is the typical basic timeline for a takeover offer?

#### Mandatory public takeover offer (indicative timeline)





## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Currently, Indonesia does not have any specific rule or regulation for taking private. As such, if a public company intends to carry out a take-private, it must submit a request letter (i) to OJK to issue a ruling letter stipulating the terms and conditions of the take-private and (ii) to the IDX to suspend the trading of its shares on the IDX system (to prevent leakage and price fluctuation — see below discussion on the minimum offer price requirements). Some of the key items that we want to highlight for taking private transactions are as follows (some of them are subject to the specific OJK ruling letter):

- a) A taking private transaction is considered as a conflict of interest transaction. Therefore, the taking private transaction must first be approved by the independent shareholders, i.e., the shareholders other than the controller(s) of the public company, the principal shareholders of the public company, directors of the public company, commissioners of the public company and their affiliates. The first meeting has to be attended by more than 75% of the independent shareholders and approved by more than 50% of the total independent shareholders.
- b) The minimum offer price must be higher than the prices mentioned below:
  - the highest market price of the relevant shares on the IDX in the last 90 days before the announcement of the independent shareholders meeting (which contains the taking private plan)
  - the nominal/par value
  - the highest price reached in the regular market during the two-year period before the announcement of the independent shareholders' meeting (adjusted for any changes in nominal value of the shares in the last two years), plus a premium in the form of a return on investment over the last two years, calculated as the shares' initial public offering price multiplied by the average of the three-month Indonesian Central Bank certificate (SBI) rate, or the interest rate of other equal government bonds that prevails when the approval from independent shareholders is obtained
  - the fair value based on an appraisal by an independent registered OJK appraiser that is appointed by the public company, where the appointment and the value are approved by the independent shareholders

In our experience, the actual offer price (which is approved in the independent shareholders' meeting) has been higher than the above-mentioned requirements.

- c) As soon as the independent shareholders meeting has approved the take-private, the offeror (in this case, the controlling shareholder) must submit a tender offer statement to OJK for its review. The tender offer for completing the take-private can only be done after the tender offer statement has been declared effective by OJK, for a tender offer period of 30 to 90 calendar days. This maximum 90 calendar days period may be extended by OJK, typically if the total number of shareholders of the public company has not gone down to less than 50 parties (i.e., OJK's requirement to be able to convert the public company's status to a private company). Similar to an MTO, the tender offer for a take-private must be unconditional and the consideration must be cash.
- d) During this process, the public company will also process the delisting application from the IDX. Do note that only public companies that have been listed on the IDX for at least five years can apply for a delisting.



8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

In the context of an MTO, unless the target company is in a certain sector or industry, such as banking, there will be no shareholders' approval required to proceed with the transaction. Meanwhile, the take-private will require approval from independent shareholders of the public company and in this matter, in theory the offeror may approach some independent shareholders to support the taking private plan provided that all independent shareholders must be treated equally (meaning that any of them should not have different terms and conditions, e.g., offer price). In the context of a tender offer (either during an MTO or a taking private transaction), the offeror (or its advisor) could approach the shareholders to get them to participate in the tender offer and sell their shares. The approach should be done in such a way that the shareholders do not feel they are being pressured to sell their shares or being squeezed out of the public company.

9

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

There are no particular restrictions on management incentivization, but this is not common in Indonesia. In the context of a taking private transaction, it is prohibited from treating shareholders differently (at least those that have the same class of shares).

10

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

No, even public companies play important roles in taking private transactions. The public company is the one that is required to, among other things, (a) submit the request letter to both OJK and the IDX, (b) get the independent shareholders' approval, and (c) appoint the independent appraiser to determine the fair value of the shares.

11

**Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

In Indonesia, bidders cannot immediately initiate the taking private process after completing its takeover (and MTO) given the sell-down requirements. As such, as discussed in answer 1 above, there will be a time gap between the completion of the MTO and the start of the taking private transaction. In addition, a taking private transaction requires approval from the independent shareholders of the public company. These factors may cause uncertainty for bidders around completing a taking private transaction.



# JAPAN



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** In general, when a person purchases shares of a listed company in the following circumstances, such purchase may only be made through a tender offer under the Financial Instruments and Exchange Act of Japan ("FIEA"):

- a. The bidder proposes to purchase shares in excess of 5% of the total number of voting rights of the target from more than 10 shareholders in a period of 61 days ("61-day Aggregation Period") through off-market trading.
- b. The bidder proposes to purchase shares such that it will hold shares in excess of one-third of the total number of the target's voting rights, irrespective of the number of shareholders involved through off-market trading and/or on-market non-auction trading.
- c. The bidder proposes to purchase shares, within a three-month time frame, of 10% or more of the total number of voting rights of the target in aggregate through any or, a combination of, off-market trading, on-market trading and/or subscription of new shares and at least 5% (of the total number of voting rights of the target) of such share purchase is via off-market trading and/or on-market non-auction trading, with the result that the bidder holds shares in excess of one-third of the total number of voting rights of the target.
- d. The bidder already holds more than one-third of the total number of voting rights of the target and wishes to purchase further shares in excess of 5% of the total number of voting rights in the target through on-market auction trading after the launch of a tender offer by a third party. Although the FIEA does not specify the type of trading for the purchase of further shares in circumstance (d), any purchase through off-market trading and/or on-market non-auction trading (whether in excess of 5% or not) by a bidder who already holds more than one-third of the total number of voting rights in the target will always simultaneously trigger the above circumstance (b), and as such, circumstance (d) is considered to target only on-market auction trading.

Purchases of shares in the following circumstances are excluded from the mandatory tender offer obligation:

- a. Exercise of share options and others — Purchases made by the exercise of share options, exercise of rights to allot shares, exercise of rights to subscribe to new shares granted in a rights issue and conversion of shares into another class of shares by shareholders are excluded.



- b. Acquisition by parent — Purchases by the parent of the target from 10 or fewer shareholders during the 61-day Aggregation Period with the result that the parent will hold less than two-thirds of the total number of voting rights are excluded.
- c. Transactions within a group — Purchases of shares from “persons in a special relationship” (*tokubetsu kankeisha*) are excluded under certain conditions.
- d. Consent by all shareholders — The mandatory tender offer obligation is not applicable if the total number of shareholders is less than 25 and all the shareholders agree in writing to the purchase of shares without conducting a tender offer. If the ratio of shareholding after the purchases with such consent will result in two-thirds or more, such purchases are only exempt when either (i) the approval of the meeting of the holders of the classes of shares, or (ii) the written consent of all holders of the class of shares (only if the number of such holders is less than 25) is obtained for all classes of shares other than the class of shares to be acquired.
- e. Others — Acquisition of shares by enforcing a security interest in respect of the shares, acquisition through merger, stock swap (*kabushiki koukan*), corporate split (*kaisha bunkatsu*) or acquisition of all or part of a business are not subject to the mandatory tender offer obligation. In addition, certain types of periodic acquisitions by officer shareholding or employee shareholding associations that fulfill certain preconditions, as well as some other acquisitions under exceptional situations, are also exempted.

**B.** If following the tender offer the bidder holds (by itself and/or through its 100% direct or indirect subsidiaries) 90% or more of the total number of voting rights (a “Special Controlling Shareholder”), the Special Controlling Shareholder can force all other holders of voting securities and securities conferring the right to voting securities to transfer their securities to it subject to the approval of the board of the target.

Even if the bidder fails to obtain 90% of the voting rights, it is still possible to effect the squeeze-out by using share consolidation if the bidder controls more than two-thirds of the total number of voting rights. In this share consolidation squeeze-out scheme, subject to the special resolution by a two-thirds majority vote of the shareholders present at the shareholders’ meeting, the target will conduct the share consolidation at such a consolidation ratio that the number of shares held by each of the minority shareholders (other than the bidder) is reduced to less than one whole share, i.e., fractional shares. The implementation of this share consolidation squeeze-out scheme requires shareholder approval, which makes this process more time-consuming than the squeeze-out by the Special Controlling Shareholder.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** There is no legal restriction on the minimum or maximum offer price. The common valuation process in a take-private transaction is as follows:

- a. The bidder performs its valuation of the target and provides for the rationale behind the determination of such offer price in the tender offer registration statement (“Tender Offer Registration Statement”).
- b. The target obtains its own valuation from an independent third-party appraiser to examine whether the price offered by the bidder is fair and reasonable. The target’s position statement (“Target Position Statement”) must contain an opinion of the target’s board as to whether the board will support the tender offer to be launched by the bidder and recommend that the target’s shareholders tender their shares in the tender offer.

**B.** There is no of the same class restriction on the form of offer consideration so long as the same consideration is offered to all shareholders. Consideration may take the form of shares and other securities and it is possible to structure the offer to give shareholders a choice of two or more different payment alternatives, e.g., cash or securities.

### 3

#### **What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

When launching the tender offer, the bidder must file the Tender Offer Registration Statement via the Electronic Disclosure for Investors' NETwork ("EDINET") with the Ministry of Finance of Japan, which must include, as one of the attachments, documents demonstrating that the bidder has sufficient funds to complete the tender offer (such as a bank statement showing the balance of the bidder's deposit, equity commitment letter and/or debt commitment letter issued by a lending bank) as required by Article 6, paragraph (1), item (vii) of the Cabinet Office Ordinance for Disclosure Required for Tender Offer for Share Certificates, etc., by Person Other than Issuer ("Tender Offer Ordinance").

The ability to draw down on debt facilities can be subject to various conditions precedent. However, all such conditions precedent: (i) must be objective and specific enough to demonstrate that there is a "high likelihood" for the bidder to be able to draw down the debt for the settlement of the tender offer; and (ii) must be summarized in the debt commitment letter attached to the Tender Offer Registration Statement, which becomes publicly available information when the tender offer is launched as an attachment to the Tender Offer Registration Statement.

### 4

#### **What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

The tender offer may be subject to a minimum acceptance condition and/or maximum acceptance condition if such condition is explicitly included in the Tender Offer Registration Statement. The bidder is not permitted to include a maximum acceptance condition if, after the acquisition, it intends to hold two-thirds or more of the target's voting shares.

The bidder may also withdraw the tender offer upon the occurrence of certain events if the bidder specifies such events as withdrawal events (as opposed to conditions precedent) in the Tender Offer Registration Statement. The withdrawal events that the bidder may include in the Tender Offer Registration Statement are strictly limited to any of the following events, the exhaustive list and the applicable materiality thresholds are set out in Article 14 of the Order for Enforcement of the FIEA and Article 26 of the Tender Offer Ordinance:

- a. certain corporate decisions, such as merger, sale of substantial assets, dissolution, bankruptcy and exercise of the anti-takeover defense made by the target or its subsidiary (being limited to decisions announced on or after the day of the public notice of commencing a tender offer)
- b. corporate decisions to maintain the anti-takeover defense made by the target
- c. the occurrence of certain material events in relation to the target, such as bankruptcy, filing for an injunction order seeking the cessation of the target's business, an administrative order to cease the operation of the business, the termination of the business relationship with a major customer, damage sustained from a disaster, the commencement of litigation or the delisting of shares (being limited to events that occurred on or after the day of the public notice of commencing a tender offer)
- d. if any governmental approval necessary for the acquisition of the shares in the target specified in the Tender Offer Registration Statement has not been granted before the last day of the tender offer period
- e. any events provided under the Tender Offer Ordinance that are deemed to be equivalent to items (a) through (d) above
- f. any major changes to the situation of the bidder, such as its bankruptcy

As listed in item (d) above, the bidder can effectively make the offer conditional on the obtainment of the necessary competition or other regulatory clearance if the bidder specifies a failure to obtain such clearance as one of the withdrawal events in the Tender Offer Registration Statement. In practice the regulator (i.e., the Kanto Local Financial Bureau) does not allow the bidder to include such withdrawal event without a good prospect that the clearance can be obtained within the tender offer period (which must not be less than 20 business days but not more than 60 business days). In addition, the bidder may not specify any approvals other than the governmental approvals as the withdrawal event in the Tender Offer Registration Statement. If the bidder needs to obtain certain approvals that cannot be specified as the withdrawal event, the bidder has no choice but to make a preannouncement of the tender offer (to the extent that such preannouncement is necessary to file an application for the relevant government approvals) and obtain the necessary approvals before the formal launch of the tender offer.

The withdrawal events that can be included in the Tender Offer Registration Statement as listed above cover some material adverse change type events (e.g., item (c) above). The bidder cannot include a broader material adverse change clause in the Tender Offer Registration Statement.

## 5

### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

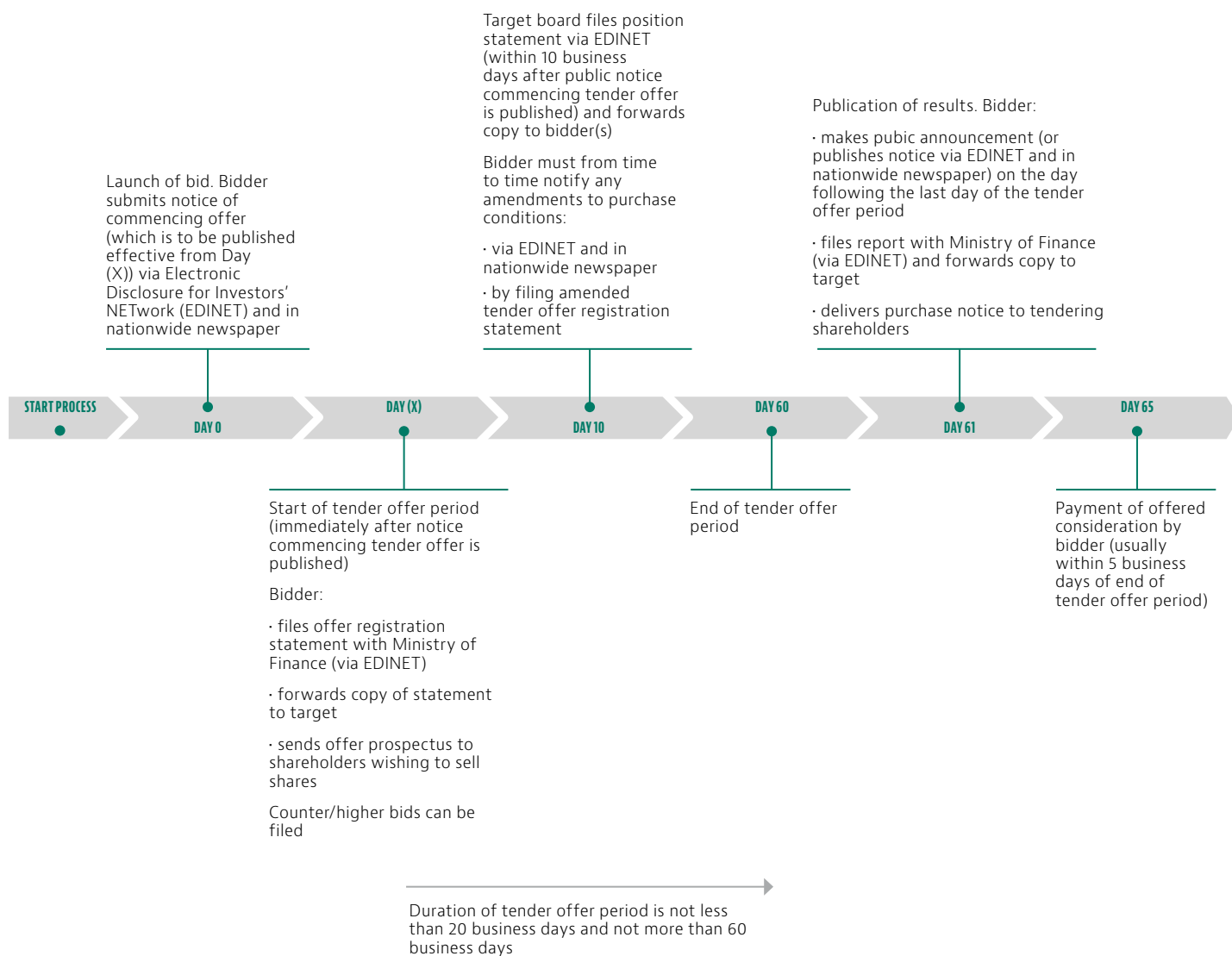
Although not a legal requirement, the bidder is practically required to have an informal consultation with the regulator (i.e., the Kanto Local Financial Bureau) two to three weeks before the launch of a tender offer.

When launching the tender offer, the bidder must publish the public notice of commencing a tender offer and file the Tender Offer Registration Statement via EDINET. A press release regarding the tender offer also has to be made by the target and the bidder (if applicable) on the day immediately before the launch of the tender offer pursuant to the timely disclosure rule of the stock exchange.

## 6

### What is the typical basic timeline for a takeover offer?

#### Public friendly takeover offer (indicative timeline)



## 7 **Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Take-private transactions can also be implemented via a stock swap (*kabushiki koukan*) under the Companies Act of Japan. Under a stock swap, the bidder can acquire all the shares of the target by passing a special resolution by a two-thirds majority vote of the target shareholders present at the shareholders' meeting. This method is commonly used when a bidder is a Japanese company and the bidder's shares are offered as the consideration (i.e., cash-out stock swap is also possible but not often used due to tax reasons). A foreign bidder cannot be a direct party to a stock swap as a stock swap is a corporate restructuring scheme available only between two Japanese companies under the Companies Act of Japan.

The implementation of the stock swap will automatically meet the delisting criteria under the stock exchange. It normally takes around two to three months to convene the target's shareholders' meeting to approve the stock swap and complete the delisting, although such period may vary depending on various factors including the necessity of merger clearance or other government approvals.

## 8 **Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Yes. It is not uncommon for the bidder to negotiate and enter into a tender offer agreement (*kokaikaisuke obo keiyaku*) with major shareholders of the target before the launch of the tender offer, whereby the bidder will undertake to launch a tender offer on the agreed terms and conditions and the major shareholder will undertake to tender its shares in the tender offer to be launched by the bidder. There is no restriction on when the bidder may start approaching major shareholders and such timing depends on various factors including the shareholding percentage of the major shareholders, as well as who takes the initiative on the preliminary negotiation with the bidder on the potential take-private transaction (i.e., the target or the major shareholder). The fact that the major shareholder enters into the tender offer agreement with the bidder must be disclosed to the public via an amendment to the substantial shareholding report (which must be filed by a major shareholder who holds more than 5% of the outstanding shares of the target) and also referred to in the Tender Offer Registration Statement and other documents to be disclosed by the bidder and the target.

It is also possible for a bidder to negotiate and enter into an agreement with the target before the launch of the tender offer, whereby the bidder will undertake to launch a tender offer on the agreed terms and conditions and the target will undertake to express its opinion to support the transaction and recommend that its shareholders tender their shares in the tender offer to be launched by the bidder.

The major shareholder and the target (as the case may be) often try to include a fiduciary out clause in the aforementioned agreement with the bidder to the effect that their undertakings will lapse if a higher competing bid is made during the tender offer period. In response to such demand, the bidder may want to negotiate to include a break fee clause in the same agreement, which is legally permissible but in practice not often agreed.



**9**
**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

All shareholders of the same class must be offered the same consideration by the bidder and there is no exception to this rule. It is possible for the bidder to enter into incentivization arrangements with management members of the target (in their capacity as the management members, as opposed to the shareholders) effective from the completion of the transaction, although such arrangements are not common. If such incentivization arrangements are agreed, they must be disclosed in the Tender Offer Registration Statement to be filed by the bidder and other relevant disclosure documents. In addition, out of concern about the potential conflicts of interest, the relevant management members should be treated as "persons having special interests" in the proposed transaction, that is, they should be excluded from any negotiation and evaluation of the proposed transaction on the part of the target and should not participate in the board resolution regarding the Target Position Statement.

**10**
**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Where the bidder intends to involve management in the bid as an investor, such transaction will be treated as the management buyout ("MBO") under the FIEA and the stock exchange rules, and the special disclosure requirements to deal with structural conflicts of interest are applicable. Such special disclosure requirements include intensive disclosure of the valuation methodologies of the bidder's shares, attachment of the valuation report obtained from a third party, and an explanation of the measures implemented by the bidder and the target to ensure the fairness of the transaction.

In addition, Japan introduced the Fair M&A Guidelines in June 2019. The Fair M&A Guidelines provide for the best practice to protect the interests of the general shareholders of a listed target by requiring the target and the bidder (as applicable) to implement various measures to ensure the fairness of the MBO transaction ("Fairness Ensuring Measures"). The Fairness Ensuring Measures include: (i) establishing an independent advisory board to evaluate the transaction; (ii) obtaining expert advice from independent external advisers; (iii) allowing (and not agreeing on the deal protection measure that may prevent) market checks; (iv) setting a majority of minority condition in the proposal; (v) enhancing information disclosure to the general shareholders and transparency of the process; and (vi) avoiding coerciveness. The relevant target and the bidder are not necessarily required to implement all such Fairness Ensuring Measures and may elect to adopt all or some of such measures by taking into account the degree of structural conflicts of interest between the acquirer and the general shareholders, and any other specific circumstances.

**11**
**Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

As with the MBO transaction, a take-private transaction of a target in which a controlling shareholder exists also entails the risk that the best interests of the general shareholders are not fairly represented by the board of directors of the target due to the existence of structural conflicts of interest similar to the MBO. As such, special requirements under the stock exchange rules and the Fair M&A Guidelines mentioned above are also applicable to a take-private transaction proposed by a controlling shareholder. Further, where a controlling shareholder or a third-party bidder proposes a take-private transaction of a target in which a controlling shareholder exists, the stock exchange rules require the target to obtain an opinion from a third party who is independent from its controlling shareholder to the effect that the transaction would not undermine the interests of minority shareholders of the target. An independent director of the target or an independent advisory board established by the target often issues such opinion.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered
- B. minority squeeze-out by the bidder

**A.** A bidder is required to launch a mandatory takeover offer ("**MGO**") to acquire the remaining shares that it does not currently own in the target company ("**Target**") where the bidder:

- i. acquires, holds or is entitled to exercise or control the exercise of more than 33% of the Target's voting rights
- ii. already holds more than 33% but not more than 50% of the voting shares of the Target and acquires more than 2% of the voting shares of the Target in any six months period

**B.** Once the takeover offer is made, the bidder can launch a compulsory acquisition to purchase the shares from the remaining minority shareholders within four months of making that offer, when the bidder acquires not less than 90% of the nominal value of the shares of that class for which the offer was made ("**90% Threshold**"). The 90% Threshold excludes shares held by the bidder and persons acting in concert with the bidder ("**PACs**"). The squeeze-out can also be exercised in respect of convertible securities.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

If a bidder acquires voting shares or voting rights prior to the beginning of an offer period, the offer price offered by the bidder may not be less than the highest price paid or agreed to be paid by the bidder and its PACs during the offer period and:

- i. for an MGO, within six months prior to the beginning of the offer period
- ii. for a Voluntary General Offer ("**VGO**"), within three month prior to the beginning of the offer period

**B.** In a takeover offer, the bidder may offer consideration for the shares in cash, shares or a combination of cash and shares.

In the following scenarios, the bidder must provide a cash alternative when non-cash consideration is offered as part of the offer:

- i. in an MGO, a bidder must always offer a cash alternative
- ii. in a VGO, the consideration must include a cash alternative when the bidder or its PACs purchased 10% or more of the shares for cash during and within the six months prior to the start of the offer period

The consideration must include a share alternative when the bidder or its PACs purchased 10% or more of the shares in exchange for shares during and within the three months prior to the start of the offer period. This applies to all takeover offers, whether mandatory or voluntary.

### 3

**What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

Where the takeover offer involves cash or an element of cash, the bidder will confirm in the offer document, and its financial adviser must be reasonably satisfied, that the takeover offer will not fail due to the insufficient financial capability of the bidder and that every shareholder of the Target that wishes to accept the offer will be paid in full.

This means that the bidder will need to show committed funding for 100% of acceptances. A bank statement or a letter of offer from a financial institution of a committed line of credit amounting to the required amount can evidence the committed funding. There is no requirement for the funding documents to be made public.

### 4

**What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

#### **(a) MGO**

No condition can be attached other than a condition requiring the bidder to receive acceptances that would result in the bidder and its PACs holding in aggregate more than 50% of the voting shares (unless this condition is already met prior to making the takeover offer).

In practice, if any regulatory or third-party approvals are required, these will have to be obtained prior to dispatching the offer document and are typically obtained during the pre-completion period under the share purchase agreement that was entered into between the offeror and the selling shareholder. The MGO is only triggered once such a share purchase agreement has become unconditional. If the necessary approvals cannot be obtained in time, an application can be made to the SC for an extension of time to dispatch the offer document.

**(b) VGO**

In a VGO, the offer document must include a condition requiring the bidder to receive acceptances that would result in the bidder holding more than 50% of the voting shares (unless this condition is already met prior to making the takeover offer). The bidder can set a higher acceptance threshold (but the threshold must be more than 50%).

In addition to the acceptance threshold, the bidder may include any other conditions except a defeating condition, where the fulfilment of which depends on:

- (i) the subjective interpretation or judgment of the bidder
- (ii) an event that is within the control of the bidder

In practice, a VGO can be made subject to regulatory or third-party approvals. It can also be subject to material adverse change clauses if the thresholds are based on objective criteria (e.g., a drop in the net asset value exceeding a specified threshold or the loss of a material license).

**5****When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

Prior to the announcement of an offer, all persons privy to any confidential information in relation to a takeover offer, in particular price sensitive information, must treat the information as confidential. Persons aware of such information should only pass it to another person when it is necessary and will need to ensure that the person receiving the information is made aware of the need to maintain confidentiality of the information.

A bidder is required to put forward a takeover offer to the board of the Target before the offer is announced to the public. A bidder may also be required to make a holding announcement, that the negotiations are ongoing, if the Target is the subject of rumor or speculation about a possible offer, or there is undue movement in its share price or a significant increase in the volume of share turnover.

A bidder that has a firm intention to make a takeover offer must make an immediate announcement by a press notice, within one hour of incurring an obligation to make a takeover offer. The press notice must be published in at least three main newspapers. One notice 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 takeover offer to the:

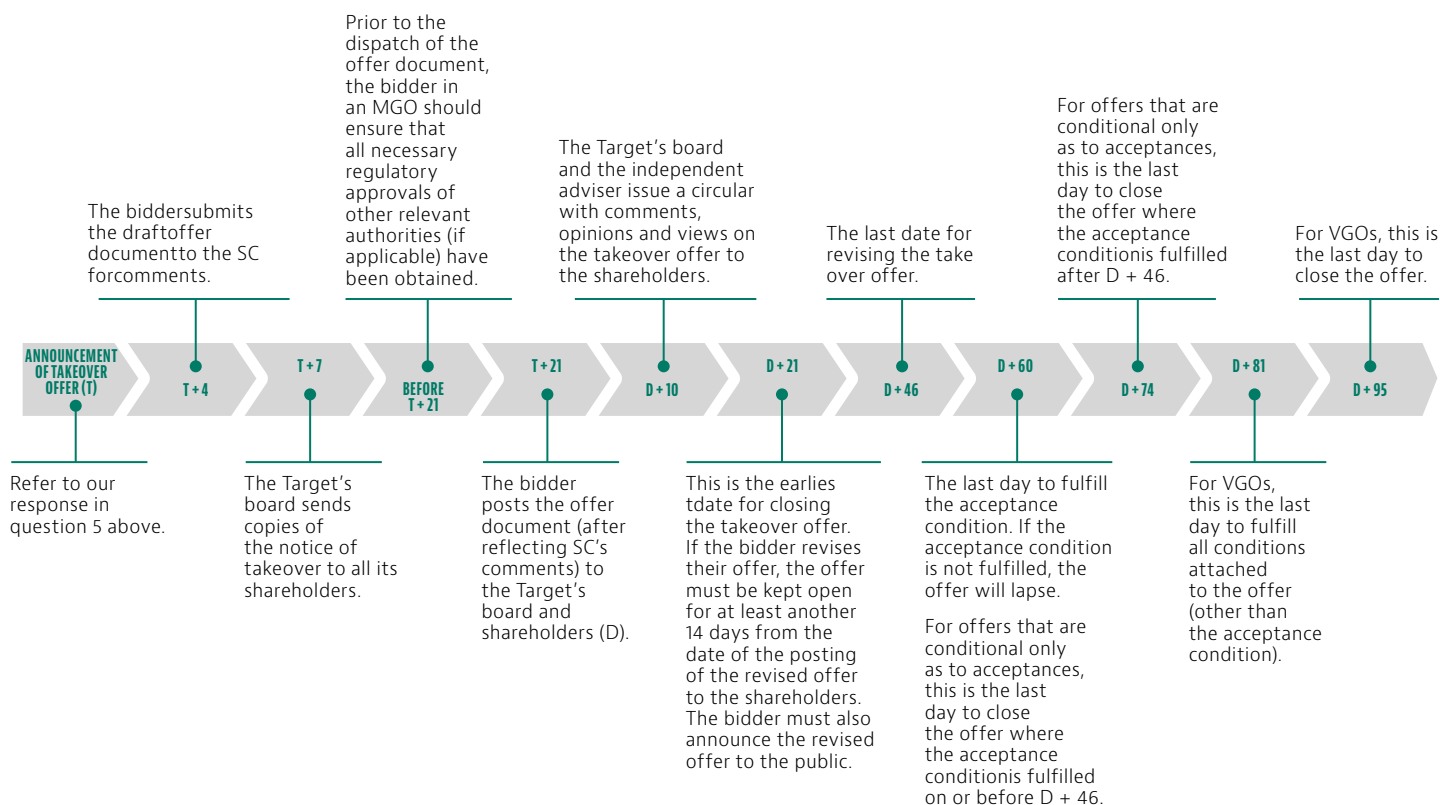
- (a) Target's board, or its designated adviser
- (b) the SC
- (c) Bursa Malaysia (the Malaysian stock exchange)

The Target board is required, within an hour of receiving the written notice of a takeover offer from the bidder, to make an announcement on Bursa Malaysia. A copy of the notice of the takeover offer must also be sent to all the Target's shareholders within seven days of receiving the notice.

## 6

### What is the typical basic timeline for a takeover offer?

The timeline for MGOs and VGOs is as follows:



## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

### **(a) Other methods of taking private**

#### Scheme of arrangement/selective capital reduction

Bidders can also privatize a company in Malaysia via a scheme of arrangement or selective capital reduction. These are also regulated as takeovers.

The proposal must be approved by more than 50% in number and 75% in value of the disinterested shareholders and no more than 10% in value object.

Generally, this would take up to six months to complete.

#### 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 approval of over 50% of the votes attached to the ordinary shares, unless otherwise set out in the Target's articles of association or it is a major disposal.

The timeline for the transaction will vary depending on the assets and liabilities to be transferred.

### **(b) Delisting**

The Target is allowed to delist where a takeover offer has resulted in 90% or more of the listed shares being held by the bidder or its PACs. In cases where the bidder and its PACs do not hold 90% or more of the listed shares, the Target is only permitted to request delisting where:

- (i) The Target convenes a general meeting to obtain approval from its shareholders and sends a circular, in the prescribed form, to the shareholders.
- (ii) The resolution for withdrawal is approved by a majority in number, representing 75% of the value of the shareholders. The proportion of shareholders objecting to the withdrawal at the meeting must not be more than 10% in value.
- (iii) The shareholders are offered a reasonable cash alternative or other reasonable alternatives for their shares (exit offer).
- (iv) An independent adviser is appointed to advise and make recommendations to the shareholders in connection with the delisting as well as the fairness and reasonableness of the exit offer.

If the bidder has achieved acceptances rendering the offer unconditional, but falls short of the compulsory purchase threshold, the bidder will have to launch a second takeover offer to satisfy the exit offer requirement.

## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Yes, these are typically structured as unilateral irrevocable undertakings by the relevant shareholders to tender their shares to the bidder. This is to avoid the shares from being excluded from the squeeze-out threshold.

It is possible to approach the shareholders prior to the announcement of the takeover offer but the bidder will need to exercise care not to trigger a mandatory offer on the basis that the parties have come together to act in concert.

Other than unilateral irrevocable undertakings, a bidder can collaborate with one or more major shareholder or management to undertake a takeover. These collaboration arrangements will have to be carefully considered, as they may trigger a mandatory offer on the basis that the parties have come together to act in concert.



**9****Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Unless approved by the SC, the bidder or its PACs are not permitted to make arrangements with selected shareholders, if such arrangements have favorable conditions that are not extended to all the Target's shareholders. Arrangements between joint offerors regarding membership, control and management of the Target are permitted.

The SC may permit management incentives but will normally require such arrangements to be disclosed to the independent adviser and for the independent adviser to opine that they are fair and reasonable. The SC may also require such arrangements to be approved by the non-interested shareholders at a general meeting.

**10****Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Management may be in possession of inside information. Any person in possession of inside information is prohibited from trading on the shares of the Target and is prohibited from disclosing the information to any third party that may trade on the shares of the Target. There is an exemption for the acquisition or disposal of securities or the communication of information that is carried out under any other written law relating to, among others, schemes of arrangements and takeovers. However, the scope and application of this exemption has not been tested in court. The market convention is not to trade while in possession of inside information.

Where management are also directors of the Target, they are obliged to exercise their powers for a proper purpose, and in good faith, in the best interest of the Target. Being involved in a privatization transaction may conflict with their director's duties or they may be duty bound to disclose information relating to the privatization (prior to the announcement of the privatization) to the board of the Target, if it is relevant to the matters deliberated by the board.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

Public-to-private transactions are routinely undertaken in Malaysia.

The primary responsibility for the accuracy of the content of the takeover documentation rests with the board of directors of the bidder and each director is personally liable. The board will have to pass a resolution approving the responsibility statement that "each of the directors has taken reasonable care to ensure the facts stated and opinions expressed in the takeover documentation are fair and accurate and that no material facts have been omitted and that each director accepts responsibility accordingly."



For further information or assistance with take-private transactions, please reach out to any of the contacts listed below or your usual Baker McKenzie contact.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** There are two percentage thresholds that will trigger both disclosure obligations and mandatory tender offer requirements:

- i. First, any person, or group of persons acting in concert, who intends to acquire **35% of the outstanding voting shares or such outstanding voting shares** that are sufficient to gain control of the board in a public company in one or more transactions within a period of 12 months will disclose such intention and contemporaneously make a tender offer for the percentage sought to all holders of such securities within the said period.

If the offer is oversubscribed, the aggregate amount of securities to be acquired at the close of such tender offer will be proportionately distributed across selling shareholders with whom the acquirer may have been in private negotiations and other shareholders.

Any person, or group of persons acting in concert, who intends to acquire **35% of the outstanding voting shares or such outstanding voting shares** that are sufficient to gain control of the board in a public company through the exchange trading system will not be required to make a tender offer even if such person or group of persons acting in concert acquire the remainder through a block sale if, after acquisition through the exchange trading system, they fail to acquire their target of 35% of such outstanding voting shares that is sufficient to gain control of the board.

Any person, or group of persons acting in concert, who acquires **35% of the outstanding voting shares or such outstanding voting shares** that are sufficient to gain control of the board in a public company directly from one or more stockholders will be required to make a tender offer for all the outstanding voting shares.

Second, if any acquisition would result in an ownership of over **50% of the total outstanding equity securities** of a public company, the acquirer will be required to make a tender offer for all the outstanding equity securities to all remaining stockholders of the said company at a price supported by a fairness opinion provided by an independent adviser or equivalent third party. The acquirer in such tender offer will be required to accept any and all securities thus tendered.

**B.** There are no Philippine regulations imposing a threshold that allows a minority squeeze-out where the bidder can compel the remaining minority shareholders to transfer their securities to the bidder in a takeover bid.

**2****What are the requirements as to offer price:**

- A. in relation to minimum offer price**
- B. form of offer consideration**

For a mandatory tender offer that is triggered by the acquisition that would result in ownership of 50% of the total outstanding securities of a public company, the offer price must be supported by a fairness opinion provided by an independent financial adviser or equivalent third party. For this purpose, only independent firms that are compliant with the qualifications prescribed by the Philippine Securities and Exchange Commission ("Philippine SEC") may conduct the valuation and issue the fairness opinion.

There is no required form of offer consideration; however, in mandatory tender offers, the offeror is compelled to offer the highest price paid by them for such securities during the preceding six months. If the offer involves payment by transfer or allotment of securities, such securities must be valued on an equitable basis.

No tender offer is allowed unless it is open to all security holders of the class of securities subject to the tender offer and the consideration paid to any security holder pursuant to the tender offer will be the highest consideration paid to any other security holder during such tender offer.

In the event that the bidder or offeror in a tender offer increases the consideration offered after the commencement of the tender offer, the bidder or offeror will pay such increased consideration to all security holders whose tendered securities have been accepted for payment by such bidder or offeror, whether or not the securities were tendered prior to the variation of the tender offer terms.

**3****What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

A person making a tender offer is required to make an announcement of its intention in a national newspaper of general circulation in the Philippines within five business days from either the company's board approval authorizing negotiations relative to the purchase of shares that may result in a mandatory tender offer or 30 business days prior to the commencement of the offer, provided that no announcement is made until the offeror has the resources to implement the offer in full. One of the disclosure requirements in tender offers is the confirmation of the offeror's financial adviser or another appropriate third party that the resources available to the offeror are sufficient to satisfy the full acceptance of the offer. This confirmation is included in the report that will be published and distributed to the security holders.

**4****What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

It is permissible, upon agreement by the parties to an acquisition that will trigger a mandatory tender offer, to announce the intention to make a tender offer subject to the fulfillment of certain conditions precedent. In the event that an offer has been announced but has not become unconditional in all respects and has been withdrawn or has lapsed, neither the offeror nor any person who acted in concert with it in the course of the offer will be allowed to announce an offer for the target company or acquire any securities of the target company that would require such person to make a mandatory tender offer within six months from the date on which the offer has been withdrawn or has lapsed. Only upon prior approval by the Philippine SEC will a tender offer within the specified period be allowed.

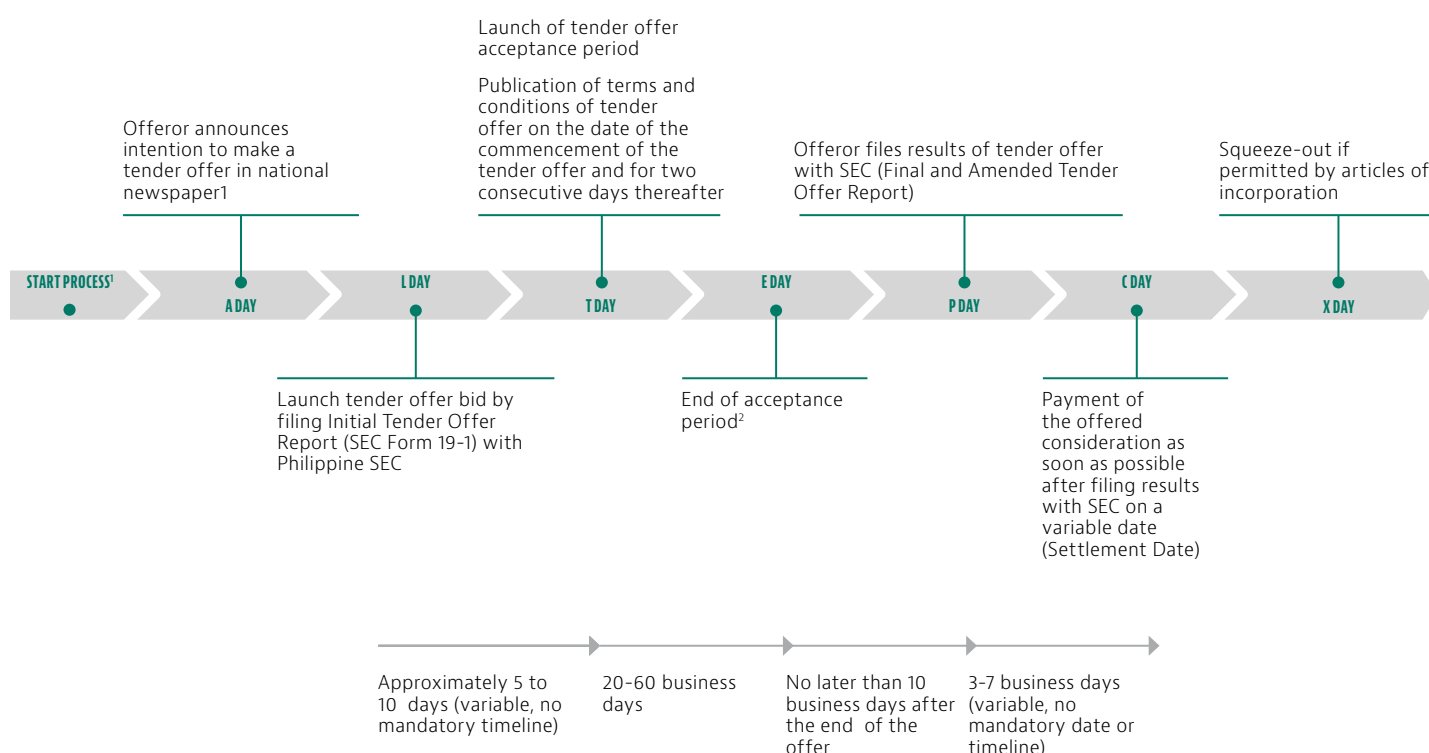
**5****When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

- a. An announcement of an intention to make a tender offer will be made in a national newspaper of general circulation either within: (i) five business days from the company's board approval authorizing negotiations relative to the purchase of shares that may result in a mandatory tender offer; or (ii) 30 business days prior to the commencement of the offer.
- b. No bidder is allowed to make a tender offer unless, at least two business days prior to the commencement of the tender offer, the bidder:
  - i. files with the Philippine SEC the SEC Form 19-1 (Initial Tender Offer Report) with the Philippine SEC, including all exhibits thereto with proof of payment of the required filing fees
  - ii. hand-delivers a copy of the SEC Form 19-1, including all exhibits thereto, to the target company at its principal executive office and to each exchange where such class of the target company's securities are listed for trading
- c. The bidder is required to publish the terms and conditions of the tender offer in two national newspapers of general circulation in the Philippines on the date of commencement of the tender offer and two consecutive days thereafter.
- d. The bidder will file with the Philippine SEC copies of any additional tender offer materials as exhibits to the SEC Form 19-1 and, if a material change occurs in the information set forth in such SEC Form (Amended Tender Offer Report), copies of an amendment of such form. Copies of the additional tender offer materials and/or amendments will be hand-delivered to the target company and to any exchange as required under item (b).
- e. The bidder will report the results of the tender offer to the Philippine SEC but will file copies of the final amendments to the SEC Form 19-1 (Final Tender Offer Report) no later than 10 business days after the termination of the tender offer.

## 6

### What is the typical basic timeline for a takeover offer?

#### Mandatory public takeover (indicative timeline)



<sup>1</sup> Within (i) five business days from approval by the board of directors of the selling shareholders or the bidder or (ii) 30 business days prior to the commencement of the tender offer.

<sup>2</sup> The acceptance period shall remain open for at least 20 business days, except that a tender offer should to the extent possible be completed within 60 business days.

**7**

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Aside from the mandatory tender offer, a bidder may also undertake a voluntary takeover bid where the bidder, by agreement, makes an offer of securities that do not necessarily meet the thresholds that may trigger the conduct of a mandatory tender offer. Voluntary takeover bids are subject to merger control clearance if the transaction breaches certain thresholds under the Philippine Competition Act (PCA).

The Philippine Stock Exchange (PSE) will allow the delisting of a security upon the filing of a Petition for Voluntary Delisting and compliance with the following requirements:

- a. A majority of the company's incumbent directors must approve the delisting.
- b. All security holders must be notified of the proposed delisting prior to the filing of the petition with the PSE.
- c. The Petition for Delisting must be filed, together with the proposed tender offer terms and conditions, at least 60 days prior to the date when the delisting will become effective.
- d. The tender offer to all stockholders of record must be conducted and must be supported by a fairness opinion or valuation report stating that, from the financial point of view of the person making such opinion or report, the terms and conditions of the tender offer are fair based on certain procedures followed and assumptions made.
- e. Following the acquisition of tendered shares, the proponent of the delisting must show that it has obtained at least 95% of the issued and outstanding shares of the company.
- f. The listed company applying for delisting must be clear of any unpaid fees or penalties imposed by the PSE.

If after an evaluation of the Petition for Delisting and the required documents the PSE finds that the delisting will not prejudice the interests of investors, the PSE will issue an order for delisting. The company will be required to pay a voluntary delisting fee equivalent to its annual listing maintenance fee for the year when the application for delisting was filed.

As for the timing, the company will be able to set the effectivity date of delisting. In setting the effective date of delisting, the company should ensure that the prerequisite tender offer requirement is taken into consideration. The delisting will not be considered effective automatically upon the completion of the tender offer. Considering that the tender offer is a prerequisite to delisting, the delisting will only become effective after the completion of the tender offer requirement and after the delisting has been approved by the PSE.

It is a fair estimate that the Order of Delisting will be issued approximately 10-20 working days from the submission of the Petition for Delisting and its complete supporting documents.



**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

There are no specific regulations or restrictions against obtaining undertakings from shareholders to support a transaction.

As additional deal protection measures in relation to bid takeovers, any person who will become aware of a potential tender offer before the same has been publicly announced are required not to buy or sell (directly or indirectly) the securities of the target company until the tender offer has been publicly announced. Such buying or selling will constitute insider trading.

Where a tender offer has commenced or it is about to commence, it unlawful for:

- a. any person (other than the bidder) who is in possession of material non-public information relating to such tender offer to buy or sell the securities of the issuer sought or to be sought by such tender offer if such person knows or has reason to believe that the information is non-public and has been acquired directly or indirectly from the bidder, those acting on its behalf, the issuer of securities sought or to be sought by the bidder, or any insider of such issuer
- b. any bidder, those acting on its behalf, the issuer of the securities sought or to be sought by the bidder and any insider of the issuer to communicate material non-public information relating to the tender offer to any other person where such communication will likely result in the violation of the preceding paragraph

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

There are no particular restrictions on management incentivization in the context of a public-to-private transaction. In the Philippine market, negotiations on management incentivization are typically done after the conclusion of the bid. However, it is worth noting that, as a matter of good corporate governance practice, the target company should provide a clear disclosure of its policies and procedures for setting board and executive remuneration, as well as the level and mix of the same in the required Annual Corporate Governance Report, which is submitted to the Philippine SEC. It is recommended that companies disclose the remuneration on an individual basis, including termination and retirement provisions.

On treating certain shareholders differently from others, as a general principle, all holders of securities of the same class must be afforded with equal treatment. Each share will be equal in all respects to every other share, except as otherwise provided in the articles of incorporation and in the certificate of stock.

**10**
**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Regarding the involvement of target management in a public-to-private transaction, it should be noted that the board of directors of the target company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid. The board must give its views on the effects of the implementation of the bid on employment, conditions of employment and the locations of the company's places of business in cases where the shareholders seek the board's advice.

In the course of a tender offer or before its commencement, if the board has reason to believe that an offer might be imminent, the target company will not: (a) issue any authorized but unissued shares; (b) issue or grant options in respect to any unissued shares; (c) create, issue or permit the creation or issuance of any securities carrying rights of conversion into, or subscription to, shares; (d) sell, dispose of or acquire, or agree to acquire, any asset whose value amounts to 5% or more of the total value of the assets prior to acquisition; or (e) enter into contracts that are not in the ordinary course of business; except, in each case, if such transaction is pursuant to a contract entered into earlier or with the approval of the shareholders of the target company in a general meeting, or where prior approval of the Philippine SEC has been obtained, in light of the existence of certain special circumstances.

**11**
**Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

- a. The Philippine Foreign Investments Act (FIA) generally allows foreign investors to invest up to 100% equity in companies in all types of business activities in the Philippines, except for certain investment areas and economic activities that are expressly reserved for Philippine nationals or that have foreign equity restrictions. Any takeover bid by a foreign investor, therefore, must begin with an evaluation on whether the target company is engaged in nationalized or partly nationalized activities and is subject to foreign equity restrictions under the FIA and the relevant regulations.
- b. Public-to-private transactions or takeover bids are subject to the relevant rules and regulations on merger control provided under the PCA. Voluntary takeover bids are subject to merger control clearance if the transaction breaches certain thresholds under the PCA.
- c. If the provision on mandatory tender offers is violated by pursuing public-to-private transactions where threshold amounts are breached without the required mandatory tender offer, the Philippine SEC, upon complaint, may nullify the said purchase and direct the holding of a tender offer.

In addition to the nullification of the transaction, noncompliance with the rules may be regarded as a violation of the Philippine Securities Regulation Code (SRC). Such violator will, upon conviction, suffer a fine of no less than PHP 50,000 (approximately USD 1,000) and no more than PHP 5 million (approximately USD 10,000), or imprisonment of no less than seven years and no more than 21 years, or both in the discretion of the proper Philippine judicial court. If the offender is a corporation, the penalty may be imposed upon such corporation and upon the officer or officers of the corporation. If the officer is a foreign national, they will be, in addition to the penalties prescribed, deported without further proceedings after serving the sentence.

Also, in cases of violations of mandatory tender offer rules, the person required to file such reports and disclosures will be disqualified from being an officer, a member of the board of directors, or a person performing similar functions, or an issuer required to file reports under any relevant rules and regulations issued by the Philippine SEC.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** A mandatory offer is triggered when either:

- i. a person acquires, whether by a series of transactions over a period of time or not, shares that, taken together with shares held or acquired by persons acting in concert with it, carry 30% or more of the voting rights of the target company
- ii. a person and persons acting in concert with it hold between 30% and 50% of the voting rights of the target company and acquire in aggregate shares carrying more than 1% of the voting rights of the target company in any rolling six-month period

Persons acting in concert comprise individuals or companies who, pursuant to an agreement or understanding (whether formal or informal), cooperate, through the acquisition by any of them of shares in a company, to obtain or consolidate effective control of that company.

Please refer to section 4.2 of the Singapore chapter of our [Global Public M&A Guide](#) for further details on mandatory offers.

**B.** The threshold for a minority squeeze-out is 90% of the total number of shares of the target company (excluding those shares already held at the date of the offer by the offeror, its related corporations, or their respective nominees). Shares acquired by the offeror from its concert parties during the offer period may be counted towards the minority squeeze-out threshold.

Please refer to section 7 of the Singapore chapter of our [Global Public M&A Guide](#) for further details on squeeze-out rights.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

#### **A. Mandatory offer**

The offer price must not be lower than the highest price paid by the offeror or any person acting in concert with it for shares carrying voting rights of the target company during the offer period (starting on the date of announcement of the offer) and within the six months prior to the commencement of the offer period.



## **Voluntary offer**

The offer price must not be lower than the highest price paid by the offeror or any person acting in concert with it for shares carrying voting rights of the target company during the offer period and within the three months prior to the commencement of the offer period.

Please refer to sections 4.1 and 4.2 of the Singapore chapter of our [Global Public M&A Guide](#) for further details on voluntary offers and mandatory offers respectively.

## **B. Mandatory offer**

The consideration must be in cash or be accompanied by a cash alternative.

## **Voluntary offer**

The consideration may be in cash or securities or a combination thereof.

## **3**

### **What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

The announcement of a firm intention to make an offer must contain an unconditional confirmation by the financial adviser or by another appropriate third party that the offeror has sufficient resources available to satisfy full acceptance of the offer. The evidence required to demonstrate financial resources will vary from adviser to adviser, and will also be dependent on the adviser's level of comfort with the financial strength of the offeror or its sponsor.

There is no requirement that funding documents must be made public.

## **4**

### **What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

## **Mandatory offer**

A mandatory offer must be conditional only upon the offeror having received acceptances that will result in the offeror and persons acting in concert with it holding more than 50% of the voting rights of the target company. An exception to this is where the clearance by the Competition and Consumer Commission of Singapore is required under the Competition Act; such clearance may be included as an additional condition.

An offeror is permitted to attach conditions to a share acquisition agreement and announce a pre-conditional offer where the mandatory bid obligation is subject to the fulfilment of certain preconditions. The preconditions should be stated clearly in the conditional agreement and the pre-conditional offer announcement and must be objective and reasonable. The conditional agreement and the pre-conditional offer announcement must specify a reasonable period for the fulfilment of the preconditions, failing which the offer will lapse. No precondition should be invoked to cause the conditional agreement and the offer to lapse unless (i) the offeror has demonstrated reasonable efforts to fulfil the preconditions within the time period specified, and (ii) the circumstances that give rise to the right to invoke the preconditions are material in the context of the proposed transaction.



## Voluntary offer

A voluntary offer must be conditional upon the offeror having received acceptances that will result in the offeror and persons acting in concert with it holding more than 50% of the voting rights of the target company. In addition, a voluntary offer must not be made subject to conditions whose fulfilment depends on the subjective interpretation or judgment by the offeror or lies in the offeror's hands. Normal conditions, such as level of acceptance, approval of shareholders for the issue of new shares and the approval of the Singapore Exchange Securities Trading Limited (SGX-ST) for listing, may be attached without reference to the regulator, the Securities Industry Council (SIC). The SIC should be consulted where other conditions would be attached.

The SIC will allow voluntary offers conditional on high-level acceptances (i.e., higher than 50% acceptances) where (i) the offeror states clearly in the offer document the level of acceptances upon which the offer is conditional and, (ii) the offeror satisfies the SIC that it is acting in good faith in imposing such a high level of acceptances.

Voluntary offers may also be pre-conditional, and the discussion on preconditions in relation to mandatory offers similarly applies to voluntary offers.

## Regulatory and other third-party approvals/clearances and material adverse change clauses

Regulatory and other third-party approvals/clearances and no material adverse change having occurred may be made preconditions to the offer (and conditions to a voluntary offer) provided they are objective and reasonable. For example, quantitative thresholds for what constitutes a material adverse change can be specified.

## 5

### When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?

The Singapore Code on Takeovers and Mergers ("**Singapore Code**") does not have any express requirement for parties to the offer to inform the SIC of the proposed offer. However, in practice a potential offeror will often need to obtain confirmations and rulings from the SIC before it may announce its offer. These rulings relate to matters such as:

- conditions or preconditions to the offer
- "special deal" issues relating to arrangements made between the offeror and a specific group of shareholders that are not extended to all other shareholders of the target company
- exemptions from the timeline (if the takeover transaction is to be implemented as a scheme of arrangement or a voluntary delisting)

The offeror must make an announcement immediately upon an acquisition of shares that gives rise to an obligation to make a mandatory offer. In the case of a pre-conditional offer, an announcement must be made immediately upon signing of the share acquisition agreement.

Where the offeror has not yet made an approach to the target company, if the target company is the subject of rumor or speculation about a possible offer, or there is undue movement in the share price or trading volumes of the target company, and the offeror has reasonable grounds to believe that its actions (whether through inadequate security, purchase of the target company's shares or otherwise) have directly contributed to the situation, the offeror must issue a holding announcement.

Where there are such rumors or movements after the offeror has approached the target company, the target company must make a holding announcement.

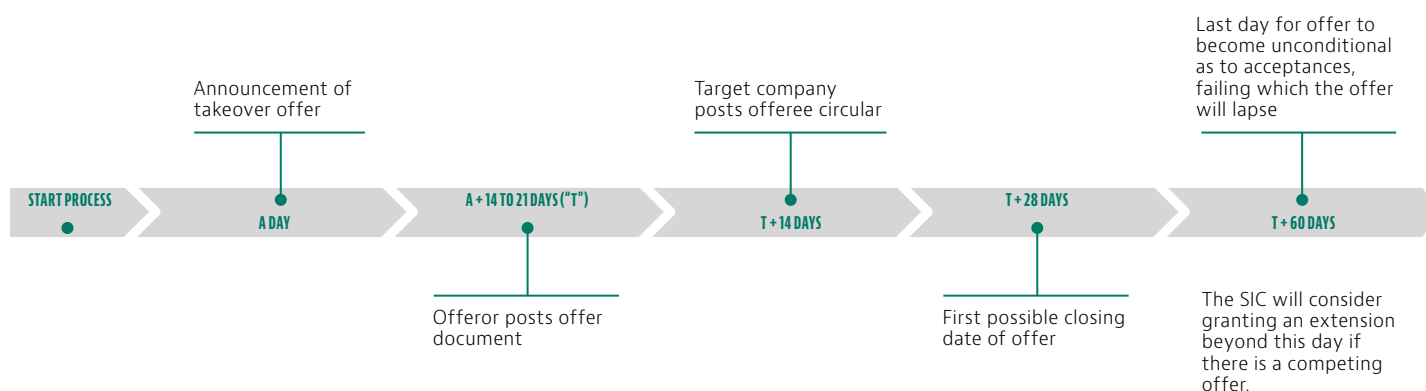
There must be absolute secrecy before an announcement.

Please refer to sections 3.5 to 3.7 and 6.2 of the Singapore chapter of our [Global Public M&A Guide](#) for further details on the announcement of the offer.



## 6

## What is the typical basic timeline for a takeover offer?



Please refer to section 5 of the Singapore chapter of our [Global Public M&A Guide](#) for further details on the timeline for offers.

## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

A scheme of arrangement or voluntary delisting are the other methods commonly used.

#### **Scheme of arrangement**

Section 210 of the Companies Act provides for a scheme of arrangement that can be used to effect the transfer of shares of the target company to the offeror in an 'all or nothing' approach. A scheme of arrangement is an arrangement between a company and its shareholders, and only the target company may initiate a scheme of arrangement.

A scheme of arrangement requires the approval of a majority in number of shareholders of the target company (unless the High Court of Singapore ("**High Court**") orders otherwise), representing at least 75% in value of the shares voted, present and voting in person or by proxy. The offeror and its concert parties as well as common substantial shareholders of the offeror and the target company will have to abstain from voting.

A scheme must also be sanctioned by order of the High Court. Once the order takes effect, the scheme binds all shareholders, including those who voted against it at the scheme meeting.

All schemes of arrangement must comply with the Singapore Code. However, the SIC may, subject to conditions, exempt a scheme from certain provisions of the Singapore Code, including those relating to the offer timetable. A scheme will typically require 4-6 months to implement.





## Voluntary delisting

The target company may apply to the SGX-ST to delist. A voluntary delisting requires the approval of a majority of at least 75% of the total number of issued shares held by the shareholders present and voting. The offeror and its concert parties must abstain from voting.

An exit offer must be made to shareholders and include a cash alternative as the default alternative. The target company must appoint an independent financial adviser to advise on the exit offer and the independent financial adviser must opine that the exit offer is fair and reasonable.

Exit offers must comply with the Singapore Code. As with schemes of arrangement, the SIC may, subject to conditions, exempt an exit offer from certain provisions of the Singapore Code. An exit offer will typically require 2-4 months to implement.

Please refer to sections 4.3 of the Singapore chapter of our [Global Public M&A Guide](#) for further details on a scheme of arrangement, and sections 4.5 and 8 for further details on a voluntary delisting.

## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Yes, it is possible to obtain undertakings from shareholders. The offeror may approach such shareholders prior to the announcement of the offer but must take steps to ensure secrecy of the offer.

There are no other means commonly used to secure the support of major shareholders or management. Any other arrangements may result in prohibited special deals or the major shareholders or management being treated as concert parties or joint offerors.

The offeror may negotiate for a break fee as a deal protection mechanism. A break fee must be minimal (normally no more than 1% of the value of the target company calculated by reference to the offer price) and the SIC should be consulted at the earliest opportunity in all cases where a break fee or any similar arrangement is proposed.

Please refer to section 6.5 of the Singapore chapter of our [Global Public M&A Guide](#) for further details on undertakings from shareholders.

## 9

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Except with the SIC's consent, the offeror or persons acting in concert with it may not make any arrangements with selected shareholders if there are favorable conditions attached that are not being extended to all shareholders.

The SIC should be consulted if the management of the target company is to remain financially interested in the business after the offer is completed. The principle applied is that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. For example, the SIC would not normally find acceptable an option arrangement that guaranteed the original offer price as a minimum.

The prohibition on special deals with shareholders will not be triggered if shareholders form a consortium with the offeror on such terms and in such circumstances that each of them can be considered to be a joint offeror.



## 10

### **Does the participation of target management in the bid consortium in a public-to-private transaction present any other particular challenges in the process?**

The target management does not usually pose any particular challenge. The board of directors of the target company must not, except pursuant to a contract entered into earlier, take any action without the approval of shareholders at a general meeting on the affairs of the target company that could effectively result in any bona fide offer being frustrated or the shareholders being denied an opportunity to decide on its merits.

In a situation with competing offers where target management takes part as one of the offerors, the following information is required to be given to the competing (non-target management) offerors promptly upon request:

- (i) the information generated by the target company (including the management of the target company acting in their capacity as such), which is passed to external providers or potential providers of finance (whether equity or debt) to the target management offeror
- (ii) any other information that is material in the context of making an offer insofar as the board of the target company is aware that the management is in possession of such information

The SIC expects the directors of the target company who are involved in making the offer to co-operate with the independent directors of the target company and its advisers in the assembly of information.

## 11

### **Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

There are no other particular challenges or sensitivities for a public-to-private transaction in Singapore.



For further information or assistance with take-private transactions, please reach out to any of the contacts listed below or your usual Baker McKenzie contact.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** A mandatory offer is triggered if a person individually or jointly with another person(s) **intends** to acquire **within 50 calendar days** shares that carry **20%** or more of the total issued shares of a public company.

**B.** There is no minority squeeze-out mechanism that can force the remaining minority shareholders to transfer their securities to the offeror at the price offered in the takeover offer. Therefore, it is normal market practice that a squeeze-out merger or a squeeze-out 100% share exchange will usually be implemented following a takeover offer to achieve the goal of privatization.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

There are no requirements on the minimum offer price at which a bid can be made, while certain restrictions are imposed on the form of offer consideration. Regardless of whatever form of offer consideration, the offeror is required to provide proof of its ability to pay the offer consideration. Under Taiwanese law, the forms of consideration for an offer are limited to:

- cash provided that the offeror provides (a) a guarantee letter issued by a financial institution to guarantee the payment of the offer consideration, or (b) a written confirmation letter confirming the offeror's ability to pay the offer consideration, issued by a financial adviser with the securities underwriting license or by a certified public accountant (CPA), provided that such CPA or financial adviser has fully understood the offeror and taken reasonable steps to evaluate the offeror's sources of funds
- domestic securities trading on the Taiwan Stock Exchange or the Taipei Stock Exchange
- foreign securities prescribed by the Financial Supervisory Commission of Taiwan (FSC) (there is no precedent in Taiwan)
- the stocks or corporate bonds of the offeror provided that the offeror is a public company incorporated under Taiwanese law (there is no precedent in Taiwan)
- if the offeror is a foreign company, the stocks or corporate bonds of the offeror falling within the scope prescribed by the FSC (there is no precedent in Taiwan)
- other assets of the offeror provided that the offeror is a public company incorporated under Taiwanese law or a foreign company (in practice, this is subject to the FSC's approval and there is no precedent in Taiwan)

**3**

**What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

An offeror is required to provide proof of its ability to pay the offer consideration. Furthermore, for an offeror offering cash as offer consideration, the form of the proof is required to be either: (a) a guarantee letter issued by a financial institution to guarantee the payment of the offer consideration; or (b) a written confirmation letter confirming the offeror's ability to pay the offer consideration, issued by a financial adviser with the securities underwriting license or by a CPA, provided that such CPA or financial adviser has fully understood the offeror and taken reasonable steps to evaluate the offeror's sources of funds. The offeror is required to file the aforementioned proof of funding capability alongside other documentation when filing a report of tender offer with the FSC. Such funding documents will be publicly available.

**4**

**What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

It is permissible to announce a possible offer, the making of which is subject to preconditions. The scope of the permissible preconditions is narrow under Taiwanese law, which is only limited to: (i) the minimum quantity of shares tendered; and (ii) the approvals of the Taiwanese regulators, such as the Investment Commission (foreign investment approval) and the Fair Trade Commission (pre-merger notification), if applicable. If there is any material adverse change on the target's business or financial status, the offeror may seek the FSC's approval to terminate the tender offer process. Please note that the FSC has never granted such approval.

**5**

**When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

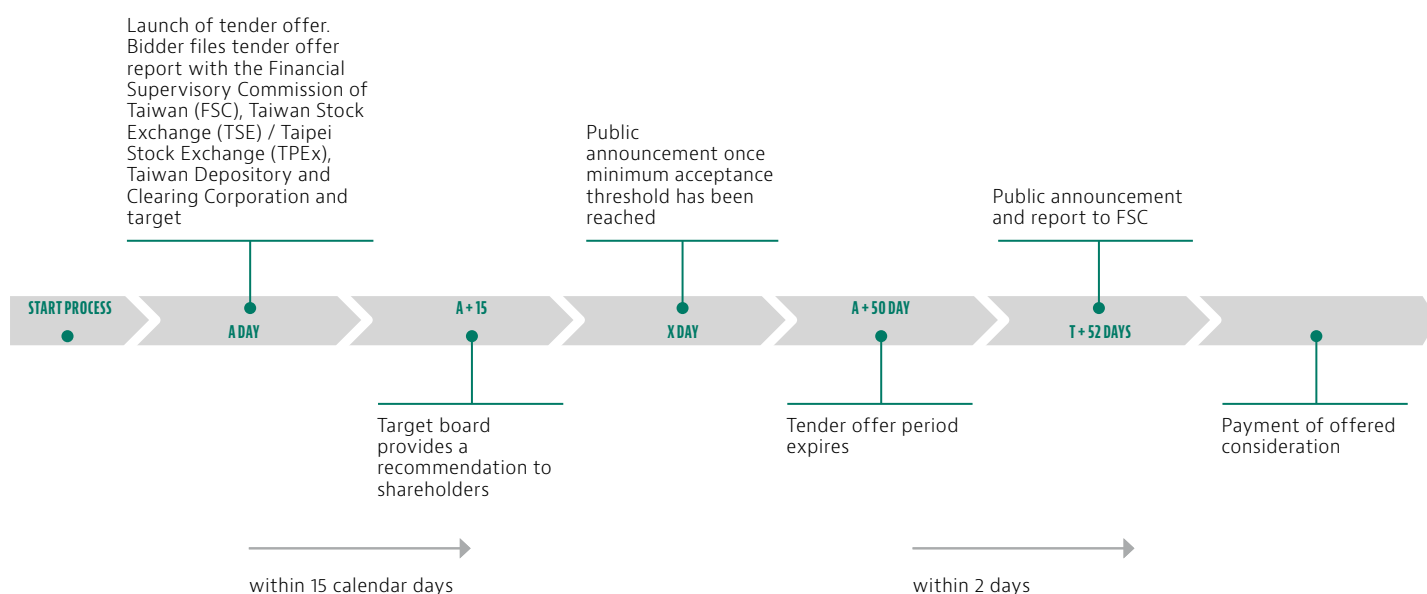
Other than the report required to be filed by the offeror with the FSC, the applicable stock exchange, the Securities and Futures Investor Protection Center of Taiwan and the target company, in order to announce/launch a tender offer, there are no obligations imposed on parties to notify or announce an offer prior to announcement unless the offeror is a public company in Taiwan that is subject to other disclosure requirements.

## 6

### What is the typical basic timeline for a takeover offer?

A takeover offer is not distinguished from a non-takeover offer. The typical basic timeline for a tender offer cannot be less than **20 days** and cannot be more than **50 days**, subject to an extension of no more than **50 days** provided that there is a competitive offer or the offeror has a justified cause conditional on the FSC's approval.

#### Mandatory tender offer (indicative timeline)



## 7

### Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.

In addition to tender offer, the other method commonly used in take-private transactions in Taiwan is 100% share exchange, also known as share transfer, normally with consideration in the form of all-cash and sometimes in the form of a mixture of cash and stock or all-stock. Under a 100% share exchange, a takeover can be effected by the passing of board resolutions and special resolutions by the shareholders of the target company. A 100% share exchange requires the approval of a majority in number representing two-thirds of the total issued and outstanding voting shares of the target at the shareholders' meeting. Once approved, all shareholders are bound by the 100% share exchange. In terms of delisting a company, approval of the shareholders representing two-thirds of the total issued and outstanding shares is required.

A 100% share exchange is a process promoted and undertaken by the target, requiring the full cooperation of the target, which cannot therefore be used in hostile situations. The majority of privatization takeover bids in Taiwan are implemented by way of a 100% share exchange, as once the requisite special shareholders' resolution has been obtained, the bidder acquires 100% from the share exchange becoming effective. Normally, a takeover bid through a 100% share exchange will take **three to five months** to consummate, taking into account obtaining approvals of delisting and ceasing the target's public status.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

It is possible to obtain undertakings from major shareholders to support the tender offer or a 100% share exchange. Such undertakings must be disclosed publicly and filed alongside the other required documents to be submitted to the FSC. The major shareholders and the directors appointed by them may need to abstain from voting in the shareholders' meeting and the board meeting. There is no limitation on timing or clear market practice in terms of timing when shareholders would generally be approached by the offeror.

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

There is a strict requirement that all shareholders, including the management, must be offered equivalent treatment by an offeror without any exceptions. Special deals between the offeror and certain shareholders that will grant certain shareholders preferential rights and substantially give rise to inequivalent treatment among shareholders are prohibited. In the case of a takeover offer, the market practice is to enter into incentivization arrangements with the management of the target post-completion of the acquisition.

**10**

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

The target board is required to publicly state its views on the offer, with reasons, and state whether they would recommend (or not recommend) that the shareholders accept it. In practice, on receipt of an approach from a bidder, the target's board will establish an independent committee to review the offer and, by reference to the opinion of the committee, the target's board will have to form a view on whether they would support the bid. Rules relating to conflicts of interests will apply when the management of the target is involved in an offer. Any members of management who are target directors will be conflicted from being involved in these decisions.

Aside from the conflicts of interest issue, regulatory authorities are expected to cast a stricter level of scrutiny on bids that contain the involvement of management, in particular, the fairness of the offer price, the source of funds and the plan on the future business of the target.



**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

The other key challenges/sensitivities relate to the rather broad application of the mandatory tender obligation. As noted in answer 1, the mandatory tender obligation applies if a person jointly with another person(s) intends to acquire within **50 calendar days** shares that carry **20%** or more of the total issued shares of a public company. The word “intends” is interpreted in the court precedents as entering into agreements with the aim to acquire shares beyond the span of the 50-day statutory period, which limits the space where potential bidders can build up a toehold position to ensure the achievement of a takeover offer.

An area that can be particularly sensitive for private equity or financial return-oriented offerors relates to the requirement for the offer documentation to disclose the offeror’s intentions regarding the future business of the target, plan on changes to the organization, financial structure and business, and plan on management and the employees. It is common in Taiwanese market practice that the offerors will preconsult with the FSC on these intentions to be disclosed in the offer documentation. In addition, for offers launched by private equity or financial return-oriented offerors, the FSC is inclined to have a stricter scrutiny of the source of funds and, in the case of foreign offerors, the Investment Commission (governing foreign investment) will also step in and act in the same way as the FSC.



# THAILAND



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** Thai securities law requires a person, either acting alone or in concert with others, together with any related persons of either that person or the persons with whom they are acting in concert, who has acquired shares in a listed company, in aggregate, up to the trigger point, i.e., 25%, 50%, or 75% of the total voting rights in the listed company ("**Trigger Point**") to make a mandatory tender offer, in accordance with the applicable regulations, unless it is exempt or waived. This is in order to allow existing shareholders the opportunity to exit upon the change of control or business takeover.

In addition to the direct share acquisition in a listed target company, a tender offer is also required when any person acquires a significant degree of control of an existing shareholder of a listed company ("**Chain Principle**"), e.g., immediate holding entity. This can be made through direct acquisition of the immediate holding entity or indirectly through the shareholders of the immediate holding entity (intermediate entities). This is the case when the aggregate shareholding of any person in control of the chain of companies reaches or exceeds the Trigger Point and the person who acquires control in the listed company through the Chain Principle will be required by law to make a mandatory tender offer.

Whether or not a person is in control of such entities may be determined in two ways: (i) by holding shares representing 50% or more of the total voting rights in the immediate holding entity (in the case of direct control) or in the intermediate entity (in the case of indirect control); or (ii) by the power to control the management or operation of the relevant entity through the nomination of a substantial number of directors.

Additionally, in relation to the tender offer obligation, the number of the shares held by the following persons are required to be aggregated with those held by the acquirer or disposer ("**Obligated Person**") ("**Aggregation Rules**"):

- i. related persons of the Obligated Person under the Thai securities law
- ii. parties acting in concert with the Obligated Person
- iii. related persons of parties acting in concert of the Obligated Person

Note that related persons under the Thai securities law include spouses and minor children, ordinary partnerships in which such a person or their spouse or minor child is a partner or, broadly speaking, limited partnerships and companies in which such a person or their spouse or minor children or the ordinary partnership hold more than 30% of the total contribution or share capital. This includes the shareholding of the related person(s) at every shareholding level.

With respect to the Aggregation Rules, "acting in concert" means an action of any person who has a mutual intention to exercise their voting rights in the same direction, or allow any other person to exercise their voting, for the purpose of achieving common control of the voting rights or a business.

The key elements in determining whether or not a party is “acting in concert” are:

- i. mutual intention to manage or exercise their voting rights in the same way to achieve common control in the listed company
- ii. having a relationship or acting together in any of a manner that may lead to acting in concert, such as using the same funding source, acquiring shares at the same time or having voting arrangements or shareholders’ agreements on voting

Both of these key elements must be met for a party to be considered as acting in concert with another party. However, in practice, the first element of mutual intention will be given more weight by the Office of the Securities and Exchange Commission (SEC) in determining the matter.

**B.** Thai securities law does not have a provision allowing majority shareholders to force the minority shareholders to sell their shares in a listed company, i.e., a minority squeeze-out. As a result, certain minority shareholders may remain even after the listing company is delisted from the stock exchange. In addition, after the tender offer has been made, the offeror shall not, for the period of six months from the closing date of the offer period, purchase or otherwise take any other action that results in their acquisition of, or their becoming holder of securities of, such a company at a price or consideration that is higher than the price or consideration specified in the tender offer documents, unless it is an acquisition of newly issued securities or it is an acquisition from making a tender offer permitting under Thai securities law.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

The requirements to the offer price under the Thai securities law can be segregated into: (a) pricing requirements in the mandatory and voluntary tender offer; and (b) pricing requirements in the delisting tender offer.

- a. Mandatory and voluntary tender offer

For mandatory and voluntary tender offer, the price may be paid in cash or in cash with additional forms of consideration. However, at least one form of consideration must be in monetary form. Additional forms of consideration must be appraised by a financial advisor. Additionally, the tender offer price must not be lower than the price that: (i) the offeror; (ii) related person of the offeror; (iii) a person acting in concert with the offeror; or (iv) related person of (iii) has paid to acquire shares in the same listed companies in the 90-day period prior to the launch of a tender offer.

- b. Delisting tender offer

For summary of the requirement to the price of delisting tender offer, please see answer to #7 below.

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

An offeror that intends to launch a takeover bid must prepare tender offer documents to be submitted to the SEC, as well as proof of funds confirming that the offeror has access to sufficient resources to satisfy the full acceptance of bid.

The sources of the fund to finance the tender offer could be both from the internal cash flow of the offeror or the credit facility supported by banks and financial institutions for the offeror. If the source of the fund is from the internal cash flow, the SEC normally requests the bank’s confirmation of funding sufficiency in the bank account of the offeror. If the source of the fund is from the credit facility, the bank’s confirmation on funding support in relation to the tender offer will be required. Such proof of funds will be a part of the tender documents that will be available to the public after the submission with the SEC.

## 4

### **What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

It is permissible to include certain conditions to the offer depending on types of the tender offer. Below are the general permissible types of conditions to be attached to the offer:

- a. Conditions for cancellation of the tender offer, which specify the right of the offeror to cancel the tender offer contingent upon the occurrence of the specified events that effect or may effect the target company's financial or share price adversely, e.g., an occurrence of any event or action that causes or may cause serious damage to the financial status or assets of the target company (given that such events do not result from the acts of the offeror), or the taking of any action by the target company after the tender offer documents have been submitted to the SEC but during the tender offer period, which results in a significant decrease in the share value.
- b. Conditions of change to the tender offer, which specify as to whether under which circumstances the offeror has the right to change the offer price, change the terms and conditions of the offer or extend the offer period. Those circumstances could be an occurrence of any event or action that has a material adverse effect on the status or assets of the target company or a submission of a competing bid from another offeror during the tender offer period.

In addition to the above, the following conditions may also be attached to the offer:

- a. In the case of voluntary tender offer, the offeror may set out the condition of the minimum acceptance level, in which, if at the closing of the offer period, the number of shares tendered is less than the specified amount, the tender offeror can cancel the voluntary tender offer. However, the tender offeror would have to clearly specify such a condition in the offer documents when submitting them to the SEC.
- b. In case the tender offer is contingent upon the condition precedent, i.e., corporate approvals, governmental or authority approvals, the offeror will not be required to submit the tender offer document until such condition precedent has been achieved and the condition precedent must also be stated in the tender offer document.

## 5

### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

The documentation to be announced or submitted for a tender offer is prescribed by relevant SEC regulations.

- a. For the offeror, in general, the following announcements in relation to the tender offer scheme must be made to the regulators:
  - i. Within three business days from the date on which a person: (1) declares their intention to acquire (e.g., informing a major shareholders or management of a listed company of the proposed acquisition of shares); or (2) acquires shares in a listed company, up to the Trigger Point, such person is required to submit to the SEC the declaration of the intention to make a tender offer with a copy submitted to the Stock Exchange of Thailand (SET).
  - ii. Within three business days from the date on which the offeror acquires the shares up to the Trigger Point, the offeror will be required to submit the report on 5% acquisition.
  - iii. Within seven business days from the date on which the declaration form has been filed, the offeror is required to submit the tender offer document to the SEC. After the filing of such tender offer document, the offeror must immediately deliver a copy of the tender offer document and the acceptance form to the target, all shareholders and securities holders, and the SET.
  - iv. The tender offer period commences within three business days from the date on which the SEC receives the tender offer document. After the tender offer period is completed, the offeror will then be required to submit a tender offer report on the final result of tender offer to the SEC within five business days from the end date of the tender offer period.

b. For the listed company

In general, when a material event occurs, a listed company must immediately disclose such relevant information to the SET. In this case, as soon as the target company acknowledges the possible tender offer, the target company is required to disclose such information to the SET website.

Additionally, within 15 business days from the commencement date of the tender offer period, the target company will be required to submit an opinion in relation to the offer along with the opinion of an independent financial advisor to the SEC, of which a copy must be distributed to the SET and all shareholders. The opinion mainly provides if the offer is reasonable and whether or not the shareholders should accept it.

## 6

### What is the typical basic timeline for a takeover offer?

Under Thai tender offer rules, there are four types of tender offers: (a) mandatory tender offer; (b) voluntary tender offer; (c) partial tender offer; and (d) delisting tender offer.

The timelines for the voluntary and mandatory tender offer do not significantly differ. A person will be required to make a mandatory tender offer upon reaching the Trigger Point. As for the voluntary tender offer, an offeror is free to make voluntary tender offer but will have to submit the tender offer documents to the SEC accordingly.

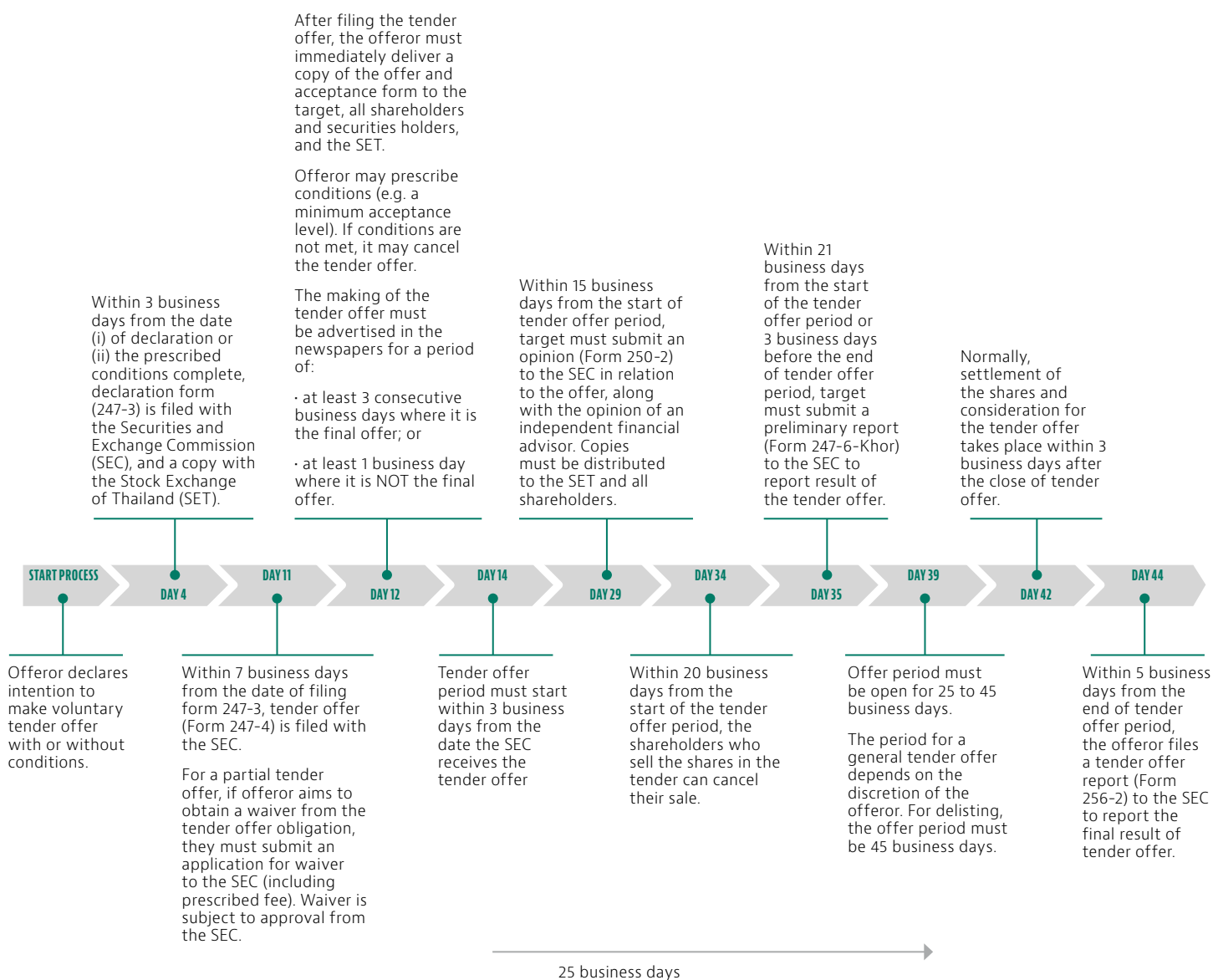
For a partial tender offer, the tender offeror aiming to obtain a waiver from the tender offer obligation must obtain an approval from a shareholders' meeting of the listed company in relation to the partial tender offer and submit the application for waiver to the SEC along with the fees. The waiver is subject to approval from the SEC.

As for delisting tender offer, the offeror must first obtain the shareholder approval of not less than 75% of the voting share capital of the listed company and there must not be shareholders representing more than 10% of the voting share capital of the listed company objecting to the delisting. It can then launch the delisting tender offer.

For the typical basic timeline of a tender offer, in addition to the filing requirements as discussed in the answer to #5 above, upon filing of the tender offer with the SEC, the tender offeror shall immediately deliver a copy of the tender offer and the acceptance form to the target business, all the shareholders and securities holders and the SET. The making of the tender offer shall also be advertised in the newspapers for a period of at least one or three consecutive business days, as the case may be. The tender offer period must commence within three business days from the day following the date that the SEC receives the tender offer documents. The tender offer period must be open for 25 to 45 business days. The period for a general tender offer depends on the discretion of the tender offeror. For delisting, the tender offer period must be 45 business days.

In practice, the tender offer process is usually completed within two or three months unless an extension to the tender offer period has been made. Unless there has been a competing tender offer or certain events occur to the business, the maximum tender offer period after such extension cannot exceed 45 business days.

## Public voluntary takeover offer (indicative timeline)



In practice, the tender offer process is usually completed within 2 or 3 months unless an extension is given.

Unless there has been a competing tender offer or certain events occur that affect the business, the maximum tender offer period after such extension cannot exceed 45 business days.

## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Aside from a mandatory and voluntary tender offer, the other method commonly used in take-private transactions is a delisting tender offer. In certain cases, the offeror launches a mandatory or voluntary tender offer first in order to collect the votes for shareholders' approval for delisting, then launches a delisting tender offer after the shareholders approve delisting. Under the relevant regulations, the offeror who has previously made a tender offer to purchase shares cannot make another tender offer for the purpose of taking over the business during a period of one year from the closing date of the offer period, except where the subsequent tender offer is a delisting tender offer, provided that the offeror has clearly stated the intention to delist the shares in the offer document of the previous tender offer (e.g., the mandatory or voluntary tender offer).

### a. Process of the delisting tender offer

The listed company will be required to hold a board of directors meeting to approve the delisting and disclose the board of directors' resolution regarding the delisting within the day the board has made the resolution.

The next step is to obtain the shareholders' approval. The delisting tender offer will require the shareholder approval of no less than 75% of the voting share capital of the listed company and there must not be shareholders representing more than 10% of the voting share capital of the listed company objecting to the delisting. In practice, the major shareholder will be the delisting tender offeror. However, legally speaking, any person may be the delisting tender offeror.

Since delisting is a significant item, all shareholders are entitled to vote on the issue and the shareholders will not be considered as having a special interest in the delisting. Therefore, the major shareholder or the shareholder who is an offeror under the delisting tender offer is allowed to cast a vote in the shareholders' meeting to approve the delisting. In addition, the independent financial advisors will be required to share their suggestions toward the delisting tender offer at the shareholders' meeting.

After the shareholders' meeting approves the delisting, the offeror must submit the delisting request form to the SET after gaining the shareholders' approval. The SET will consider the delisting request and will notify the result within 30 days upon receiving complete and correct information.

For the application or filing process and the timeline of the delisting tender offer, please refer to answers to question number 5 and question number 6 above.

### b. Delisting tender offer price

The pricing criteria in a delisting tender offer are different from the pricing criteria in a mandatory tender offer. As for a delisting tender offer, the tender offer price must not be lower than one of the following prices:

- i. the highest acquired price that: (i) the offeror; (ii) related person of the offeror; (iii) a person acting in concert with the offeror; or (iv) related person of (iii) has paid to acquire the shares within 90 days before commencement of the tender offer
- ii. the five-business day weighted average market price before the board of directors of the listed company approves the delisting
- iii. the net total asset that is marked to market
- iv. the fair price appraised by an independent financial adviser

Although the shares in a listed company are completely delisted from the SET, such a company will remain as a public company and cannot be converted back to a private company. Therefore, compliance to the rules and regulations applicable to the public company still apply.



## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

It is possible for the tender offeror to obtain undertakings from shareholders to support the transaction. Examples of which include the undertaking not to sell in a mandatory tender offer or the sale and purchase agreement to sell in the voluntary tender offer. In practice, the offeror would approach the shareholders before the launching of the tender offer and when such shareholders are approached to sell their shares, it is deemed that the offeror has declared the intention to make a tender offer. Such undertakings will also be required to publicly disclose in the tender offer documents. Aside from obtaining the undertakings, the other deal protection is the doctrine of frustration, which allows the contract to be automatically terminated if it becomes impossible to perform through no fault of either of the parties.

In addition, during the tender offer period, the Thai securities law strictly prohibits the offeror to purchase or acquire the target company's shares from the sources other than those specified under the tender offer scheme that has been announced to the SEC. It is mandatory that all shareholders must be given the fair and equal treatment under the tender offer scheme, including the equal access to the information as disclosed to the public. The shareholders who tender their shares in the tender offer are entitled to cancel the sale during the period specified in the tender offer document, i.e., at least 20 business days of the tender offer period which takes 25-45 business days.

As Thai securities law does not have a provision on a minority squeeze-out, certain minority shareholders may remain after the listing company is delisted from the stock exchange.

## 9

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

There is no legal restriction on management incentivization in a public-to-private transaction. However, the same management team normally stays after the delisting. Additionally, there are no more requirements on independent directors or the audit committee unless otherwise required by other laws governing specific business, e.g., an insurance or financial institution.

It is required under Thai securities law that in a tender offer scheme, all shareholders must have the opportunity to sell their securities equally at a fair price and under the equivalent treatment.

After the offeror has notified and filed the tender offer documents to the SEC, but before the tender offer becomes effective, the offeror is prohibited from acquiring any securities of the target company from any source other than those specified in the tender offer scheme.

In addition, after the tender offer has been made, the offeror shall not take the following actions:

- a. For the period of six months from the closing date of the offer period, the offeror shall not purchase or otherwise take any other action that results in their acquisition of, or their becoming holder of securities of, such a company at a price or consideration that is higher than the price or consideration specified in the tender offer documents, unless it is an acquisition of newly issued securities or it is an acquisition from making a tender offer permitting under the Thai securities law.
- b. For the period of one year from the closing date of the offer period, the offeror shall not take any action that is of a material nature different from those specified in the tender offer document, unless a shareholders' meeting of the company otherwise adopts a resolution with a vote of no less than three-fourths of the total votes of the shareholders present at the meeting with the right to vote and the SEC has been notified accordingly.

After delisting, if the minority shareholders hold shares amounting to more than 5% of the total issued share capital of the listed company (excluding the shares held by the offeror, the offeror's concert parties and related persons), the directors and executives of the listed company will still be required to comply with certain fiduciary and other legal duties under the Thai securities law, such as: (i) the rules on connected transactions; (ii) the rules on acquisition and disposal of material assets of a listed company; and (iii) duties to prepare and submit financial statements and reports to the SEC concerning the financial conditions and business operation of the listed company.

In practice, an acquirer who intends to delist the company would aim to acquire 95% or more of the shares in the listed company in order to avoid being subject to fiduciary and other legal duties under the Thai securities law. This is a significant issue for a listed company aiming for delisting and it should be further analyzed on a case-by-case basis for a feasible solution.

As mentioned above, the delisted company will still be required to comply with the rules and regulations applicable to the public company, given that Thai law does not recognize the concept of take-private.

## 10

### **Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

There is no restriction on the existence of the same management team in a public-to-private transaction and normally the same management team stays after delisting. In this regard, the future plan including management structure must be disclosed in the tender offer documents.

As previously discussed, the challenges in the public-to-private transaction or delisting process are particularly: (a) the requirement of shareholders' approval threshold for delisting, i.e., no less than 75% of the voting share capital of the listed company and must not be shareholders representing more than 10% of the voting share capital of the listed company objecting to the delisting; and (b) the delisting tender offer period of 45 business days, which is longer than the other types of tender offer.

Additionally, the board of directors of a listed company is required to act as the directors of the company, who are required to state their opinions towards the tender offer for the shareholders to take into account when deciding whether or not to accept such offer. The directors of the listed company should not act as the major shareholders who make or are involved in the delisting tender offer.

## 11

### **Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

The main challenges or sensitivities that an offeror in a tender offer transaction might face are listed out below.

#### **a. Implications of having more than 5% of the shares held by a minority after delisting**

As discussed in answer to question number 9 above, if after delisting, the minority shareholders hold shares amounting to more than 5% of the total issued share capital of the listed company (excluding the shares held by the offeror, the offeror's concert parties and related persons), the directors and executives of the listed company will still be required to comply with certain fiduciary and other legal duties under the Thai securities law.

#### **b. The recognition of privatization or take-private**

Another key challenge is that Thai law does not recognize the concept of privatizations or "take-private." The shareholders can delist the company and become a public non-listed company. However, although the shares in a listed company are completely delisted from the SET, such a company will remain as a public company and cannot be converted back to a private company. As a result, the public company still has to comply with the provisions in the Public Limited Company Act B.E. 2535 (1992), as amended, and other relevant rules and regulations applicable to public companies.

c. The foreign shareholding limit

If the tender offer is to be made by a foreign offeror, Thai laws governing the foreign shareholding limits must also be taken into consideration. There are several laws and regulations that govern the extent of foreign participation in business activities in Thailand. The main governing law is the Foreign Business Act, B.E. 2542 (1999) (FBA). The FBA limits the rights of foreign nationals and entities to engage in certain business activities in Thailand unless a foreign business license or the foreign business certificate from the Ministry of Commerce is obtained before the commencement of the business operation. Under the FBA, a person or an entity will be treated as foreign if an individual person is a foreign national or if 50% or more of the shares in such an entity is held by foreign shareholders. Investors contemplating new business ventures must carefully consider the FBA before attempting to set up operations. A foreigner may operate a business in Thailand unless the specific activity of that business is restricted under the FBA or is otherwise prohibited by another law. The restricted businesses under the FBA cover almost all kinds of service businesses.

In addition to the FBA, there are several statutes that impose conditions of majority ownership and management by Thai nationals in specific business sectors, examples of which are the Financial Institution Business Act B.E. 2551 (2008), as amended, the Life Insurance Act B.E. 2535 (1992), as amended, and the Non- Life Insurance Act B.E. 2535 (1992), as amended, the Thai Vessel Act B.E. 2481 (1938) and the Employment Provision and Employment Seekers Protection Act B.E. 2528 (1985).

Additionally, the Land Code of Thailand generally provides that land may only be owned by Thai individuals or Thai juristic entities in which foreign shareholders own no more than 49% of the share capital and no more than half the number of the shareholders are foreigners.

However, if the Thai juristic entities, in which (i) foreign shareholders own more than 49% of the share capital or (ii) more than half of the number of the shareholders are foreigners, have been granted special privileges by the Board of Investment (BOI), they may acquire land by obtaining permission to own the land from the BOI. Alternatively, if the land is located in an industrial estate area, such juristic entities may obtain permission to own such land from the Industrial Estate Authority of Thailand.

d. Covenant under agreements and conditions under licenses and concession

In certain cases, the listed companies have covenant under material agreements (e.g., facility agreements) or conditions under operating licenses or concession that is significant for the business operation, which specify that the listed companies must maintain their status as companies listed on the stock exchange, otherwise they may trigger event of defaults under the agreements or breach the conditions under the licenses and concessions. This may result in a breach of contract and/or revocation of licenses and concessions and may then adversely affect the business operation and financial conditions of the companies.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** Vietnamese law does not have a mandatory takeover obligation; however, there is an obligation to conduct a public offer to purchase (POP) in certain circumstances.

Under current securities law, a purchaser is required to conduct a POP in the following cases:

- i. The purchaser intends to acquire voting shares in a public company such that it will own 25% or more of the total outstanding shares in a public company.
- ii. The purchaser (alone or together with its related persons) already owns 25% or more of total voting shares in a public company, and intends to further acquire 10% or more of total voting shares in such public company.
- iii. The purchaser (alone or together with its related persons) already owns 25% or more of total voting shares in a public company and intends to further acquire from 5% to less than 10% of total voting shares in such public company within less than one year from the completion date of the previous POP (if any).

Starting from 1 January 2021, when the new securities law takes effect, a POP is triggered in the following cases:

- i. The purchaser and their related persons intend to acquire voting shares to, directly or indirectly, hold in aggregate 25% or more of the total voting shares in a public company.
- ii. The purchaser and their related persons, holding in aggregate 25% or more of the total voting shares in a public company, intend to acquire more shares and such acquisition will result in their direct or indirect shareholding reaching or exceeding each threshold of 35%, 45%, 55%, 65% and 75% of the total voting shares in such public company.
- iii. Except for where a POP has been made for all voting shares in a public company, if a purchaser and their related persons collectively hold 80% or more of the total voting shares in a public company after a POP, then they must continue to offer to acquire shares from the remaining shareholders for 30 days, with conditions on purchase price and payment method remaining similar to those of the previous POP.

**B.** Vietnamese law does not have any squeeze-out mechanism that allows a shareholder, once it has reached a certain shareholding threshold, to acquire all the shares of the remaining shareholders without the consent of such remaining shareholders. The current securities law only requires the offeror to reopen its POP with the same conditions for the remaining shares within 30 days if it holds 80% or more of total outstanding shares in a public company after conducting a POP. The current rules do not impose any obligation on the remaining shareholders to sell their shares within this time limit. This position will remain unchanged under the new securities law.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** If the target company is listed or has registered to trade on UPCOM<sup>1</sup>, the offer price must not be lower than:

- (i) the average reference price of shares of the target company as announced by the stock exchange/UPCOM within the 60 consecutive days before the POP registration application dossier is submitted to the State Securities Commission of Vietnam (SSC)
- (ii) the highest purchase price that the offeror or any other offeror has ever offered for shares of the target company during such period of time

If the target company is not listed or has not registered to trade on UPCOM, the offer price must not be lower than:

- (i) the average price of shares of the target company that has been constantly quoted by at least two securities companies within 60 consecutive days before the POP registration application dossier is submitted to the SSC; or the offering price in the latest issuance of the target company
- (ii) the highest purchase price that the offeror or any other offeror has ever offered for shares of the target company during such period of time

During the implementation of the POP, the offeror is only permitted to increase the offer price, subject to the following two conditions:

- (i) The offeror must announce the increased offer price at least seven days prior to the end of the offer tranche.
- (ii) The offeror must ensure that the increased price will apply to all shareholders in the target company, including those who have already agreed to sell their shares to the offeror.

**B.** Shares can be paid for in Vietnamese Dong, freely convertible foreign currency, gold, value of land use rights, value of intellectual property rights, technology, technical know-how, or other assets stipulated in the charter of the company. Despite such a broad scope of consideration forms permitted under the Enterprise Law, the form of consideration for the purpose of a POP must be registered with and approved by the SSC. The pro-forma POP registration form appears to suggest that payment for a POP can be made via share swap. In practice, from publicly available sources, we are not aware of any POP whereby the offeror was approved to make a non-cash payment.

<sup>1</sup> The Unlisted Public Company Market, which is the market at the Hanoi Stock Exchange for public companies not yet listed.

### 3

#### **What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

Before implementing a POP, the offeror must seek the SSC's approval for its proposed POP. The application dossier submitted to the SSC must include, among other documents, the audited financial statements and other documents evidencing the financial capability of the offeror.

The funding documents are not required to be made public.

### 4

#### **What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

Generally, the offer can only contain basic and standard transaction terms, such as the total number of purchased shares, offer price, offer period, payment method and circumstances in which the offer will be withdrawn. The offeror will be mainly responsible for dealing with any regulatory and/or third-party approvals/clearances (e.g., merger control clearance) in connection with its proposed offer.

Cases in which a POP can be withdrawn are limited. After announcing the offer, the offeror is only permitted to withdraw such offer in the following circumstances (subject to the SSC's approval):

- (i) The number of shares offered for sale does not meet the minimum shareholding ratio that the offeror proposes to acquire.
- (ii) The target company increases or reduces the number of voting shares via a share split or consolidation or via conversion of preference shares.
- (iii) The target company reduces its share capital.
- (iv) The target company issues additional securities.
- (v) The target company sells all or a part of its assets or its operational business.

Strictly interpreting the provision above, a material adverse change other than the circumstances stipulated above may not serve as a valid reason for the offeror to withdraw its offer.

### 5

#### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

The offeror must submit an application dossier to seek the SSC's approval before the POP can be conducted. The offeror must concurrently send such application dossier to the target company. Within 10 days upon receiving the offeror's application dossier, the target company's board of management must give its written opinion on the proposed POP to the SSC.

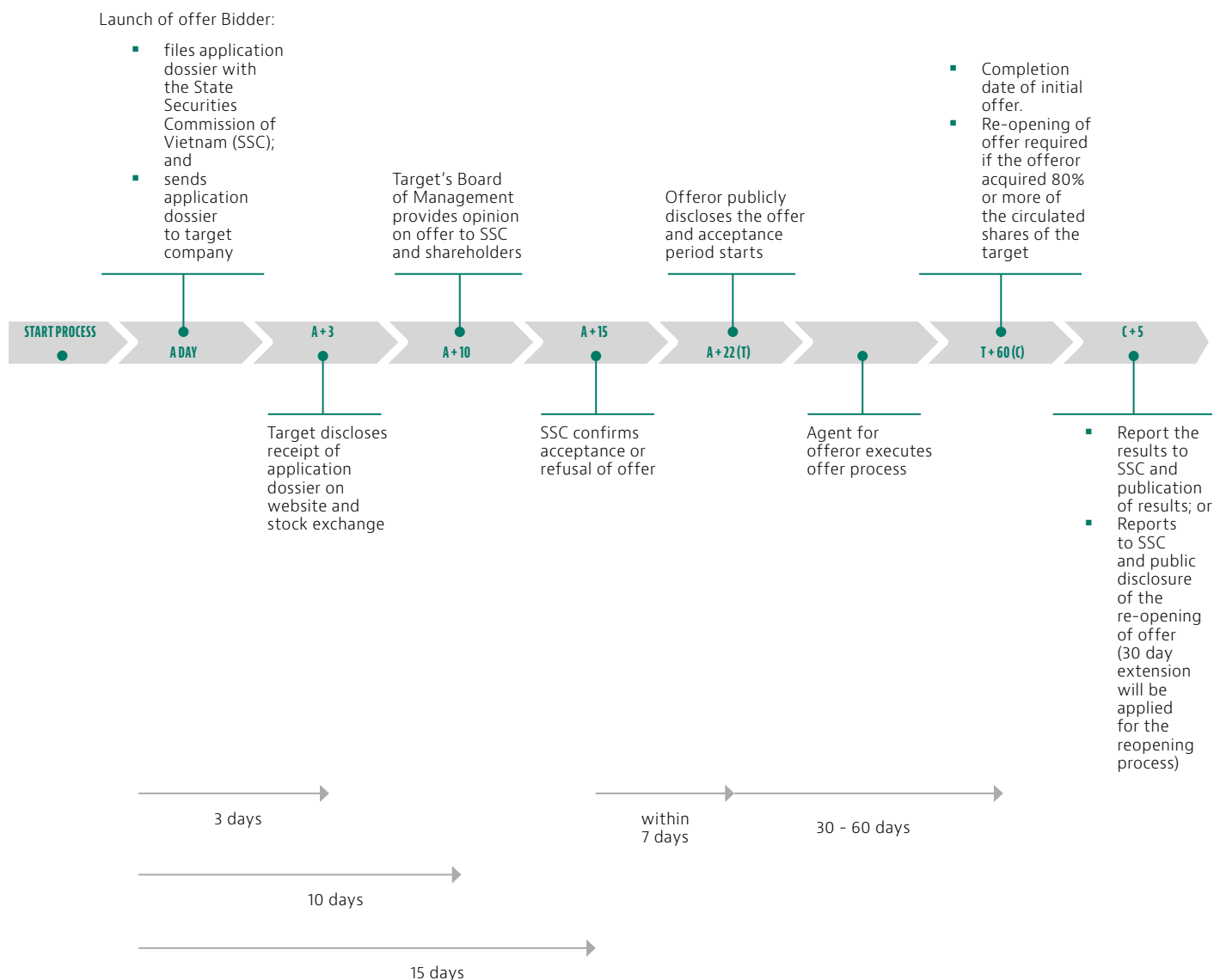
Within 15 days as from the date of receipt of a full and valid application dossier, the SSC will respond in writing as to whether the POP has been approved.

Within seven days upon receiving the SSC's approval for the POP, the offeror must publicly announce the POP on an electronic or printed newspaper for three consecutive issues, and also on the website of the stock exchange/trading center where the target company is listed/registered (as applicable). The POP can only be carried out after the offeror has made the public disclosure as described above.

## 6

### What is the typical basic timeline for a takeover offer?

#### Public tender offer (indicative timeline)





## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Under the current securities law, a public company will lose its public company status if:

- the paid-up charter capital, as stated in the audited financial statements for the most recent year, is less than VND 10 billion (approx. USD 435,000); or
- the number of shareholders is less than 100 entities.

A public company is responsible for notifying the SSC within 15 days after the date it fails to satisfy the conditions for it to remain a public company.

Under the new securities law (which will take effect on 1 January 2021), a public company will lose its public company status if it fails to maintain any of the following conditions:

- It has a paid-up charter capital of VND 30 billion (approx. USD 1.3 million) or more.
- At least 10% of its voting shares are owned by 100 or more investors who are not major shareholders.

As part of the transitional provisions, companies that have their shares listed, or traded on UPCOM, before 1 January 2021 will not be forced to deregister their public company status if they fail to meet either of the above conditions, unless otherwise decided by their general meeting of shareholders. If an existing public company, which has not had its shares listed, or traded on UPCOM, before 1 January 2021, fails to meet one of the above two conditions, it will have its public company status cancelled.

Given the current regulations, the most commonly used method to take a public company private is to reduce the number of shareholders to less than 100, either by way of (a) share transfers between existing shareholders (i.e., one or several shareholders would acquire shares from the minority shareholders), or (b) a share redemption by the public company.

Share transfer between existing shareholders is commonly seen in practice, provided that the acquirer(s) must comply with the rules on POP (where applicable).

Share redemption by a public company is still possible, but subject to various conditions. A redemption of more than 10% of total shares must be approved by the general meeting of shareholders of the public company, with the consent of shareholders holding (a) at least 65% of total voting shares of attending shareholders (in case of a physical meeting) or (b) at least 51% of the charter capital of the company (in case of circular resolution). If the public company proposes to redeem 25% or more of its total outstanding shares then it must carry out the procedures to launch a POP.

When the new securities law takes effect (on 1 January 2021), if a public company has not been listed on a stock exchange (or has not registered to trade on UPCOM) and its shareholding structure does not meet the requirements under the new law, it will automatically lose its public company status. This presents one more option to take unlisted public companies with simple shareholding structures private starting from 1 January 2021.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

A public offer to acquire shares of a public company must ensure the following principles (among others):

- The conditions for the POP must apply equally to all shareholders of the target company.
- Parties participating in a POP must be provided with sufficient information to be able to access the POP.
- The right of shareholders of the target company to make their own decisions must be respected.

Although Vietnamese law does not have a specific prohibition against shareholders undertaking to accept a POP, such undertaking would raise certain concerns as to whether any of the foregoing principles may be breached. For example, if the shareholders' undertaking is given on some conditions that the bidder must satisfy, such arrangement may be considered unequal conditions offered to shareholders in the same POP.

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Under the current regulations on corporate governance of a public company in Vietnam:

- Shareholders holding the same class of shares must be treated equally.
- The managers of a public company must not take advantage of the information obtained via their positions for personal purposes or in the interests of other individuals or organizations.

Management incentivization in a public-to-private transaction, or treating certain shareholders differently from others, may give rise to a violation of these regulations

**10**

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

As discussed above, when a POP is registered with the SSC, the target's board of management must advise the SSC of its opinion on such POP. The law does not require a board's greenlight as a requisite condition for granting the SSC's approval for the POP. The SSC may be more cautious and scrutinize the proposed POP if the target's board specifically raises objections to the proposed offer.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

Any of the following persons must not take advantage of knowledge or information about the POP to purchase or sell shares for themselves; or to provide information to, or encourage or urge, other people to purchase or sell securities prior to the official launch time of the POP:

- member of the board of management, the general director, deputy general director, chief accountant, major shareholder, or related person of the offeror
- member of the board of management, the general director, deputy general director, chief accountant, major shareholder, or related person of the target company
- any staff member of the securities company
- any other person that knows about the POP

Furthermore, as from the time of submitting the POP application to the SSC up until completion of the offer, the offeror must not:










- (a) directly or indirectly, purchase or undertake to purchase, shares, options to purchase shares or convertible bonds of the target company, outside the public offer tranche
- (b) sell or undertake to sell shares that the offeror is proposing to acquire
- (c) treat entities that own the same class of shares, options to purchase shares, and convertible bonds unequally
- (d) provide discrete information to shareholders or investors at a different information level, or provide information at a different point of time
- (e) refuse to purchase shares from shareholders of the target company during the offer period
- (f) purchase shares of the target company not in compliance with the announced conditions





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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered
- B. minority squeeze-out by the bidder

A. On Euronext Paris, a mandatory takeover offer is required where, following an acquisition of securities, a shareholder (alone or in concert with others):

- crosses the threshold of **30% in the share capital or voting rights** of the target company; or
- increases, within 12 consecutive months, its shareholding or voting rights by more than 1% while holding **between 30% and 50%** in shares or voting rights of the target company.

On Euronext Growth Paris, a mandatory takeover offer is required if, following an acquisition of securities, a shareholder (alone or in concert with others) crosses the threshold of **50% in the share capital or voting rights** of the target company.

B. Following a successful takeover offer, a bidder will be able to squeeze out the residual minority shareholders and delist the target company if it holds, alone or in concert with others, at least 90% of the share capital and voting rights of the target company.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

A. In a **voluntary takeover offer**, the bidder is, in principle, free to determine the price offered to the target shareholders. There is no minimum offer price and the offer price is not subject to the review of the Autorité des marchés financiers (**AMF**). A fairness opinion is required in many cases including, in particular, where a tender offer agreement is entered into between the bidder and the target company, or where the target company has issued securities other than shares.

In a **mandatory takeover offer**, the price must at least be equal to the highest price paid by the bidder (or any person acting in concert with it) during a period of 12 months preceding the triggering event of the take-over offer, i.e., the threshold crossing. In addition, if the bidder owns more than 50% of the shareholding upon the filing of the offer, the consideration may not be less than the volume weighted average stock market price of the shares over the last 60 trading days, except if the AMF agrees otherwise. A fairness opinion will also be required in most cases.

Except following a successful voluntary standard offer (i.e., an offer not preceded by the acquisition of a block representing more than 30% of the shareholding or the voting rights), the enforcement of a squeeze-out is subject to the delivery of a fairness opinion in respect of the squeeze-out price by an independent expert.

Whenever an independent expert must be appointed, the AMF will review the offer price in light of the fairness opinion.

**B.** In a **voluntary takeover offer**, the bidder is, in principle, free to determine the form of consideration offered to the target shareholders. The offered price may be paid in cash, securities or a combination of both, as the case may be, at the option of the target company's shareholders and/or within the limits set by the bidder.

Where securities are offered as consideration, they have to be: (i) regarded as liquid by the AMF; and (ii) listed or admitted to trading on a regulated market in one of the EU or EEA member states for the takeover bid to be approved. As a result, where the bidder that is offering consideration in the form of securities is from outside the EU or EEA, it must seek a listing in the EU or EEA (preferably in France, failing which the AMF usually requires the implementation of a sale facility to allow the former shareholders of the target company to promptly dispose of their newly received securities following the settlement of the takeover offer at no cost) for the securities it plans to offer as consideration. This will require the preparation of a prospectus. If the offered securities do not meet these conditions, the bidder must offer a cash alternative to all the target company shareholders.

In addition, if the bidder or persons acting in concert with the bidder have acquired securities giving access to more than 5% of the share capital or the voting rights of the target company for cash, the bidder will have to offer an unlimited cash alternative as part of the takeover offer.

In a **mandatory takeover offer**, the consideration offered must consist of cash.

In a **squeeze-out**, the indemnity is usually paid in cash but, to the extent that the squeeze-out follows an offer with a consideration partially or fully in the form of securities, the indemnity can be paid in securities, provided that an all-cash option is also offered.

### 3

#### **What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

There is no regulatory or stock exchange requirement for debt financing to be provided on a certain-fund basis. As the offer must be filed with the AMF by a presenting bank, which, by law, must guarantee the payment of the offer price to the tendering shareholders if the offeror fails to do so, the bidder, in practice, will comply with the requirements set forth by the presenting bank. If the offeror relies on a debt financing to pay all or part of the offer price, the presenting bank will require certainty of funding at the time of the filing of the offer letter with the AMF. A cash guarantee is also usually requested by the presenting bank for the portion of the price to be paid by the offeror out of its own funds.

There is no requirement that financing documents must be made public. Only a brief description of the financing arrangements must be included in the offer documentation.

Only financial intermediaries authorized to provide the investment service of underwriting in France are allowed to act as presenting banks.



## 4

**What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

The general rule is that offers must be unconditional.

It is permissible to condition an offer to the following conditions precedent: (i) merger control clearance; (ii) governmental approval (foreign investment clearance or industry-specific regulation); (iii) minimum acceptance level (but not in excess of 66.2/3% of the shares or voting rights and it being noted that any offer will lapse if the threshold of 50% in shares or voting rights is not reached by the offeror); (iv) approval of the bidder's shareholders; and (v) successful completion of another takeover offer by the offeror.

Conditions precedent such as financing, absence of a material adverse event or reaching the squeeze-out threshold are not allowed.

## 5

**When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

The general rule is that any person planning a financial transaction that may have a significant impact on either the market price of a security or on the rights of the holders of that security must publicly disclose the terms of the contemplated transaction as soon as possible. Disclosure can be deferred if confidentiality is essential to the transaction and it is possible to maintain such confidentiality. A potential offeror is not required to make any public announcement as long as it is able to maintain confidentiality.

Similar rules apply to the target company. French-listed issuers are required to disclose any inside information as soon as possible. Inside information is information of a precise nature, which has not been made public, relating, directly or indirectly, to the issuer that, if it were made public, would be likely to have a significant effect on the price of its stock. The receipt of an offer by the target company will qualify as inside information but the disclosure may be deferred provided that: (i) immediate disclosure is likely to prejudice the legitimate interests of the issuer; (ii) delay of disclosure is not likely to mislead the public; and (iii) the issuer is able to ensure the confidentiality of that information.

In practice, in a friendly transaction, neither the offeror nor the target company is obliged to publicly disclose the negotiations, provided that they have put in place customary confidentiality measures, including entering into a non-disclosure agreement. Failing the signing of a non-disclosure agreement, the target company remains free to make an announcement in response to an offer received from, or any announcement made by, the bidder.

If confidentiality can no longer be ensured (notably in case of a leak, mere rumors not specific enough being usually dealt with by a "no comments" statement), an immediate public announcement setting out the characteristics of the offer must be made by either the bidder or the target company.

Where there are reasonable grounds to believe that a potential bidder is preparing a public offer, particularly where the market of the securities of a target company undergoes unusual changes in terms of volume and/or price, the AMF can ask such potential bidder to "put up or shut up," i.e., to disclose its intentions to the public within a given time period or refrain from launching a takeover offer.

Upon the AMF enforcing the "put-up or shut-up" rule, the bidder can either:

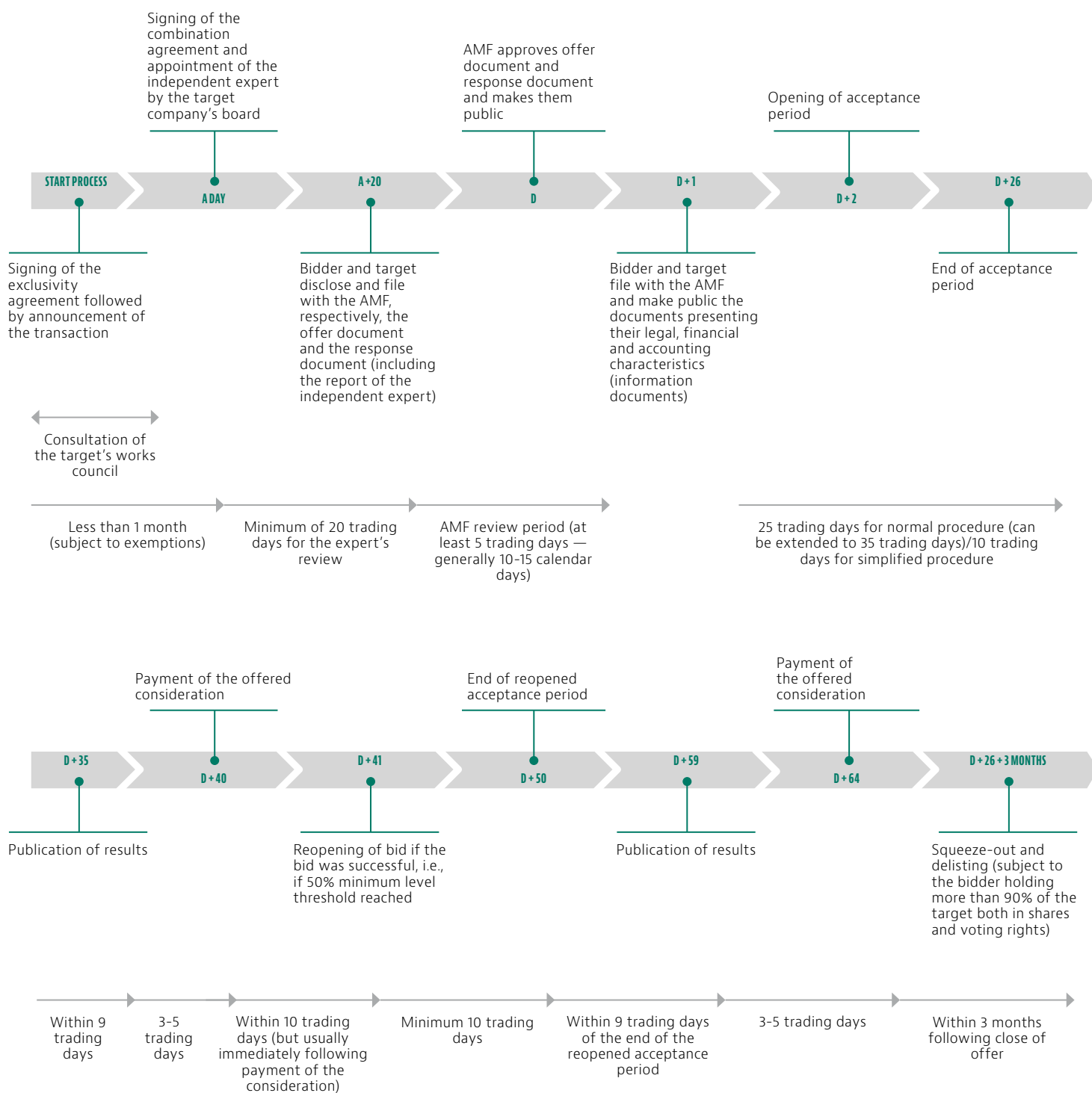
- confirm its intention to file an offer, in which case the AMF will set the date on which the bidder must issue a public announcement setting out the characteristics of the offer or file its offer; or
- announce that it does not intend to file an offer, in which case it will be precluded from doing so during the six months following such announcement, except in the event of significant changes affecting the environment, the situation or the shareholding of any concerned party, including the target company.



## 6

### What is the typical basic timeline for a takeover offer?

#### Friendly public takeover bid (indicative timeline for a standard procedure\*)



\* Periods referred to in the timeline are expressed in trading days unless otherwise stated.

## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Unlike the UK, there is no statutory, court-approved scheme of arrangement available in France to complete a take-private transaction.

Take-private transactions are usually completed through takeover offers.

## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

It is common practice that the bidder approaches shareholders of the target company with a view to acquiring blocks or obtaining commitments to tender shares to the takeover offer.

The acquisition of a block of shares is not prohibited by the fact that the offeror holds inside information either: (i) as a result of a due diligence exercise (any inside information being subsequently publicly disclosed); or (ii) by the mere fact that it is aware of its intent to initiate an offer. The price of the block acquisition must not be higher than the offer price, though; failing this, it may lead to an increased offer price.

The signature of commitments to tender is also permissible but the AMF requires that they lapse in the event of a competing bid. Breakup fees payable by the committing shareholder if its commitment lapses are accepted provided that its amount remains reasonable.

For inside information concerns, the shareholders are usually “wall-crossed” only shortly before the announcement of the transaction.

In addition, the bidder can secure the transaction through a tender offer agreement with the target company.

This agreement may set forth a commitment from the target company to recommend the offer and a breakup fee payable by the target company in the event of default to satisfy such commitment. Breakup fees must be compliant with the principle of free competition between offers and the interest of the target company (*intérêt social*). As a result, in practice, the AMF does not accept an amount of breakup fee in excess of 2% of the equity value of the target company.

The agreement may also include no-shop arrangements whereby the target company agrees to terminate existing discussions and not to initiate new discussions with third parties. Such arrangements cannot prohibit the target company from discussing with third parties approaching it on an unsolicited basis in accordance with the principle of free competition between offers.

The agreement may finally provide for a matching right whereby the bidder will have the right to match (or improve) the terms of a higher bid received by the target company.

All the above arrangements have to be disclosed in the offer documentation.

## 9

### **Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Offerors are permitted to offer incentivization arrangements to the management to retain them. As any special arrangement with an existing shareholder conflicts with the principle of equal treatment of all shareholders, incentivization arrangements are subject to strict transparency and fairness requirements.

More specifically, an incentivization arrangement will not include: (i) put options allowing the management to exit at a guaranteed price; (ii) put options allowing the management to exit based on a formula that is not consistent with the formula used to determine the offer price; or (iii) compensation packages that are not consistent with the market standards for the managers of a company in the same situation.

The incentivization arrangements will be reviewed by the independent expert in charge of issuing the fairness opinion and will be particularly scrutinized by the AMF.

They will also be disclosed in the offer documentation.

## 10

### **Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

The minority shareholders often challenge the reinvestment of the management in the acquisition holding. Obviously, the principle of equal treatment of all shareholders requires that any reinvestment by the management be made at a price that is, by transparency, no less than the offer price. The minority shareholders usually require more, claiming that they should receive a premium to be deprived of the possibility to reinvest and be part of the new story. This is not a claim that the AMF has satisfied so far.

In addition, any agreement between the management and the bidder may pose particular challenges in terms of conflict of interest and equal access to information of all bidders in the event of a competing bid. In those circumstances, it is best practice that the board appoints a committee composed of independent or, at least non-conflicted, directors to monitor the takeover offer process. This best practice has recently become a legal requirement following a reform enacted in early 2020: whenever an independent expert is to be designated, an ad hoc committee composed of a majority of independent directors must now be appointed to select the independent expert, follow up on its diligence and issue an opinion on the merits of the offer.

## 11

### **Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

A key challenge for bidders is the persistent uncertainty to reach the squeeze-out threshold when they engage in a public-to-private transaction, although the applicable threshold has recently been lowered from 95% to 90% of the shares and voting rights.

There is no statutory, court-approved mechanism available under French law that might guarantee the success of the transaction once a minimum threshold in voting rights is achieved; neither is there any possibility of conditioning a takeover offer to reach the 90% squeeze-out threshold.

When they engage a public-to-private transaction, take-private sponsors are therefore almost always exposed to the risk of not being able to delist the target company as a result of the transaction. This is a major concern compared to other key jurisdictions.

There are some mitigating factors to take into account when assessing this risk. First, thanks to the lowering of the squeeze-out threshold to 90% of the shares and voting rights, the risk of an interloper being in capacity to block a squeeze-out is now more limited. Second, many French-listed companies are controlled, which often allows the bidder to secure the acquisition of significant interests in the target company ahead of the process being public and, thus, at least partially, secure the reaching of the squeeze-out threshold. Third, it is possible for the bidder to purchase shares on the market both during and after the takeover offer, subject to certain restrictions on price and volume. However, none of the foregoing can guarantee the delisting of the target company.



For further information or assistance with take-private transactions, please reach out to any of the contacts listed below or your usual Baker McKenzie contact.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** A mandatory offer is triggered when a person acquires an interest in shares that (taken together with shares in which persons acting in concert with them are interested) carry 30% or more of the voting rights of a company.

**B.** If, following the takeover bid or at a later stage, the bidder (together with the persons with whom they act in concert) holds **95%** or **90%** of all voting rights, they can initiate a squeeze-out procedure. There are three squeeze-out procedures, under the Takeover Act, the Stock Corporation Act and the Transformation Act (a so-called “merger squeeze-out”). The rules applicable to each procedure differ, except that for all procedures the shares of all other shareholders are transferred to the bidder in exchange for cash compensation.

If, following a takeover bid, the bidder holds at least **95%** of all voting rights, they can initiate a squeeze-out procedure under the Takeover Act. An advantage of a squeeze-out under the Takeover Act is that the compensation paid in the offer, i.e., the offer price, is deemed to be adequate if at least 90% of the shares that were subject to the offer have been tendered. In case the bidder granted only a share-for-share consideration in the offer, they, for the purpose of squeeze-out, have to offer alternative cash compensation. If the 90% target is not met, it is not recommendable to use the post-takeover squeeze-out procedure.

A squeeze-out under the Stock Corporation Act, requiring a majority of at least **95%**, is more complex than under the Takeover Act, particularly as the major shareholder has to prepare a specific report in anticipation of the general meeting and the “fairness” of the compensation has to be reviewed by an auditor appointed by the court. Dissenting minority shareholders may block the effectiveness of the squeeze-out by court action for some time, and may claim for higher compensation.

A “merger squeeze-out” under the Transformation Act has the advantage that the majority shareholder can implement a squeeze-out with a holding of only **90%** of the registered capital. The squeeze-out under the Transformation Act is only possible if the majority shareholder is a German stock corporation (*Aktiengesellschaft*), a German partnership limited by shares (*KGaA*) or a European stock corporation (*SE*); if the bidder is a different form of German legal entity, it can convert into a stock corporation.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

**A.** Unless the offer is a so-called simple voluntary bid, aimed at less than 30% of the voting rights of the target (or in a situation where the bidder already holds control, i.e., 30% or more of the voting rights in the target), the bidder has to offer as minimum price the higher of (i) the highest price paid by the bidder during the offer period and during the six months before the offer period and (ii) the three-month volume-weighted average price of the target shares.

**B.** Except where the bidder or anyone acting in concert with the bidder has acquired 5% in securities of the target against cash payment, there are no restrictions on the nature of consideration, i.e., cash or shares. If the target shares carry voting rights, the bidder must also offer shares carrying voting rights if it makes a share-for-share offer. In this case the shares must be "liquid," i.e., they must be admitted to an exchange in the EU to ensure the shareholders can sell them easily. If the bidder (or any person acting in concert with it) acquires 5% or more in target shares during the period of six months before the public announcement of the offer, any bid must be in cash or accompanied by a cash alternative.

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

The German Takeover Act ("**Act**") states that a bidder should only launch a bid after ensuring that it can fulfil in full any cash consideration. The German regulator, BaFin ("**BaFin**"), does not permit a bid to be subject to any financing condition and in practice the financing must be available on a "certain funds" basis from the time of the formal launch of the offer, i.e., at the point in time at which the offer is publicly announced. The offer document for a cash bid must include a "cash confirmation" by a German or EU investment firm or credit institution that is independent from the bidder, confirming that the bidder has taken all measures to ensure that sufficient funds are available to the bidder to pay the offer consideration when due for all shares covered by the bid. BaFin typically requires such cash confirmation at the point in time at which the draft offer document is submitted to it for approval. The investment firm giving the cash confirmation will be liable for the accuracy of its statement and it could be required to provide the cash consideration if it did not act responsibly and ensure that the bidder has taken all reasonable steps to ensure that the cash was available. This means that if the bid is to be wholly or partially funded by drawing down on debt facilities, the ability to draw down on such debt facilities must normally be wholly unconditional, or conditional only upon sufficient acceptances of the bid being received or any other conditions that the bid has been made under (e.g., regulatory approvals, material adverse change). The cash confirmation statement itself is all of the "evidence" required, but (subject to certain limited exceptions or dispensations) all of the financing arrangement must be summarized in the offer document.

**4**

**What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

It is permissible to announce a possible offer, the making of which is subject to conditions. Offers must not be subject to conditions or preconditions that depend solely on the subjective judgment of the bidder or the fulfilment of which is in the bidder's hands except for the bidder's shareholders' approval of the bid. In practice, the latter condition is hardly seen in the market. German market practice is to include a material adverse change condition, which must be based on an objective test (and potentially the fulfilment of such condition being confirmed, e.g., by an independent accountant). BaFin will closely check that any material adverse change condition meets this standard. Other conditions allowed under the Act are a minimum shareholder acceptance condition (save for mandatory offers) and required material regulatory approvals, typically antitrust approval or foreign investment approval.

**5**

**When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

Immediately before any public announcement of an offer, the bidder has to notify BaFin (and stock exchanges where target securities and derivatives are listed) of the offer. Immediately after publication of the offer, the bidder has to inform the target company.

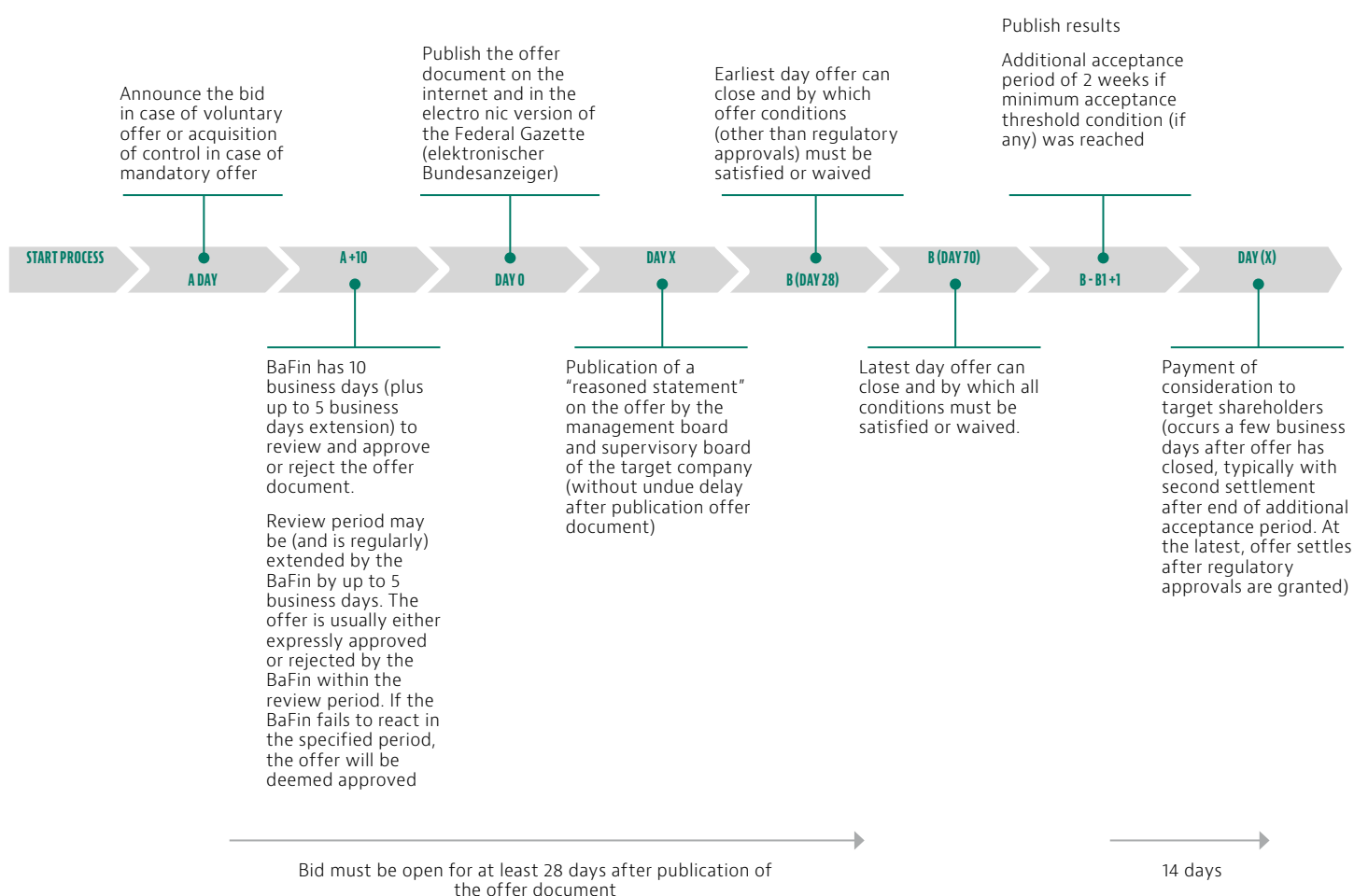
The obligation to publicly announce the offer arises with the bidder's decision to make an offer, upon which decision such public announcement has to be made promptly.

Typically in a friendly offer, the bidder's announcement is followed immediately by an ad hoc announcement by the target company.

## 6

### What is the typical basic timeline for a takeover offer?

#### Takeover offer (indicative timeline)



## 7

### Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.

Takeover bids in Germany are typically made by way of a public offer under the Act.

Another possibility would be a merger under the Transformation Act, but the hurdles and the costs in such a structure are high and it is not commonly used. In addition to complex cross-border considerations for mergers even within the European Economic Area, i.e., between companies from different jurisdictions, one of the issues is the need for shareholders' approval, which typically requires a qualified majority of 75%, but would still be subject to legal challenges by shareholders and, depending on the circumstances, to a statutory procedure enabling shareholders to demand a higher consideration.





## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

It is common for bidders to seek “soft” irrevocable undertakings (IUs) from one or more of the target’s major shareholders or to sign share purchase agreements (SPAs) with such shareholders to ensure a certain position. In such case, the offer is typically publicly announced immediately after such SPAs or IUs are signed. IUs typically lapse if a higher competing bid is made. Timing depends a lot on the circumstances, but shareholders would often only be approached after due diligence on the target has been completed and if there is support for an offer at the target management board.

Except for the mentioned, and rarely used, merger under the Transformation Act, there is no vote on the part of the target shareholders.

The Act and/or German stock corporation law generally prohibit inducement fee agreements (except potentially to a very limited extent and essentially not exceeding the bidder’s actual costs) and other deal protection measures including exclusivity/“no-shop” agreements and arrangements having a similar or comparable financial or economic effect as an inducement fee.

A bidder may derive some comfort from the restrictions on frustrating action to which the target management board is subject from an early stage. After the public announcement of a bid, potentially sooner if the target management board has reason to believe that a bona fide bid might be imminent, the target management board must not take steps that could effectively frustrate the bid. In particular, it may not issue shares, options or convertible securities, sell or acquire material assets or enter into contracts outside the ordinary course of business if not already planned before obtaining knowledge from the bid, without consent from the target supervisory board and/or the shareholders’ meeting.

## 9

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

All shareholders of the same class must be treated equally by a bidder and special deals for certain shareholders are prohibited.

The Act prohibits the promising or suggesting of undue economic advantages by the bidder to management or supervisory board members of the target. The background to this is, in particular, the concept that the management board and supervisory board are required under German law to only act in the best interests of the target (including in their public reasoned statements on the offer), and that the bidder will be prevented from influencing management board or supervisory board members to prioritize their interests. In a take-private transaction, it is common for the bidder to wish to retain senior management of the target and to enter into incentivization arrangements post-completion of the acquisition. Such arrangements cannot be promised or suggested before the end of the offer. It is common in the German market for bidders to wait until completion of the bid before entering into discussions with management about their incentivization arrangements going forward.

It is not uncommon for management individuals to hold shares in the target and there have been arrangements to allow management shareholders to roll over their participation in the target in a participation in the bidder or the bidder group. Such structure hinges on the role of management individuals as shareholders, not on their management role.

**10****Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

The target management and supervisory board are required to publicly state their views on the offer, with reasons, and whether they would recommend that shareholders accept it. In practice, on receipt of an approach from a bidder, the target management board will have to form a view on whether they would be minded to support the bid, give access to due diligence and recommend acceptance. This will depend on a number of factors, including the consideration offered, transaction certainty and legal considerations, including those on competition law if the bidder is a competitor of the target.

While target management and supervisory board members must act only in the best interests of the target, there is a tendency for them to also look at their own position, which should not be one of the prime considerations.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

The other key challenges/sensitivities in Germany relate to identifying and managing “concert parties” of bidders, disclosing future intentions for the target business and, potentially, foreign investment restrictions.

The Act contains provisions requiring persons who “act in concert” to be treated as one person. Persons are treated as acting in concert where, under an agreement or understanding they co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company. Persons will also be presumed and/or deemed to be acting in concert where they have any of a number of specified relationships with one another, including where there are “affiliated” companies under common control of a parent company. This can be challenging in the context of a PE bidder with a number of portfolio companies, a range of managed funds and various limited partners, who will need to be assessed for these purposes. The position can be more challenging with sovereign wealth funds or publicly owned entities, e.g., in the case of China.

An area that can be sensitive for PE bidders relates to the requirement for the offer documentation to disclose the bidder’s intentions regarding the future business of the target and its employees and pension arrangements. A number of specific areas must be covered, including, for example, plans relating to any research and development function, location of places of business including headquarters and the continued employment (or otherwise) of employees and management. The disclosure of these intentions should be pre-agreed with the BaFin, who may push for meaningful and specific disclosure, in particular regarding any proposed headcount reductions. This can feel uncomfortable for PE bidders unfamiliar with German public M&A and should be focused on from an early stage, as problems can arise from inconsistencies between internal presentations, discussions with the target management board and the public disclosure.

Foreign investment considerations need to be made, depending on the origin of the bidder and its shareholders. Germany has long embraced foreign investment, imposing few limits on foreign investors and offering them the same rights and benefits as domestic acquirers. In light of a number of large foreign investments that have led to increased wariness among the German public, Germany has strengthened and continues to strengthen its foreign investment review laws through a number of consecutive reforms.

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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered
- B. minority squeeze-out by the bidder

#### A. A mandatory offer is triggered in two circumstances:

First, if as a result of a direct or indirect acquisition of voting securities of a listed company, an investor acquires (alone or acting in concert with others) at least 30% of the voting securities of such company ("**30% Threshold**"), which is reduced to 25% if such company does not qualify as a small or medium-sized enterprise ("**SME**") and no other person owns a greater participation ("**25% Reduced Threshold**"). The articles of association of a listed company that qualifies as an SME might vary the 30% threshold to a different percentage ranging from 25% to 40% of the voting securities ("**SME Threshold**").

An "indirect" acquisition occurs when an investor acquires voting securities of another company (whether listed or not), the main assets of which consist of the voting securities held in the listed target company and such voting securities represent the 30% Threshold (or the 25% Reduced Threshold or the applicable SME Threshold).

Second, if an investor, who already holds (A) more than the 30% Threshold of a listed company or, in case the listed company qualifies as an SME company, the applicable SME Threshold, but (B), in all cases, less than 50% of the voting securities of such listed company, directly or indirectly, acquires more than 5% of the outstanding voting securities of such listed company over any 12-month period.

**B.** The right of a bidder to squeeze out i.e., force all the holders of the outstanding voting securities to transfer such securities to it, arises if: (A) following a takeover bid (either voluntary or mandatory) over the entire voting stock of a listed target company, the bidder (alone or in concert with others) comes to hold at least **95%** of the voting securities of the listed target company; and (B) the bidder has stated in the offering document the intention to avail itself of such right.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

Consideration can be either in cash or in kind, or a combination of the two. In mandatory takeover bids, the minimum price cannot be lower than the highest price paid by the bidder (and any person acting in concert) for the same voting securities of the target company in the 12-month period prior to the date on which the decision to launch the bid is publicly disclosed (see answer 5 below). If no purchases of voting securities of the listed target company were made in the 12-month period, the price cannot be lower than the weighted average trading price for the voting securities of the listed target company during the 12 months prior to the date on which the decision to launch the bid is publicly disclosed (see answer 5 below). Exceptions to the foregoing are regulated by the Italian security exchange agency ("**CONSOB**").

In voluntary takeover bids, offer price is freely determined by the bidder; however, if during the offer period of the voluntary takeover bid, the bidder (or any persons acting in concert with it) acquire, directly or indirectly, outside of the bid voting securities that are the subject of the voluntary takeover bid at a price higher than the offered price, the offered price must be revised to reflect such higher price (so-called best price rule).

### **3 What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

Prior to launching the offer, the bidder must ensure that it can fulfill the obligation to pay the overall consideration assuming full acceptance of the offer. The bidder is required to provide CONSOB with the adequate documentary evidence of the above no later than the day before the date of publication of the offering document.

A full description on how the transaction will be funded will be included in the offering documents. If the transaction is carried out through debt financing, the offering documents will include details on the lending parties, the main conditions of the loan, the terms and procedures for repayment of both principal and interest, the existence of any guarantees, covenants and negative pledges, if significant. CONSOB may request additional information on funding during the bid procedure.

### **4 What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

In a mandatory takeover bid, the offer will be unconditional (except only for statutory conditions, such as merger clearance, statutory approvals, etc.). In a voluntary takeover bid, the offer can be made subject to objective conditions precedent (such as a minimum acceptance level, MAC clauses, MAE clauses relating to the target, war clause, financial covenants, non-insolvency clauses, etc.), but not to conditions the satisfaction or nonsatisfaction of which solely within the bidder's discretion (so-called subjective conditions precedent).

### **5 When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

The decision of a bidder to launch a voluntary public takeover bid (or the obligation of a bidder to launch a mandatory public takeover) must be notified immediately to CONSOB by way of the submission of a notice ("**Initial Notice**"). At the same time, the Initial Notice must be disclosed to the target company and the public. No later than 20 days from the date of the Initial Notice, the bidder must file with CONSOB an offering document (*Documento di Offerta*) for CONSOB's approval and subsequent publication. If said deadline is not met, the offering document (*Documento di Offerta*) is declared inadmissible by CONSOB and the bidder may not make a further bid on the same securities of the target company for the following 12 months.

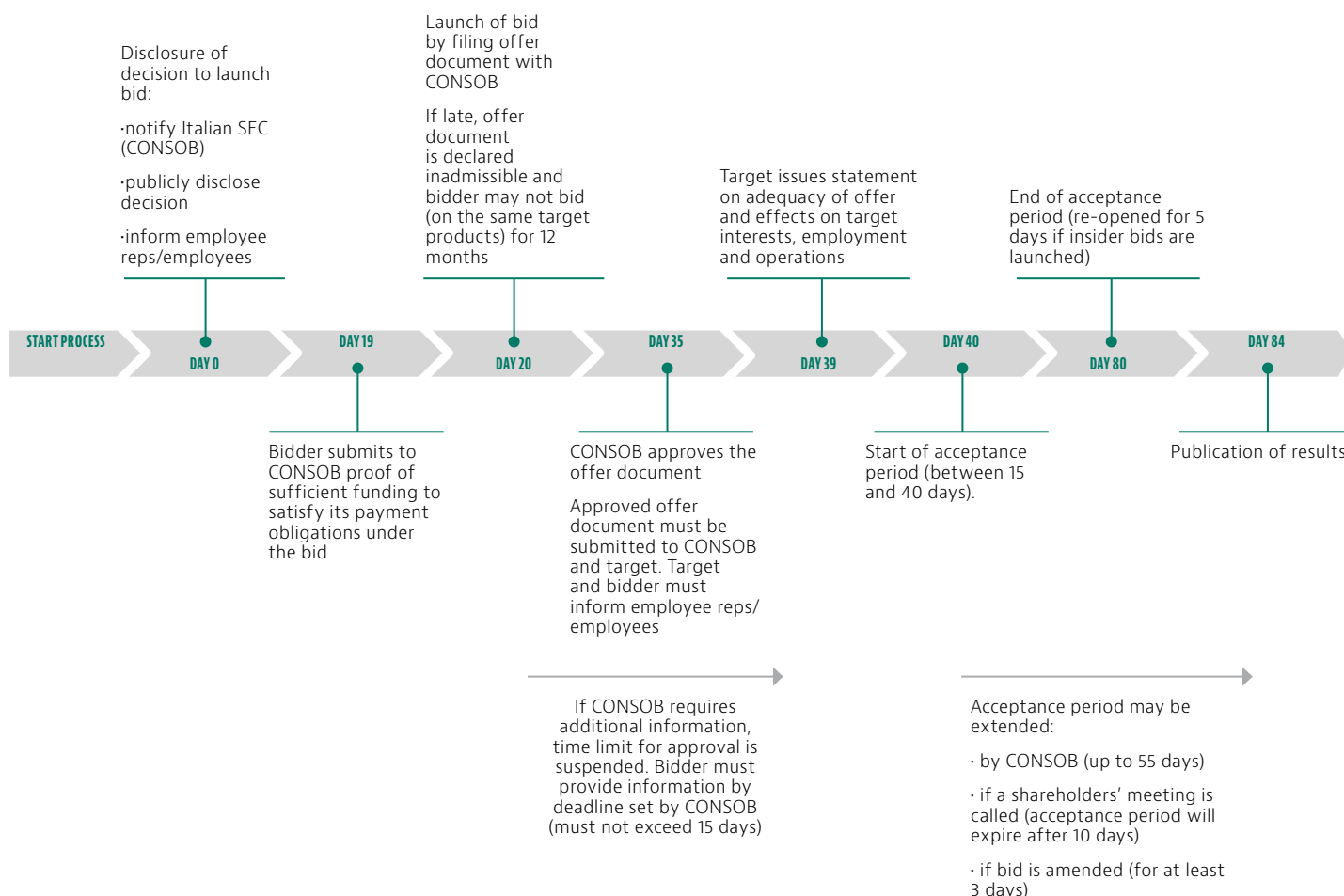
A number of rules apply before a public takeover bid is announced. These rules are mainly derived from the EU insider trading and market abuse legislation and the EU disclosure of shareholdings and transparency legislation. They impose restrictions in relation to prior stakebuilding by a bidder, announcements of a potential takeover bid by a bidder or a target company and prior due diligence by a potential bidder. Some careful planning is therefore necessary if a potential bidder or target company intends to start a process aimed at launching a public takeover bid. Main obligations are derived from the insider trading and market abuse EU legislation and EU directives on disclosure of shareholdings and transparency.

No put-up or shut-up rule applies in Italy. If there are rumors or leaks that a (potential) bidder intends (or may be required) to launch a public takeover bid, even though such (potential) bidder has not yet publicly disclosed such intention (or requirement), and the trading performance of the securities involved is affected, CONSOB may request such (potential) bidder to disclose information and documents to inform the general public.

## 6

### What is the typical basic timeline for a takeover offer?

#### Voluntary public takeover bid (indicative timeline)



## 7

### Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.

As a general rule, CONSOB may not oppose the delisting of an Italian company that is listed on an Italian regulated market, provided that sufficient protection has been given to the investors in and the security holders of the company that is going private and bearing in mind that a delisting can occur in specific circumstances only. Traditional schemes through which a company may go private and be delisted include global takeover bids without restoration of the minimum free float; mergers or spin-offs of a listed company in a non-listed company; conversions of listed securities in non-listed securities; and buybacks that reduce the free float below the minimum level. Shareholders of a listed company, who vote against, or abstain from voting, a resolution having the effect of causing the delisting of the company, may exercise their withdrawal rights.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Shareholders can freely and publicly communicate their support to a bid provided that inducement fee arrangements, and any other similar agreements, are prohibited and any agreement (however formalized) between a bidder and a shareholder aimed at facilitating a positive outcome of a tender offer must be made public and described in the offering document.

A bidder may also derive some comfort from the restrictions on frustrating action which the target board is subject to from an early stage. The board of directors of the target company must abstain from adopting any action or having the company involved in any transaction that may adversely affect the achievement of the goals of a pending takeover bid (so-called passivity or board neutrality rule; please refer to answer 11 for the exceptions). The passivity (or board neutrality) rule applies from the date of the Initial Notice until the end of the bid or until the bid expires. Please consider that the mere search for other bids ("white knights") is not subject to such rule (see also answer 11 below).

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

All shareholders of the same class must be offered equivalent treatment by a bidder and special deals for certain shareholders are prohibited. In a take-private transaction, it is common for the bidder to wish to retain senior management of the target and to enter into incentivization arrangements post-completion of the acquisition. Bidders should wait until the completion of the bid before entering into discussions with management about their incentivization arrangements going forward. Please also refer to answer 10 below.

**10**

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

The holders of the securities of the target company must be given sufficient time and information to enable them to make a properly informed decision on the bid.

The board of directors of the target company must issue a statement where it gives its views on the adequacy of the consideration offered and the effects of a successful completion of the takeover on: (i) the interests of the target company; (ii) employment and conditions of employment at target company level; and (iii) continued operations at existing sites.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

The other key challenges/sensitivities in Italy relate to: (A) anti-takeover measures that can be adopted by the management of the target company; and (B) identifying and managing “parties acting in concert.”

**A. Anti-takeover measures**

As a general rule, the board of directors of the target company is subject to the so-called passivity rule (see answer 8 above). This notwithstanding certain defensive actions can be taken if approved by the ordinary shareholders’ meeting or the extraordinary shareholders’ meeting, respectively (depending on the respective areas of attributed decision-making powers) or if expressly permitted by the articles of association of the target company.

The main anti-takeover defense mechanisms include: (i) actions aimed at increasing the overall consideration to be offered by the bidder (e.g., capital increases, share buybacks and conversion of non-voting securities into voting securities); (ii) actions aimed at significantly varying the business characteristics of the target company (e.g., mergers, demergers, split-ups, spin-offs, reorganizations, sale of core assets (crown jewels), purchase of non-core assets, increase in indebtedness, joint ventures or acquisitions of other companies that trigger antitrust approvals); and (iii) actions aimed at preventing the successful conclusion of the bid (e.g., launch of a takeover bid for the securities of the bidder, lawsuits against the bidder and hostile advertising campaigns against the bidder).

Additional provisions could be set out in the articles of association of the target company.

**B. Parties acting in concert**

Italian Legislative Decree No. 58/98, as amended from time to time (“Italian Financial Act”), provides for a general definition of persons acting “in concert” to include any persons who cooperate on the basis of an agreement in order to: (i) obtain, maintain or strengthen the control over a target company; or (ii) hinder the success of a takeover bid launched with respect of a target company. This is regardless of whether such agreement is express or tacit, oral or formalized in a written form, valid and binding or invalid and with no effect. The Italian Financial Act provides for a set of non-rebuttable presumptions, whereby persons meeting certain factual requirements and/or carrying out certain conduct are conclusively deemed to be acting in concert.

CONSOB has identified certain factual circumstances whereby persons are presumed to be acting in concert, unless such persons are able to provide evidence to the contrary. The following persons are presumed to be acting in concert with the bidder unless they can prove the contrary: (i) the bidder’s spouse, cohabiting partner, persons related by consanguinity or affinity, and direct relatives and relatives up to the second degree, and children of the bidder’s spouse or cohabiting partner; and/or (ii) financial advisers to the bidder in respect of transactions relating to the issuer, where said advisers (or companies belonging to their group) have purchased securities of the issuer outside the scope of their trading activity (as ordinarily carried out and at arm’s length) on their own behalf, after their appointment or during the month prior to such appointment.

The concept of persons acting in concert is very broad and, in practice, issues may arise when determining whether persons actually act in concert. This is especially relevant in relation to mandatory takeover bids. If the conditions and/or presumptions referred to above are satisfied and one or more persons in a group of persons acting in concert acquire voting securities, as a result of which the aforesaid group in the aggregate would pass the relevant triggering threshold, all members of the group will be jointly and severally liable to launch a mandatory takeover bid, even though the single member does not individually pass the relevant triggering threshold.





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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** The bidder is required to make an offer for all remaining shares of the target company if the bidder has (solely or together with shares when acting in concert) acquired 30% or more of the voting rights in the target company. Certain situations are exempted from the requirement to make a mandatory offer. These include, a shareholder having a 30% interest in the company prior to the IPO. If a shareholder that has a 30% interest in the target company is able to reduce its shareholding within the so-called "30-day grace period," it will not be required to make a mandatory offer.

**B.** A shareholder holding at least 95% of the shares and voting rights in the target company can initiate a squeeze-out procedure in order to acquire the remaining shares.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

In a voluntary offer, the consideration can be in cash and securities issued by the bidder or a combination of these. The bidder must make the same offer, subject to the same terms and conditions (equal treatment rule). In line with the equal treatment rule, the bidder must comply with the "best price rule." Under the best price rule the bidder must pay the highest of (i) the price offered under the offer (whether or not raised) and (ii) the highest price paid by the bidder pursuant to transactions in the target company's securities entered into by the bidder after the moment of formal announcement of the offer, with the exception of regular stock exchange trading.

In a mandatory offer, the consideration can be in cash and securities issued by the bidder, or a combination of these; if it includes securities, these must be liquid and traded on a regulated market. The offer price in a mandatory offer must be "fair" (billijk). A fair price is defined as the highest price that the bidder, or persons acting in concert with the bidder, has paid for the same kind of securities in the year prior to the announcement of the mandatory offer. If the bidder did not acquire any securities in the year prior to the announcement of the mandatory offer, the average share price as quoted on the stock exchange during that preceding year will be deemed "fair."

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

The bidder has to publish a "certain funds" announcement when the offer document is submitted to the AFM for approval (at the latest). The certain funds announcement must include a detailed description setting out the manner in which the bidder has secured the payment of the offer price. The certain funds announcement does not have to be approved by the AFM and there is no requirement to demonstrate that the bidder has the necessary funds in place, for example, by submitting a commitment letter to the AFM. The bidder must also issue a certainty of funds press release on each occasion that the offer price is raised.

## 4

**What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

**There are two type of conditions:**

- i. Pre-offer conditions: these are the conditions that are subject to the satisfaction or waiver by the bidder prior to commencement of the offer.
- ii. Offer conditions: these are the conditions that are subject to the satisfaction or waiver by the bidder to declare its offer unconditional.

Under Dutch law, both conditions are possible. The pre-offer and offer conditions are usually included in a so-called merger protocol entered into between the bidder and the target company.

For the offer conditions, it should be ensured that fulfilment is not dependent on or can be influenced by the will of the bidder. The offer conditions should be formulated as clear and measurable as possible (i.e., there should be no degree of discretion for the bidder to determine whether the offer conditions have been fulfilled). It is possible to include a material adverse change clause as an offer condition, provided that it is clear and objectively defined. It is also possible to include third-party approvals as an offer condition. Pursuant to Dutch law, in a mandatory offer, no offer conditions can be imposed by the bidder to declare the offer unconditional.

**Examples of customary pre-offer conditions:**

(i) no breach of the merger protocol having occurred, (ii) no material adverse change having occurred, (iii) no revocation of the board recommendations, (iv) the target company's foundation not having exercised its call option right to have preference shares issued to it (only to be included if such protective measure has been put in place by the target company), (v) no notification having been received from the AFM that preparations of the offer are in breach of the offer rules

**Examples of customary offer conditions:**

(i) no breach of the merger protocol having occurred, (ii) a minimum acceptance threshold (a common percentage is 95% in light of the Dutch squeeze-out provisions; however, other acceptance thresholds or a combination of acceptance thresholds are also possible), (iii) no material adverse change having occurred, (iv) relevant competition clearances for the offer having been obtained, (v) no revocation of the board recommendations, (vi) the target company's foundation not having exercised its call option right to have preference shares issued to it (only to be included if such protective measure has been put in place by the target company), (vii) no notification having been received from the AFM that preparations of the offer are in breach of the offer rules

**5****When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

In a friendly voluntary offer situation, the offer process usually starts with a joint public announcement by the bidder and the target company. The announcement will contain the intention of the bidder to make an offer. Such announcement usually follows once the bidder and the target company have agreed upon and executed a merger protocol.

The first public announcement in a friendly or hostile offer marks the formal announcement of the offer and, from the moment the announcement is made, strict rules on the disclosure of information about the offer apply. In addition, a timetable within which the offer must be made and completed will commence.

An offer process may also start with the announcement of a mandatory bid or a target company can request the AFM to require a potential bidder to clearly state its intentions regarding a possible public offer. If the AFM imposes the “put-up or shut-up” rule, the potential bidder must, within six weeks, either announce a public takeover bid or publicly state that it will not announce a public offer. If the potential bidder states that it will not announce a public offer, it will not be able to announce a new public offer for the same target company for six months.

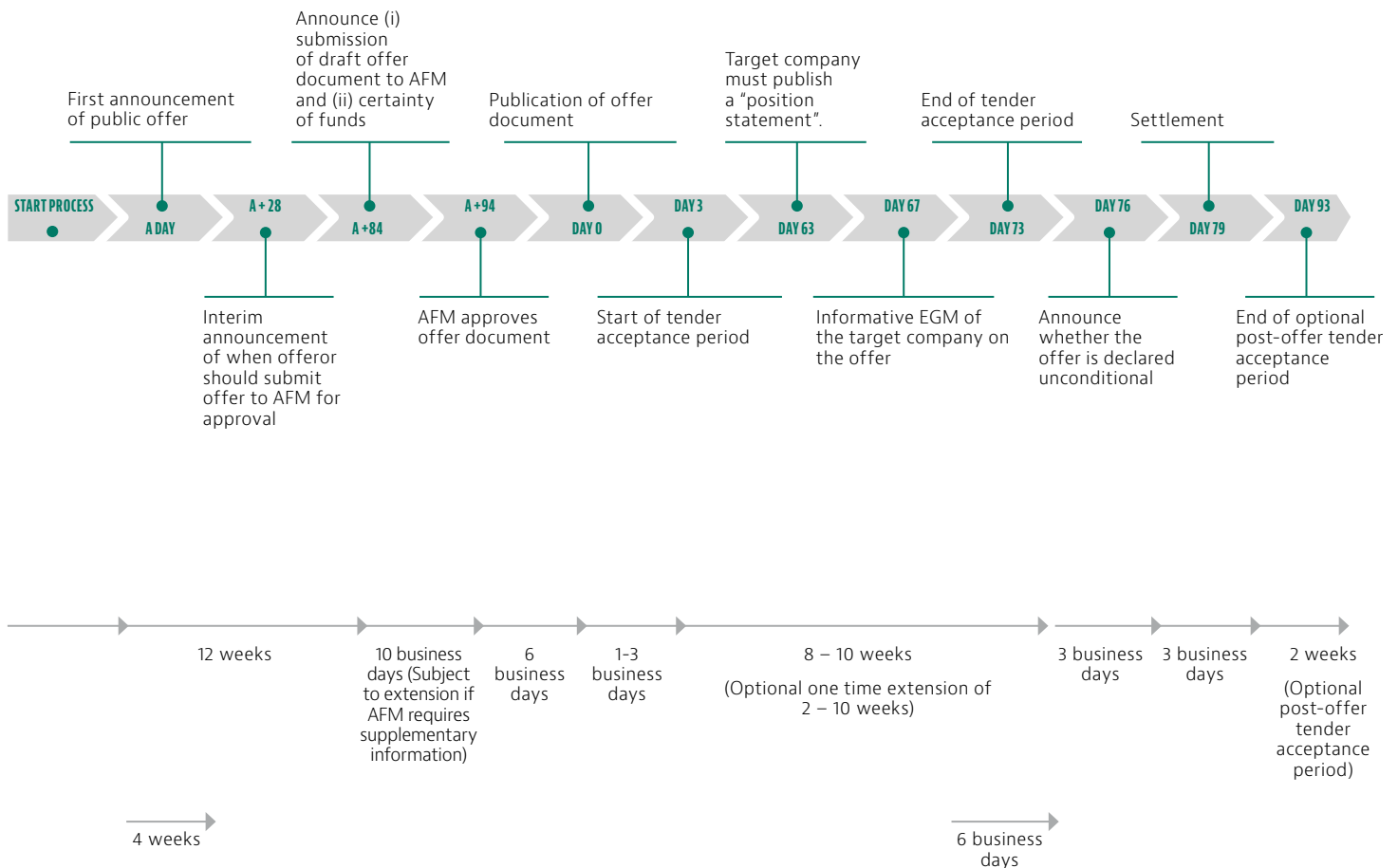
The bidder must issue a press release within four weeks of the announcement of a public offer. If the bidder fails to submit its application for approval of the offer document to the AFM within the stated period (i.e., 12 weeks after the announcement of the proposed bid), it will make a public statement to that effect.

The above does not affect the obligation of the bidder and the target company to publish inside information without delay.

## 6

### What is the typical basic timeline for a takeover offer?

#### Public offer (indicative timeline)



**7**

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

It is common in Dutch voluntary offers to pre-wire alternative restructuring options to be able to acquire full control if the 95% threshold is not satisfied in the public bid. In these cases, the bidder is typically willing to lower the acceptance level to 75%-80%. Alternative squeeze-out mechanisms (restructurings) are normally also included in the merger protocol, such as a pre-wired asset sale, which entails the bidder purchasing all assets of the target company shortly after declaring the public bid unconditional. The bidder in this scenario pays a part of the purchase price in cash and remains due for another part in the form of a loan that is equal to the stake of the bidder in the company. As a result of the asset sale, the target company will essentially become a 'cash box' and all remaining shareholders will receive cash for their shares upon liquidation of the target company. An asset sale will only be permissible if certain conditions are met. It is important for the bidder to ensure sufficient transparency about its intentions in this respect during the bid process and to have a business motive (typically integration) for the post-bid asset sale and liquidation of the target company. The target executive board and (independent) supervisory board members may only approve an asset sale after careful consideration, especially where minority shareholders' interests are concerned. The asset sale may not lead to a disproportionate disadvantage of minority shareholders and the price should be fair (e.g., based on a fairness opinion). These structures should also be assessed from a tax perspective.

A delisting requires termination of the listing agreement with Euronext Amsterdam. After obtaining a positive decision from Euronext Amsterdam on the application for delisting, the delisting will (ultimately) take place on the 20th trading day after publication of the decision.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

It is possible to obtain an undertaking from major shareholders of the target company to tender their shares in the target company to the bidder and vote in favor of certain proposals to be voted upon in a shareholders meeting (e.g., decisions around the pre-wire alternative restructuring option as explained under question number 7 above) ("**Irrevocable Undertakings**"). Usually, major shareholders are approached before any intention to make an offer has been publicly disclosed. This means that inside information is shared with a third party. The MAR permits Irrevocable Undertakings to be obtained from major shareholders, provided that the willingness of such shareholders to tender their shares is reasonably required for the decision to make the offer. Approaching major shareholders in this way is known as taking market soundings. As these shareholders will gain access to inside information, non-disclosure and standstill agreements are usually entered into with such shareholder before it is approached to enter into an Irrevocable Undertaking.

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

All shareholders of the same class must be offered equal treatment by a bidder. Therefore, special deals for certain shareholders, subject to very limited exceptions, would be contrary to the principle of equal treatment. In a take-private transaction, it is common for the bidder to wish to retain senior management of the target company and to enter into incentivization arrangements post-completion of the acquisition. This will be disclosed in the offer memorandum.

**10****Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Where the bidder intends to involve current management in the offer and in the target company going forward, particular challenges arise from the rules relating to conflicts and to equality of information to competing bidders (if any), which need to be followed. A conflict of interest may exist if the company intends to enter into a transaction with a company in which a member of the management board or the supervisory board personally has a material financial interest. This may mean that the relevant statutory board members should refrain from the consultation/deliberation and decision-making process around the bid (including not attending relevant meetings about the bid). Any such conflict of interest may impact the decision-making that requires (at least) a majority of the votes.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

Other key challenges/sensitivities can relate to identifying and managing “concert parties” of PE bidders. If the offer is made by “concert parties” their mutual financial and corporate relationship should be disclosed.

Another area that can be particularly sensitive for PE bidders relates to the requirement for the offer documentation to disclose the bidder’s intentions regarding, amongst other things, the future business of the target company and its employees. A number of specific areas must be covered, including plans relating to the location of places of business including headquarters and, in particular, the continued employment (or otherwise) of employees and management.

Dutch law requires the natural persons and/or legal persons responsible for the offer document to accept responsibility for the information contained in the offer documentation and to state “that to the best of their knowledge and belief (voorzover hun redelijkerwijs bekend kan zijn) the information contained in the document is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the import of such information.” For PE bidders, it may need to be discussed with the AFM who the appropriate individuals should be for these purposes.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** A mandatory takeover offer is triggered when a person, acting alone or in concert with others, acquires 35% or more of the voting securities in a regulated company ("Regulated Company" includes all South African public companies (including those that are listed on the stock exchange) and certain South African private companies).

There is an exception to this rule, if: (i) the threshold is exceeded as a result of an issue of securities, as opposed to a transfer of securities; (ii) the remaining shareholders have agreed to waive their right to receive a mandatory offer by ordinary resolution; and (iii) the Takeover Regulation Panel (TRP) has exempted the bidder from making the mandatory offer.

**B.** A minority squeeze-out may be exercised by a bidder that offered to acquire all of the securities of a Regulated Company (or all of the securities of a particular class), (i) if the holders of at least 90% of the relevant issued securities have accepted the offer made by the bidder within four months of such an offer being made; and (ii) if the bidder then gives notice to the remaining holders within a further two months that the bidder will acquire all such remaining securities, and, having given such notice, the bidder is then entitled and obliged to acquire the remaining securities by means of a compulsory acquisition on the same terms as the original offer.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** Except where the bidder, or anyone acting in concert with the bidder, acquires or has acquired any interest in securities of the Regulated Company within the previous six months, there are no restrictions on the nature of consideration or price at which the bid can be made. If the 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 equal to the highest consideration paid by the bidder for those acquisitions.

**B.** The acquisition consideration may be discharged in cash or shares, or a combination of cash and shares. If securities carrying 5% or more of the voting rights are acquired, then the offer must be accompanied by a cash consideration.

A bidder cannot offer shares in a foreign company that is not listed on the Johannesburg Stock Exchange (JSE) as consideration, without the approval of the Exchange Control Department of the South African Reserve Bank (SARB). The Exchange Control Department allows 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.



### 3

#### **What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

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, in the prescribed format and to the satisfaction of the TRP, to provide security for payment of the full cash portion of the consideration. Such confirmation must be provided both at the time the firm intention announcement is made and also on posting of the offer circular to shareholders. It is, therefore, not possible for a cash or part-cash bid to be conditional on the bidder obtaining finance.

It is not a requirement for funding documents to be made public. The offer circular must contain a description of the financing arrangements entered into by the bidder, including capital amount, interest rate, security given, period and repayment terms, if the offer is highly leveraged.

### 4

#### **What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

It is common for takeover offers to be subject to regulatory and other conditions. Regulatory conditions typically include antitrust 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 that contain change of control provisions. An offer may be made subject to a no material adverse change clause, but 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 fulfillment (or not) of such a condition. Any material adverse change condition must, therefore, be objectively worded and tested.

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
- 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.

## 5

### When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?

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 an announcement must be made immediately when the target board receives a formal written offer, or where a mandatory offer is required. The target is responsible for making the announcement. It is published in the press and on SENS (the JSE's electronic news alert system), and must contain:

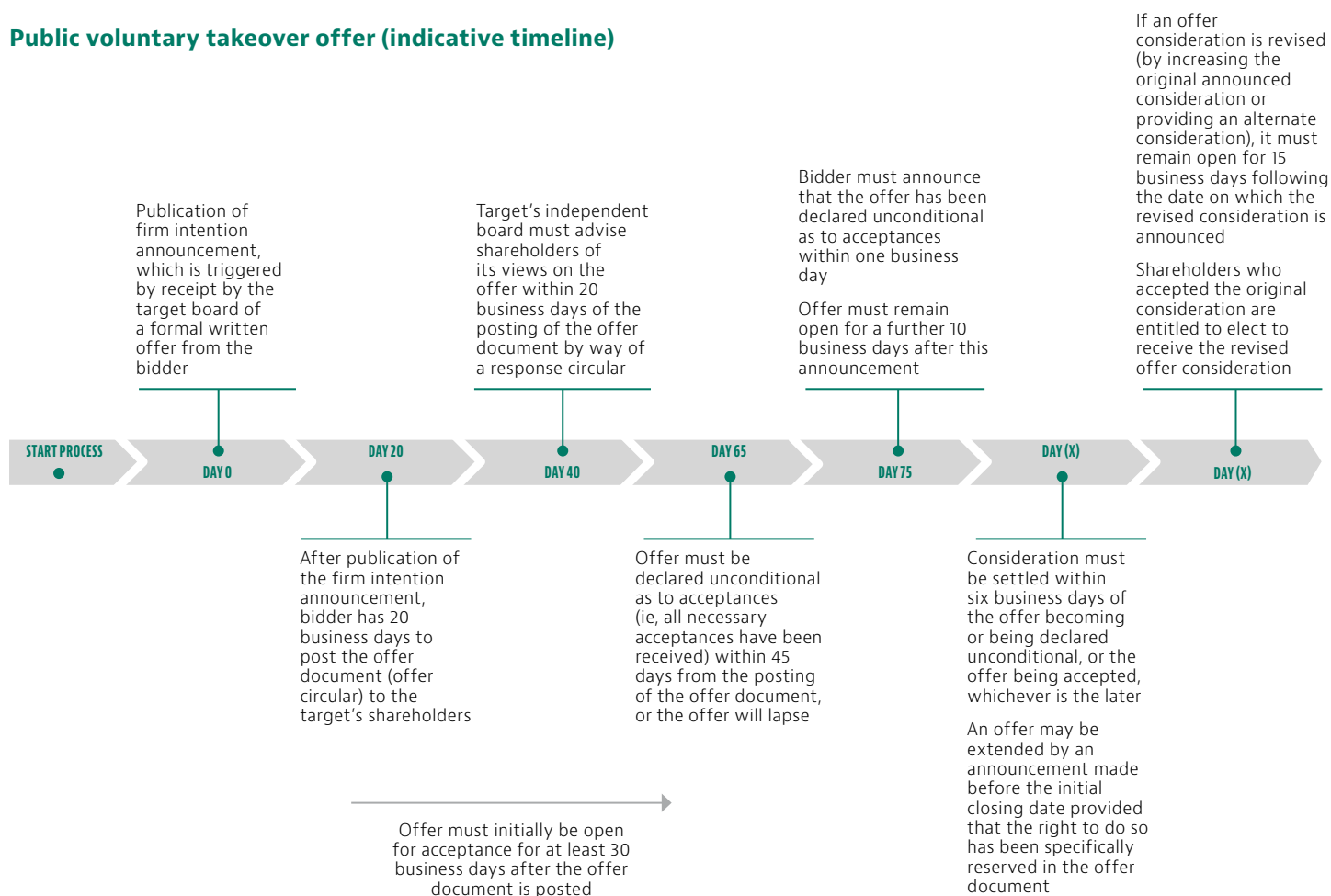
- terms of the offer
- identity of the bidder
- details of any existing holders of shares in the target
- all material conditions to which the offer is subject
- details of any arrangements which exist between the bidder and the target or any concert party of either of them

All announcements require the prior approval of the TRP, therefore, any firm intention announcement must first be submitted to the TRP before submitting an offer to the target.

## 6

### What is the typical basic timeline for a takeover offer?

#### Public voluntary takeover offer (indicative timeline)



## 7

### **Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Apart from a general offer, control of public companies is usually obtained by means of a scheme of arrangement or statutory merger/amalgamation, both of which require a minimum of 75% of approval by shareholders.

A scheme of arrangement is the most commonly used mechanism to implement a takeover. It is broadly defined and includes most arrangements concluded between the company and holders of any class of its securities. Common examples are the repurchase by a company of all its securities other than those acquired by the takeover bidder, resulting in the latter becoming the sole shareholder, or the exchange of its securities for securities in the bidder.

The statutory merger or amalgamation provisions of the Companies Act are a recent addition to South African law. In practice, however, it is seldom used as it requires all known creditors of the target to be notified of the transaction, whereupon creditors can intervene in the transaction even after it is approved by shareholders and a merger agreement is signed. Furthermore, creditors could apply for leave to have the merger reviewed by the courts, which could substantially delay the implementation of the transaction even if the creditors' review application should fail.

A scheme of arrangement and statutory merger are "fundamental transactions." All fundamental transactions require the approval of a special resolution (75% affirmative shareholder vote) and may also require court approval if either:

- the special resolution is opposed by at least 15% of the voting rights exercised, and any person who voted against the resolution requires the company to seek court approval
- the court grants leave to a single dissenting shareholder to require that the fundamental transaction be approved by the courts

The most utilized method for a listed company to delist its shares is for it to:

- send a circular to its shareholders:
  - seeking their approval to delist
  - clearly stating the reasons for the delisting
  - containing a bid to the shareholders for their shares accompanied by a statement from the board of directors that the bid is fair (who, in turn, have been so advised by an independent expert appointed for that purpose)
- submit a written application to the JSE stating from which time and date it wishes the delisting to be effective

The JSE Committee will approve the delisting if the aforementioned shareholder approval is obtained and the company has stated the reasons for its delisting in the written application.

The circular and shareholder approval will not be required if:

- in terms of a takeover bid, the bidder is to hold more than 90% of the shares in a Regulated Company and notice was given by the bidder of its intention to delist the shares in the initial bid document or any subsequent circular sent to the shareholders
- following the completion of a scheme of arrangement with shareholders, the bidder has acquired all the shares in the company or the JSE is satisfied (in its discretion) that the company no longer qualifies for a listing

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Yes. In a takeover bid scenario, it is common for the bidder to obtain irrevocable undertakings to support and vote in favor of the proposed transaction from the target's main or institutional shareholders prior to formally submitting its bid to the target.

This is subject to the following restrictions:

- only shareholders holding 5% or more of the aggregate securities subject to the offer may be approached
- not more than five such shareholders may be approached
- the relevant shareholders must sign confidentiality undertakings in relation to the offer
- the shareholders must adhere to the provisions of the Financial Markets Act, 2012, in relation to insider trading prior to the announcement of the offer

The undertakings are usually conditional upon:

- the requisite approvals being obtained (including shareholder approval for the transaction)
- the bid being made within a certain period
- the bidder being satisfied with the outcome of any due diligence investigation it decides to undertake

If the bidder and a shareholder enter into an irrevocable undertaking, that shareholder's voting rights will be excluded when calculating whether the relevant percentage of votes, which are required in support of a resolution authorizing the entering into of the transaction, has been attained.

Aside from the above, the bidder may offer shareholders or management an opportunity to participate in the equity of the target or otherwise post completion, in order to secure their support for the transaction. However, any shareholders entering into such arrangement may run the risk of acting in concert with the bidder.

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

No, there are no restrictions on management incentivization. However, (i) any directors who will benefit from the bid may not form part of the independent board established by the target to evaluate the bid. The independent board is required to state publicly whether it recommends the offer in question to shareholders; and (ii) details of the arrangements or discussions will need to be disclosed publicly in the offer circular.

All shareholders are required to be treated equally.

**10**

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

As stated above, any conflicted directors will be prohibited from participating in the independent board, for the purposes of evaluating the bid. All actual or potential competing bidders are required to be given (on request) the same information by the target. This rule also extends to information disclosed, other than in writing, such as site visits and meetings with the target's management. This poses particular challenges where members of the target's management are also part of the bidder team.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

As with the UK, key challenges and sensitivities include identifying and managing “concert parties” of bidders. Parties are considered to be “acting in concert” by any action pursuant to an agreement between or among two or more persons, in terms of which any of them cooperate for the purpose of entering into or proposing an affected transaction or offer. Concert parties are excluded from voting at any shareholder vote, for the purposes of approving the bid.

Further, certain protections exist during a takeover that protects the value and shareholders of the target. If the board of the target believes that a bona fide offer might be imminent, or has received such an offer, the board must not:

- take any action in relation to the affairs of the target that 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, options or convertible securities
- 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
- make a distribution that is abnormal as to the timing and amount
- without the consent of the TRP and shareholders, or in terms of a pre-existing obligation or agreement

Bidders should be aware that where an offer has not become or been declared unconditional, and has then been withdrawn or lapsed, neither the bidder nor its concert parties can, for 12 months following the date on which the offer is withdrawn or lapses (except with the consent of the TRP):

- make an offer for the target
- acquire any shares of the target that would result in a mandatory offer requirement being triggered



# SPAIN



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

Spanish legislation does not provide a specific regime for take-private transactions. These kind of transactions are subject to the general regime for takeover bids and, in particular, to the regime for de-listing takeover bids and the provisions applicable to the squeeze-out/sell-out rights, as they may involve the acquisition of the total share capital of a target company.

Generally, and depending on the characteristics of the target company, the shareholders' structure and the bidder's strategy, a take-private transaction is usually implemented either as a voluntary takeover bid or as a mandatory takeover bid preceded by a previous acquisition of a controlling interest. Common features of both kind of takeover bids in a take-private transaction include:

- i. The bidder needs to disclose in the relevant offer document its intention to delist the shares of the target company further to the settlement of the takeover bid.
- ii. The price of the takeover-bid needs to be offered in cash, or at least offering the possibility of receiving the consideration in cash, and established according to same criteria used for the so called de-listing takeover bids. This requires that the price is not lower than the highest among the highest price or consideration paid or agreed upon by the bidder or any person acting in concert with the bidder regarding the same type of securities during the 12 months immediately prior to the takeover bid announcement (equitable price) and the price resulting from certain valuation methods established by the Spanish regulation for such purposes and on which an independent expert report is required.

The performance of the transaction by means of a voluntary takeover bid provides the bidder with a more flexible regime and it mainly allows for the subjection of the transaction to different conditions including, as the case may be, the achievement of a minimum percentage of acceptance in the takeover bid or the previous approval of particular resolutions by the general shareholders' meeting of the target company. Additionally, structuring a take-private transaction by way of a voluntary takeover bid eases the reaching of the thresholds for the application of the squeeze-out right referred to below, as more acquisitions of shares are executed "through" the takeover bid instead of outside the takeover bid.

Take-private transactions structured by way of mandatory takeover bids are usually aiming to ensure the acquisition of a controlling interest by the bidder, previously to the relevant takeover bid, and to prevent potential competing bids.

**A.** A mandatory takeover bid obligation is triggered as a consequence of the prior acquisition of a controlling interest in the target company. The threshold that determines control, and therefore the mandatory nature of a takeover bid, is set at the direct or indirect ownership of 30% of the voting rights of the target company, excluding any treasury stock or non-voting shares from the calculation.

In addition, the obligation to launch a takeover bid would also arise if the bidder acquires less than 30% of the target company's voting rights but appoints a number of directors, which, in addition to those already appointed by the bidder if any, exceeds half the number of directors of the target company within 24 months of said acquisition.

Lastly, the acquisition of such a controlling interest and therefore the obligation to launch a mandatory takeover bid may arise also as a result of a group of shareholders considered to be acting in concert. The concert would be deemed to exist in case of shareholders' agreements affecting a controlling interest that aims to establish a common policy with respect to the management of the company or to significantly influence such management or that, with the same objective, regulates the voting rights on the board of directors, in which case the obligation to launch a takeover bid will correspond to the shareholder holding, directly or indirectly, the most voting rights.

**B.** The bidder may exercise its squeeze-out right and force the remaining minority shareholders to transfer their securities to the bidder at the price offered in the takeover bid if, by virtue of the acceptances of a takeover bid:

- a. The bidder holds at least 90% of the voting rights in the target company's share capital.
- b. The bid has been accepted by at least 90% of the voting rights to which it was addressed.

By way of fair reciprocity, under the same conditions, minority shareholders have the right to force the bidder to purchase their securities (sell-out).

Note that the rights of squeeze-out/sell-out are only applicable in takeover bids, whether mandatory or voluntary, for 100% of the affected securities of the target company. Therefore, the squeeze-out/sell-out rights do not arise in the case of partial (voluntary) takeover bids.

The intention of the bidder to exercise its squeeze-out right shall be specified in the offer document and such right shall be exercised within three months as of the expiry of the acceptance period.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** Unless the de-listing is pursued as a result of reaching the squeeze-out right thresholds described above or in other circumstances as described in answer number 7 below, mandatory or voluntary takeover bids that are eventually aiming to de-list the target company will be launched in cash, or will at least offer the possibility of receiving the consideration in cash, and at least at the highest of the following:

- a. The equitable price (precio equitativo), which is the highest price or consideration paid or agreed upon by the bidder or any person acting in concert with the bidder in regards to the same type of securities during the 12 months immediately prior to the takeover bid announcement.
- b. The price resulting from jointly taking into account and justifying the respective relevance of different valuation methods of the shares of the target company, e.g., book value, net asset value, weighted average price over the last six months, consideration offered in a preceding takeover bid and other generally accepted valuation methods, including cash flow discount, company multiples, comparable transactions and others. An independent expert report on such valuation methods is required to be provided by the bidder.

**B.** Although in theory the de-listing of a target company may be pursued as a result of a voluntary offer with compensation in cash, securities or a combination of both that reaches the threshold for the exercise of the squeeze-out right, take-private transactions structured by way of an offer generally require a cash consideration.



### 3

#### **What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

A bidder shall only announce a takeover bid after ensuring that it can fulfil any cash consideration in full, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.

Evidence of a guarantee for the consideration offered shall be provided to the Spanish National Securities Market Commission (CNMV) when filing the request for authorization of the takeover bid or within no more than seven business days of such date. Such evidence shall be provided in the form of either:

- a. a bank guarantee
- b. documents showing that a cash deposit has been made with a credit institution, securing payment of the cash consideration vis-à-vis the market members or settlement systems and vis-à-vis the acceptors of the bid, and allowing for the use thereof by the clearing and settlement system of the market on which the securities covered by the bid are traded

There is no requirement to make public the funding documents that the bidder may have entered into with, for example, financial institutions to obtain financing for a relevant takeover bid although a detailed description in the offer document is mandatory.

### 4

#### **What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

Except for the authorization of the transaction by the relevant antitrust or regulatory authorities, a mandatory takeover bid is not subject to any conditions.

Voluntary takeover bids may be conditioned by the bidder to a range of requirements, including the passing of certain resolutions at the general shareholders' meeting of the target company, the acceptance of the bid by a particular number of securities, the approval of the bid by the general shareholders' meeting of the bidder and, in general, any other condition deemed valid by the CNMV. The regulations applicable to voluntary takeover bids are much more flexible than those governing mandatory takeover bids with regard to the withdrawal.

The Spanish regulation provides a reference to the right of the bidder to withdraw from a takeover bid, either voluntary or mandatory, when due to the exceptional circumstances beyond the control of the bidder, the bid may not be carried or is manifestly unfeasible, provided the CNMV authorizes the withdrawal.

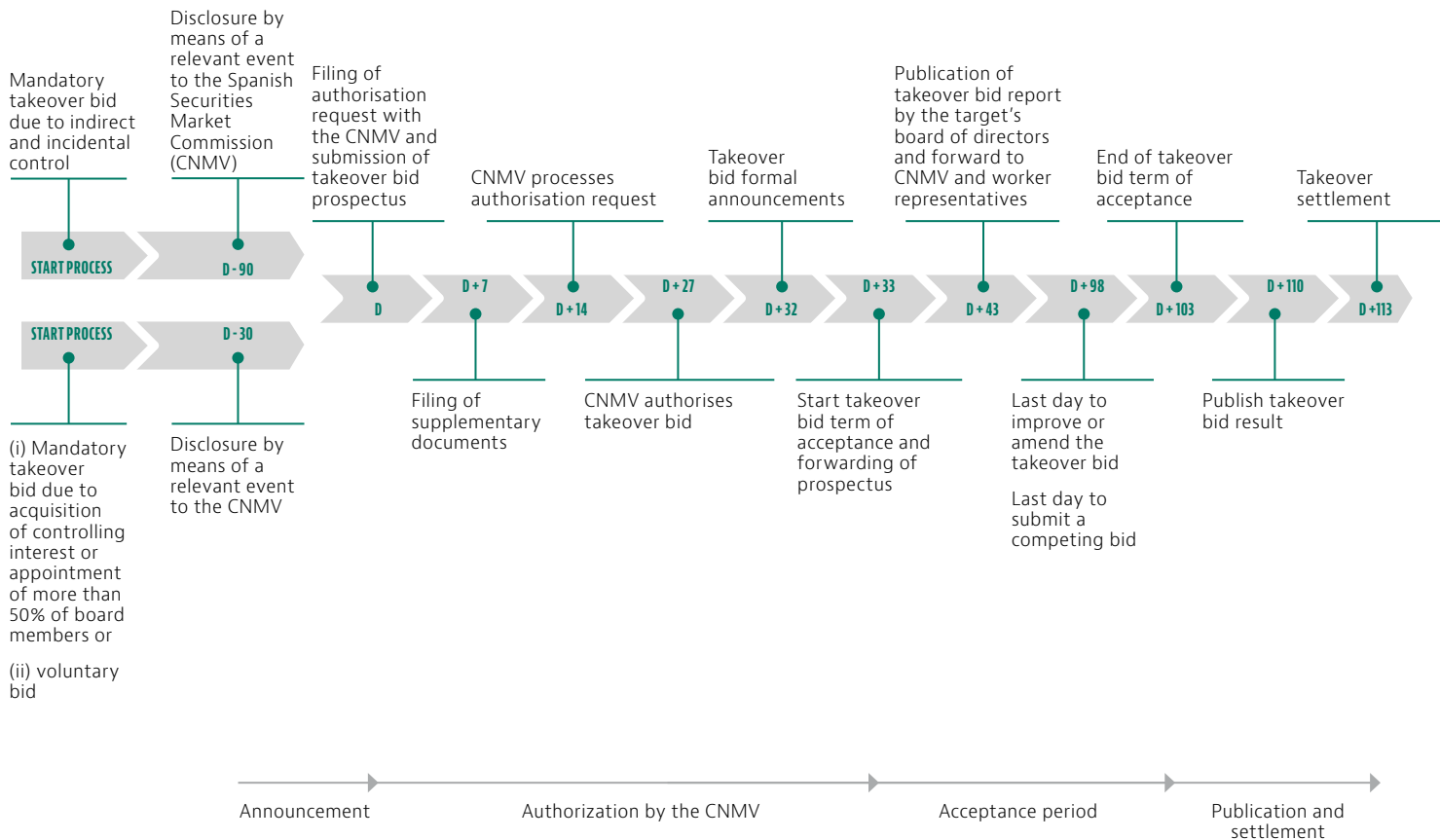
### 5

#### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

In the case of a voluntary takeover bid, the decision to make the bid must be announced as soon as it is adopted. If the consideration of the takeover bid consists of cash, the bidder must, before making the announcement, ensure it can afford such consideration in full. Whoever falls within the obligation to launch a mandatory takeover bid must make public such circumstance and announce the bid immediately. Spanish takeover bid regulation does not contemplate an early disclosure obligation, and in particular, the put-up or shut-up rule is not provided for under Spanish regulation.

## 6 What is the typical basic timeline for a takeover offer?

### Takeover bid (indicative timeline)





## 7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Aside from general voluntary or mandatory bids that are aimed to eventually de-list the target company, a take-private transaction could also be structured:

- a. By way of a specific delisting takeover bid.

A delisting takeover bid may be launched either by the target company or by a third-party bidder, provided that it obtains the approval of the shareholders acting at a general meeting of shareholders of the target company. In practice, this usually requires the bidder to have acquired a majority stake of the target company by means of a preceding bid.

The delisting takeover bid shall be addressed to the entire share capital of the target company and the consideration shall be fully paid in cash. Such consideration shall not be lesser than the higher of:

- i. the equitable price
  - ii. the price resulting from jointly taking into account and justifying the respective relevance of different valuation methods of the shares of the target company, e.g., book value, net asset value, weighted average price over the last six months, consideration offered in a preceding takeover bid and other generally accepted valuation methods, including cash flow discount, company multiples, comparable transactions and others; the determination of the price in accordance with the above shall be documented in a report issued by the board of directors of the target company and usually supported by a valuation report prepared by an independent expert
- b. As a result of a corporate transaction whereby the shareholders of the target company become shareholders of another listed company. If they become, in whole or in part, shareholders of an unlisted company, it will be necessary to launch a de-listing takeover bid.

## 8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Yes, irrevocable commitments or agreements whereby the future bidder undertakes to launch a takeover bid at a given price and within a given period and certain shareholders undertake to accept the bid are common in the Spanish market. These commitments may oblige the undertaking shareholder to accept the bid irrespective of the existence of a competing bid (hard commitments) or may only oblige the undertaking shareholder to accept the bid provided that there is no competing bid offering a higher consideration (soft commitments). Any irrevocable commitments shall be disclosed within the announcement of the bid, and therefore shall be executed beforehand.

Undertakings from the management are not customary in the Spanish market, except for the agreement on a break-up fee. Such a fee may only apply in the event of competing bids, and would be payable by the target company to the first bidder in compensation for the expenses incurred in preparing the bid in the event that its bid is not successful because such competing offers having been made, provided such a fee: (i) does not exceed 1% of the total amount of the bid; (ii) is approved by the board of directors of the target company with a favorable report from the financial advisors to the target company; and (iii) is described in the offer document.

**9****Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

There are no particular restrictions on management incentivization in a public-to-private transaction.

A landmark principle under regulations is that all holders of the securities of a target company whose circumstances are equal must be afforded equal treatment. Moreover, if a person acquires control of a company, the other holders of securities must be protected.

With respect to the target company's management and employees, the offer document shall include information regarding the strategic plans and intentions concerning the future activities of the target, the employees and managers, at least during the 12 months following the settlement of the bid.

**10****Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Where the bidder intends to involve management in the bid and in the target company going forward, particular challenges arise from the rules relating to conflicts and to equality of information to competing bidders.

Within 10 calendar days after commencement of the acceptance period, the target board is required to issue and publish a detailed report on the takeover, stating its comments for and against and expressly declaring any agreement that may exist between the target company and the bidder or the directors or shareholders thereof, or between the latter and the board members of the target company in relation to the takeover bid.

In practice, on receipt of an approach from a bidder, the target board will have to form a view on whether they would be minded to support the bid, give access to due diligence and recommend acceptance.

All actual or potential competing bidders are required to be given (on request) the same information by the target company. This rule also extends to information disclosed other than in writing such as site visits and meetings with the target's management.

# 11

## Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?

A new screening mechanism for certain investments by non-European Union and non-European Free Trade Association residents in certain industries deemed to be of public interest is now applicable in Spain, which may affect any takeover bid launched by non-EU Residents (as defined below).

In particular, the following direct investments in Spanish companies will require prior authorization by the Spanish Council of Ministers (which may take up to six months):

- a. Acquisitions of 10% or more of the stock in Spanish companies (or transactions that otherwise enable an effective participation in the management or control of Spanish companies) by residents in countries outside the European Union and the European Free Trade Association ("non-EU Residents") or by EU Residents ultimately at least 25% owned or controlled, directly or indirectly, by non-EU Residents in connection with certain strategic assets, including: (i) critical infrastructures, e.g., energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructures, and other strategic facilities; (ii) critical technologies, e.g., artificial intelligence, robotics, semiconductors, cyber security, aerospace, defense, energy storage, quantum and nuclear technologies, as well as nanotechnologies and biotechnologies; (iii) supply of energy; (iv) companies with access to sensitive information from a data privacy perspective; and (v) the media.
- b. Investments by foreign investors: (i) directly or indirectly controlled by the government, including any public authority, sovereign funds or the armed forces of a third country; (ii) that have previously invested in, or participated in activities in, companies engaged in the security, public order and public health of another EU Member State (including all the strategic assets listed in paragraph (a) above); or (iii) in respect of which administrative or judicial proceedings have been instituted against in another EU Member State (or in the home state or in a third state for criminal or illegal activities).

Failure to obtain the authorization may result in the transaction being invalid. Performing the investment without having obtained prior authorization is deemed to be a serious administrative infringement, punishable with fines ranging from EUR 30,000 to the amount of the transaction.



For further information or assistance with take-private transactions, please reach out to any of the contacts listed below or your usual Baker McKenzie contact.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered**
- B. minority squeeze-out by the bidder**

**A.** The obligation to announce a mandatory takeover offer is triggered as soon as a person, alone or together with a related party, as a result of an acquisition of shares in the company, directly or indirectly, represents at least 30% of the votes of the outstanding shares of the target company. The Swedish Securities Council may grant exceptions from the mandatory takeover offer obligation.

**B.** If following the takeover offer the bidder directly or indirectly holds more than 90% of the shares, the bidder can force the other shareholders to sell their shares to the bidder at the price offered in the takeover offer, provided that more than 90% of the outstanding shares not held by the bidder were acquired in the offer. If 90% of the outstanding shares not held by the bidder were acquired by the bidder and if the shares are traded on a regulated market, the price will correspond to the listed value on the day the squeeze-out was called for, unless special grounds dictate otherwise. For shares not traded on a regulated market, the price is determined in such a manner that it corresponds to the price for the share that might be expected upon a sale under normal circumstances. This type of squeeze-out procedure is subject to the same rules and procedures that would otherwise apply to a stand-alone squeeze-out procedure outside the framework of a voluntary or mandatory public takeover offer, with the exception of the price.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price**
- B. form of offer consideration**

**A.** The bidder is free, in principle, to decide the price if the consideration is to be paid in cash, subject to the condition that the highest price paid by the bidder within six months before or after the offer, or during the offer, must, in general, be reflected in the price.

**B.** The offered price may be paid in cash, securities or a combination of both. All shareholders of the same class of securities must have equal rights to any form or value of consideration, subject to exceptions granted by the Swedish Securities Council or if there are certain circumstances in the specific case in favor of an exception, such as legal obstacles for receiving the consideration.

**3****What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?**

A bidder must announce an offer only after ensuring that it has certain funds and after taking all reasonable measures to secure the implementation of any other type of consideration. The financing must cover 100% of the shares of the target and be available for the duration of the takeover offer, including any reasonable extensions of the initial acceptance period. In the event that the bidder relies on external financing to implement the takeover offer and the lender sets financing conditions, the tender offer may be made conditional on the release of such funds. It is not required that the funds be made readily available on a designated cash account or a similar account.

The offering announcement should state to what extent the offer is financed with own and borrowed funds. If the relevant financial information about the bidder is not already publicly available, financial key ratios relevant for the assessment of the bidder's ability to pay should be included. If the bidder is dependent on additional or other financing from shareholders or others to complete the offer, relevant information regarding this must be provided. The lender's conditions, however, must be drafted objectively and the financing conditions must be reproduced in summary both in the press release announcing the tender offer and in the offer document. If the conditions governing the payment of a required acquisition credit comply with the requirements of the Swedish takeover rules and do not deviate from what may otherwise be expected for such an arrangement, it is sufficient to provide a short statement of the existence of an acquisition credit on usual terms.

Funding documents must not be made public, but the preparations should be well documented as the bidder may be required to provide documentation in writing where it is clear that sufficient preparations were made.

**4****What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.**

If the bidder has stipulated conditions to the completion of the offer, such as the achievement of a specific level of acceptances, the bidder must state whether these conditions have been satisfied or, where applicable, that the offer will be completed notwithstanding that all of the conditions have been satisfied.

The principal factor that determines the success or failure of a tender offer is whether the bidder obtains a sufficient number of acceptances to provide the bidder with the required degree of control over the target. Normally, the bidder makes the offer subject to the condition that a minimum acceptance level is achieved. The most common is 90% to initiate a squeeze-out procedure to force the remaining shareholders to sell their shares but the bidder reserves the right to waive the condition. In other words, a tender offer cannot be completed unless the acceptance condition is satisfied or waived. Further, if a tender offer has been made conditional, a shareholder who has accepted the tender offer maintains the right to revoke its acceptance until the bidder has announced that the conditions have been fulfilled (or waived) or, if no such announcement is made, until the acceptance period has expired.

In addition to the minimum acceptance level, the bidder is free to make the takeover offer subject to specific conditions that the bidder may not have control over, such as, among other things, merger control clearance or a material adverse change condition. According to the Swedish takeover rules and statements made by the Swedish Securities Council, conditions for a takeover offer must be, with certain exceptions, drafted in such a way that the fulfillment of the condition in question can be determined in an objective manner. To be deemed permissible, conditions should be stated in such a manner as to minimize the degree to which the fulfillment of the relevant condition is made dependent upon the bidder's subjective judgment.



With respect to material adverse change, the bidder often stipulates as a condition for completion that the bidder is entitled to withdraw the offer if, after the offer has been made public, information concerning the target company comes to light that differs significantly from what the bidder had reason to expect given the information published or provided by the target company. Such a condition must be formulated with sufficient precision to allow for the objective determination of whether the condition has been fulfilled.

As stated above, an offer may be conditional upon regulatory approvals. A certain degree of subjective assessment is typically accepted for this type of condition where it is not possible to rely solely on objective criteria. Regulatory approvals that the bidder has stipulated as conditions, therefore, may be subject to requirements only the bidder can determine whether the prerequisites for completing the offer still apply.

If conditions for the completion are stipulated, the bidder is to state that the offer may be withdrawn based on a condition for completion only if the nonfulfillment of the condition is of material importance to the acquisition of the target company by the bidder. This does not apply to conditions regarding achievement by the bidder of a certain level of acceptances of the offer.

A mandatory takeover offer may not have any acceptance condition.

#### **Withdrawal of a takeover offer**

A bidder may only withdraw a takeover offer if the bidder has:

- i. made the takeover offer conditional upon the bidder achieving a certain acceptance level or the passing of certain resolutions in connection with the takeover offer at the bidder's shareholders' meeting, and it is clear that such condition has not or cannot be fulfilled (the Swedish Securities Council has allowed material adverse change clauses relating to changes in the target company's liquidity or profit, but has not allowed such clauses to be applied in relation to changes in, for example, the Nordic capital markets or any other general market)
- ii. made the takeover offer conditional on no third party announcing a takeover offer to acquire shares in the target company on terms and conditions that are more favorable to the bidder's takeover offer, and such third party's takeover offer has been made public
- iii. stipulated a condition other than what is indicated in item (i) or (ii) for the takeover offer's fulfillment, it is clear that this other condition has not been (or cannot be) fulfilled and this other condition is of material importance to the bidder's acquisition of the target company

In the event that the bidder decides to withdraw the takeover offer, it must make such decision immediately available to the public through a press release.

A mandatory takeover offer may not be withdrawn.

## **5**

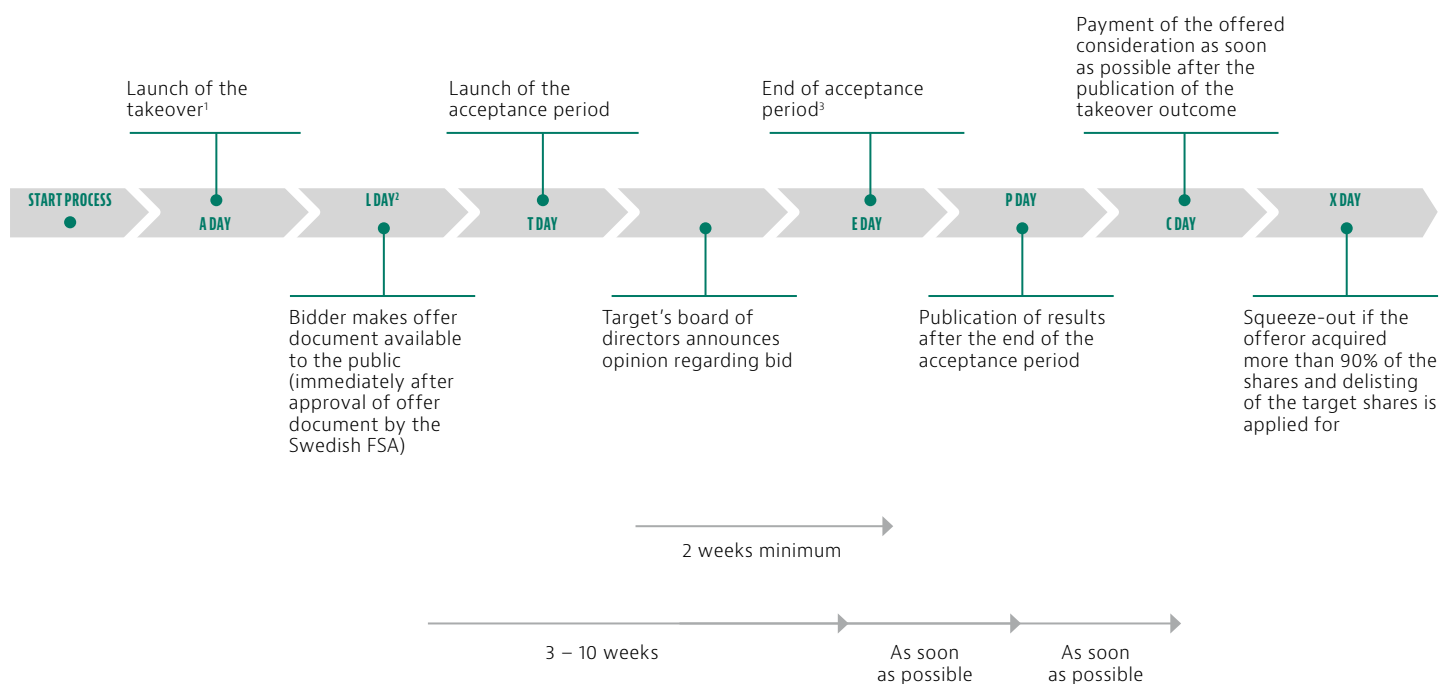
### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

Prior to a bidder announcing a takeover offer, the bidder must undertake to comply with the Swedish Takeover Act and the Swedish Takeover Code by executing an undertaking in writing and submitting it to the regulated market on which the target company's shares are admitted for trading. Prior to announcing the offer, any uncertainty regarding the interpretation of a provision in the Swedish Takeover Code and/or the Swedish Takeover Act in a specific case should be eliminated by submitting an enquiry to the Swedish Securities Council. Information publicly announced must be simultaneously submitted to the regulated market, the Swedish Securities Council and the Financial Supervisory Authority. This is normally done by confirming that the information distributor includes these recipients in its press release distribution list.

If there are rumors or leaks that a potential bidder intends to launch a takeover offer, the Swedish Securities Council could force an announcement, which is normally issued by the target company. This could lead to an early disclosure and possibly an acceleration of the preparations by a bidder, as the bidder could be forced to make an announcement on the bidder's intentions. If a bidder has been compelled by the Swedish Securities Council to make an early disclosure, the Swedish Securities Council may decide that an offer must be announced within a certain period of time or that the bidder must otherwise refrain from making an offer.

## 6 What is the typical basic timeline for a takeover offer?

### Voluntary public takeover (indicative timeline)



1. Offer document filed with Swedish Financial Services Authority (FSA) within four weeks of announcement (but normally before A Day)

2. Usually this is shortly after A Day

3. Normally the acceptance period is closer to three weeks but may be extended by one week to allow for additional acceptances following a declaration that the takeover has been

## 7 Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.

There are no other commonly used methods.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

Yes, it is common that major shareholders undertake to accept the offer under certain conditions in an "irrevocable undertaking." The contacts with such major shareholders are normally initiated in connection with the preparation of a bid, typically prior to approaching the target company or following a positive initial discussion with the target company.

In the offering announcement, the bidder will disclose details of any binding or conditional commitments, declarations of intent or positive statements by shareholders of the target company regarding the acceptance of the offer. If these contracts, commitments, declarations of intent or positive opinions contain terms and conditions, such terms and conditions will be summarized in the announcement so it is clear, for example, in which circumstances a shareholder is not bound by an acceptance commitment.

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

Yes, one of the most important takeover principles is the principle of equal treatment of shareholders, which requires, for example, the bidder to offer all shareholders with identical terms the same consideration per share. If the takeover offer is made for shares with different terms, such as financial terms (such as ordinary shares and preferential shares), the consideration per share may vary. In addition, warrant holders or holders of other financial instruments in the target should receive fair treatment when tendering their securities.

It is permitted to offer certain incentives to employees, conditional on the prior approval of the board of the target company. A determination of whether such approval is to be given is also to be made based on the obligation to act in the interests of shareholders. If the bidder has offered employees of the target company a bonus arrangement or similar prior to the announcement of the takeover offer, details of this arrangement are to be included in the launch press release. Such arrangements may include, for example, one in which employees are promised in advance that they may participate in a bonus programme after the implementation of the takeover offer or that they will receive a certain cash payment if they remain with the target company for a certain period of time after the takeover offer has been completed. Also, in general, management may be offered new/different roles in the target company post-closing (as long as this complies with the principle of equal treatment).

**10**

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Yes, there are rules around situations where members of target management or members of the target's board of directors submit or participate in the takeover offer. In such cases, the minimum acceptance period for the offer is extended from three to four weeks. In addition, the target company must normally obtain a valuation opinion from an independent expert regarding the shares in the target company and publish this opinion no later than two weeks prior to the expiry of the acceptance period. If the consideration offered is in a form other than cash, the valuation opinion also has to include a valuation of the consideration offered. In the offering announcement, the bidder must state: (i) that the offer is subject to the rules contained in the designated chapter of the Swedish takeover rules; and (ii) provide information on which directors or senior executives of the target company that are the cause for the designated chapter being applicable.

**11****Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

Given that certain investors during the last few years have acquired more than 10% of the shares in the target company, thereby preventing a squeeze-out procedure, the takeover offer must be carefully structured to minimize this risk.

For further information or assistance with take-private transactions, please reach out to any of the contacts listed below or your usual Baker McKenzie contact.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered
- B. minority squeeze-out by the bidder

**A.** A mandatory offer is only triggered for public companies. There are two main sets of rules regulating the mandatory tender offer obligation:

- i. Pursuant to the Communiqué on Tender Offers No. II-26.1 ("**Tender Offer Communiqué**"), if a person and/or other parties acting in concert with this person acquire management control of a public company, they are required to launch a tender offer to purchase the shares of the remaining shareholders. Management control is defined as the direct or indirect acquisition of (i) 50% or more of a public company's share capital and/or voting rights, or (ii) preferred shares that entitle their holders to appoint or nominate the majority of the directors. As an exception to this general rule, if persons acquire management control as a result of a pre-emptive capital increase, they can be exempted from the tender offer obligation by the Capital Markets Board of Turkey (CMB).
- i. There are certain cases under the Communiqué on Common Principles of Material Transactions and Shareholders' Put Option No. II-23.1 ("**Material Transactions Communiqué**") wherein a mandatory tender obligation is triggered.

If a shareholder or shareholders of a public company acting in concert hold, directly or indirectly, 95% or more voting rights of a public company, the public company is entitled to apply to Borsa Istanbul (i.e., the only stock exchange in Turkey) for delisting. Under the Material Transactions Communiqué, delisting is classified as a material transaction. Material transactions, e.g., delisting, must be submitted to the approval of the general assembly with the quorum required under the Material Transactions Communiqué. Within five business days following a company's general assembly meeting approving the delisting, (i) the company must apply to Borsa Istanbul to delist its shares and (ii) the shareholder (or shareholders acting in concert) with management control must apply to the CMB to initiate a mandatory tender offer.

**B.** Squeeze-out is applicable for both public and private companies.

- i. **Public Companies:** Pursuant to the Squeeze-Out and Sale Rights Communiqué No. II-27.2 ("**Squeeze-Out Communiqué**"), a person (or persons acting in concert) holding equal to or over 98.0% of the total voting rights of a public company (i.e., controlling shareholder) has the right to squeeze out the minority shareholders, as a result of which the shares of the listed company are automatically delisted and the company converts into a private company. In this respect, a squeeze-out right is triggered when a real person or legal person becomes a controlling shareholder or, in the case of an existing controlling shareholder, makes additional purchases. Whenever the majority shareholder becomes eligible to squeeze out minority shareholders, minority shareholders will first enjoy their sell-out rights. Accordingly, they will have the right to sell their shares to the majority shareholder within three months as of the disclosure of the shareholder becoming a majority shareholder. If any minority-held shares are not sold during the three-month buyout period, the majority shareholder can then call the minority shares.
- ii. **Private Companies:** Under the Turkish Commercial Code, if the controlling company, directly or indirectly, holds at least 90% of shares and voting rights in a capital stock company (*sermaye şirketi*) and the minority prevents the company from running its business, does not act in good faith, creates obvious trouble or behaves in a reckless manner, the controlling company can purchase the shares of the minority at stock exchange value, if any, or at the value determined in accordance with the TCC. This squeeze-out option does not apply to public companies.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

**A. Pursuant to the Tender Offer Communiqué**, the mandatory tender offer price must not be below the higher of (i) the highest price paid by the acquirer and those who act in concert with the acquirer in return for the shares acquired within six months preceding the triggering share acquisition, and (ii) the arithmetic average of the daily weighted average trading price of the shares for the six-month period preceding the date of the public announcement regarding the execution of the definitive agreements for acquiring shares. The calculation methods differ depending on whether the target is acquired indirectly or has different classes of shares with different shareholding rights or privileges.

**Pursuant the Material Transactions Communiqué**, the mandatory tender offer price (for takeovers triggered by material transactions, as explained above) will be calculated over the weighted average price of the shares for the last 30 days prior to the first disclosure to the public of the company's delisting decision.

**Pursuant to the Squeeze-Out Communiqué**, the minimum squeeze-out price is the weighted average price of the shares for the last 30 days prior to the disclosure of the shareholder who becomes a majority shareholder.

**B. Pursuant to the Tender Offer Communiqué**, the mandatory offer price may be paid in cash, listed securities or a combination of both. A selling shareholder must approve the payments in securities in order for the bidder to pay such shareholder in listed securities, partially or fully.

**Pursuant to the Squeeze-Out Communiqué**, payment for the minority shares must be made in cash and Turkish lira.

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

Pursuant to the Tender Offer Communiqué, a bidder must only announce an offer after ensuring that it can fulfil any cash consideration in full, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration where the CMB can request a guarantee from banks or other parties for the consideration. The information form (*bilgi formu*) approved by the CMB must be published on the Public Disclosure Platform (the platform on which public companies in Turkey are required to publish disclosures) and the target company's website within three business days following approval.

## 4

### What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.

A mandatory tender offer cannot be conditional. Voluntary tender offers may be conditional and such conditions may be included in the offer documentation (i.e., information form (*bilgi formu*)) to be submitted to the CMB.

## 5

### When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?

#### i. Public mandatory tender offer

##### ▪ *For the cases explained in 1.a.i above*

The bidder announces its decision to initiate a tender offer, or the event triggering the mandatory tender offer, on the Public Disclosure Platform, following the event triggering the mandatory tender offer requirement, along with:

- price/pricing methodology
- whether the bidder will make an application to the CMB for an exemption

Then, the mandatory tender offer application must be filed to the CMB for approval within six business days from the mandatory offer triggering event, e.g., share transfer.

The mandatory tender offer must be launched within six business days from receiving the CMB's approval.

In any case, a mandatory tender offer must be launched within two months from the triggering event.

##### ▪ *For the cases explained in 1.a.ii above*

Within five business days following a company's general assembly meeting approving the delisting, (i) the company must apply to Borsa Istanbul to delist its shares and (ii) the shareholder (or shareholders acting in concert) with management control must apply to the CMB to initiate a mandatory tender offer. The actual mandatory tender offer must be commenced within six business days following the adoption of the general assembly decision on delisting. Alternatively, the mandatory tender offer can be held prior to the general assembly meeting through a process similar to book building under certain conditions.

#### ii. Public voluntary takeover offer

When the bidder's intention to make a voluntary tender offer is revealed, bidder announces decision to initiate a takeover offer on the Public Disclosure Platform, along with:

- price/pricing methodology
- amount of funds available and source of funds

Then, the bidder applies to the CMB regarding the voluntary tender offer with the required documentation.

The voluntary tender offer must be launched within six business days from receiving the CMB's approval.

#### iii. Squeeze-out

When a person (or persons acting in concert) becomes a controlling shareholder or, in the case of an existing controlling shareholder, makes additional purchases, such shareholder becoming entitled to squeeze out the minority shareholders is required to publicly disclose such entitlement on the Public Disclosure Platform.

If any minority-held shares are not sold in the preceding three months following the disclosure, the majority shareholder can then call the minority shares.

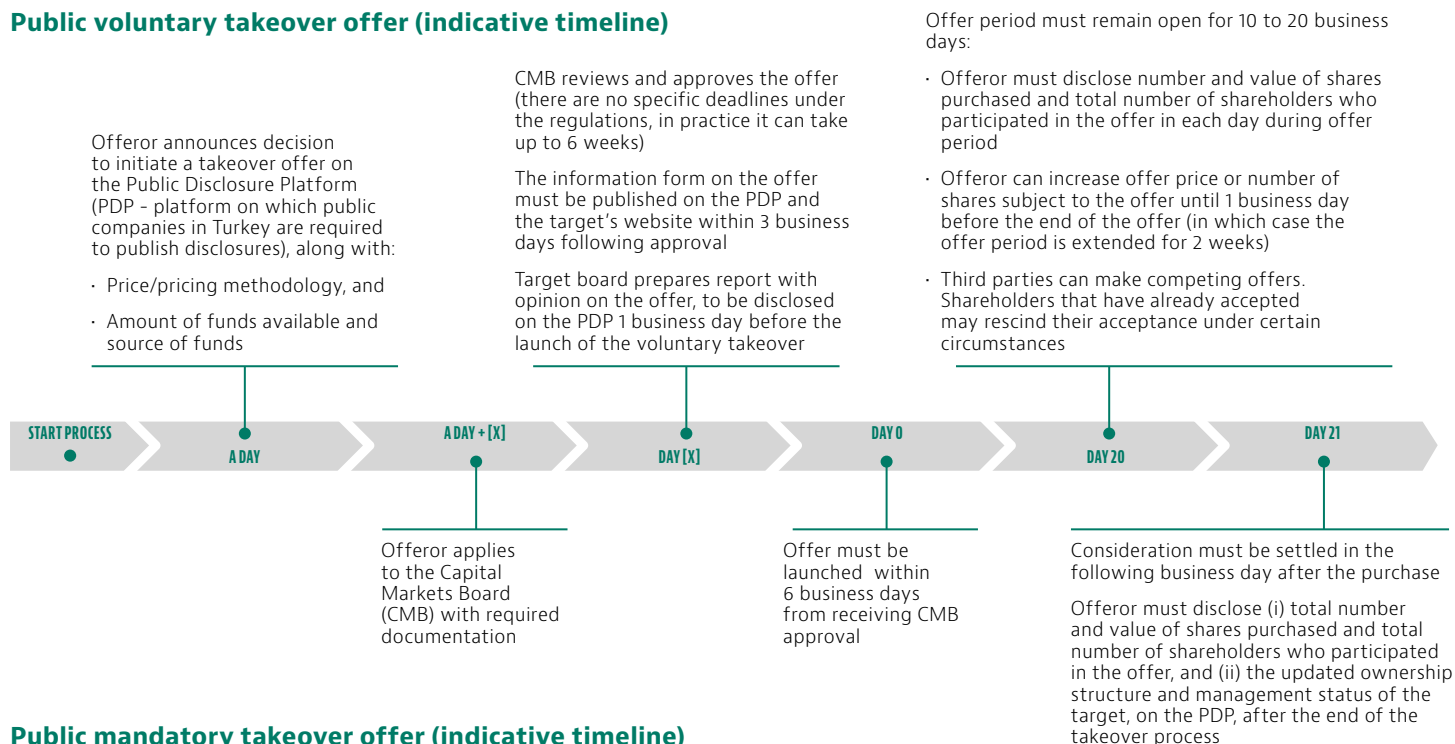
The majority shareholder is required to exercise the squeeze-out right within three business days after the elapse of the three-month period during which the minority shareholders can exercise their put option rights.



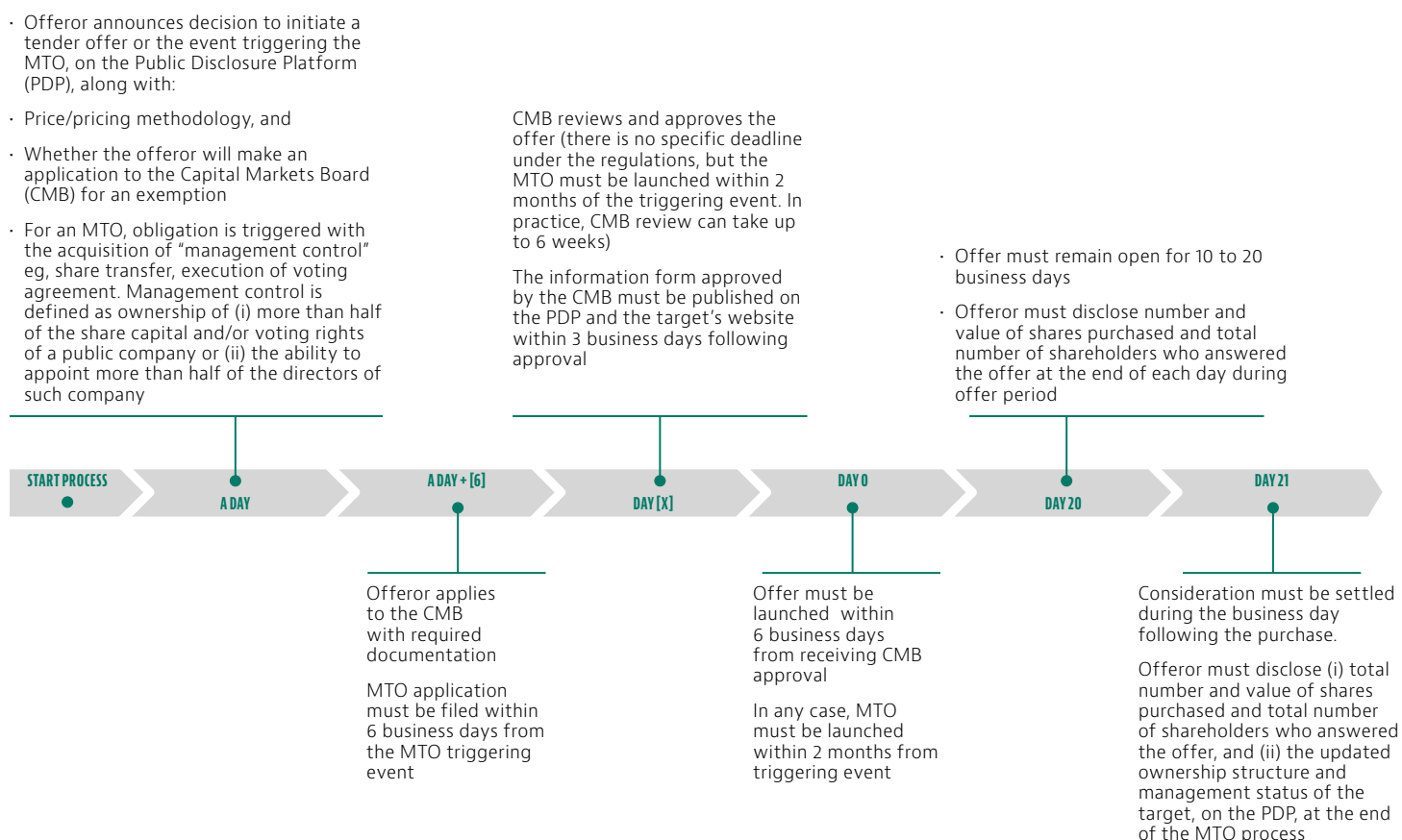
## 6

### What is the typical basic timeline for a takeover offer?

#### Public voluntary takeover offer (indicative timeline)



#### Public mandatory takeover offer (indicative timeline)



**7**

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Takeover bids are made by way of a contractual offer, which may be a voluntary offer. There are no other specific methods under law.

**8**

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

It is possible to obtain contractual undertakings from shareholders to support the transactions. Such undertaking shall have a binding effect only upon the parties of the contractual arrangement. In other words, third parties are not bound by a contractual undertaking to the extent they are not parties to the agreement providing for such undertaking. If a shareholder breaches its undertaking and transfers its shares to a third party, the validity of such transfer will not be affected and the bidder will only be able to seek compensation from the relevant shareholder for damages incurred due to the breach of the undertaking. In terms of timing, there are no statutory obligations.

Inducement fee agreements are not expressly prohibited by law. However, it is prohibited to treat investors unequally or create false markets in the target shares concerned by the offer in such a way that the rise or fall of the prices of the shares becomes artificial and the normal functioning of the markets is distorted. This general rule should be taken into consideration in cases wherein inducement fee agreements are made.

**9**

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

In a takeover bid, all shareholders of the same class must be offered equivalent treatment by a bidder.

**10**

**Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Shareholders of public companies may voluntarily make a tender offer to other shareholders for all or part of the shares of the target. In such cases, the target company's board is required to publicly state its views on the offer, with reasons via an assessment report. While the view of the board is not binding for the shareholders, it may have an effect on the shareholders' decision regarding the tender offer and, accordingly, adversely affect the process.

The board's report on the voluntary tender offer or a competitive offer may provide relief as anti-takeover defense mechanisms, yet the practice of these in the Turkish market is not developed. Conventional anti-takeover mechanisms such as the poison pill (capital increase by the board under the authorized capital system through limiting subscription rights) and cross-shareholding may, in theory, be applicable.

The majority of Turkish public companies have a low free float and are controlled by a single shareholder (or shareholders acting in concert). In practice, this leaves very limited room for hostile takeovers in the Turkish market.

# 11

## Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?

For the purpose of the Turkish tender offer rules, persons are acting in concert if they collaborate with the bidder, the target or any other person on the basis of an express or implied, verbal or written, agreement, aimed at acquiring management control over the target or frustrating the success of a tender offer. Under the Tender Offer Communiqué, individuals and/or entities are deemed to be acting in concert with the following:

- other companies in which the management control is exercised by such individual and/or legal entity shareholders of the target
- individuals and/or legal entities exercising management control of the legal entity shareholders of the target and other companies in which the control is exercised by such individual and/or legal entity, i.e., individuals and/or legal entities exercising management control of legal entity shareholders of the target

The concept of persons acting in concert is very broad and, in practice, many issues can arise in determining whether or not persons act in concert. This is especially relevant in relation to mandatory tender offers. Management control means directly or indirectly holding more than 50% of a public company's voting rights, individually or jointly along with persons acting together, or holding privileged shares with a right to appoint the simple majority of the board of directors or nominate the same in the general assembly. Accordingly, if one or more persons in a group of persons acting in concert acquire the management control of a public company, the members of the group will have a joint obligation to carry out a mandatory tender offer together.

An area that can be particularly sensitive for bidders relates to the requirement for the offer documentation for mandatory tender offers (i.e., tender offer information form (*pay alim teklifi bilgi formu*)) to disclose the bidder's strategic plans regarding the future business of the target. The offer documentation under which strategic information will be disclosed should be approved by the CMB. This can feel uncomfortable for bidders not familiar with Turkish public M&A and should be focused on from an early stage, as problems can arise from inconsistencies between internal presentations, discussions with the target board and public disclosure.

Turkish capital markets rules expressly set out that the bidder is ultimately liable for any untrue, misleading or incomplete information included in the offer documentation. The accuracy of the information to be disclosed via offer documentation should be carefully assessed by the bidders.

For further information or assistance with take-private transactions, please reach out to any of the contacts listed below or your usual Baker McKenzie contact.



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## 1

### What are the thresholds for:

- A. when a mandatory take-over offer obligation (if any) is triggered
- B. minority squeeze-out by the bidder

#### A. A mandatory offer is triggered in two circumstances:

- First, where a person acquires an interest in shares that (taken together with shares in which persons acting in concert with them are interested) carry 30% or more of the voting rights of a company.
- Second, where a person (together with persons acting in concert with him) is already interested in shares carrying between 30% and 50% of a company's voting rights, any further acquisition increasing that percentage (even an acquisition of a single voting shares) triggers a mandatory offer obligation.

**B.** If, by acceptances of a takeover offer, the bidder acquired or unconditionally contracted to acquire at least 90% in value of the shares to which the offer relates and at least 90% of the voting rights attached to such shares, it can force the remaining minority shareholders to transfer their securities to the bidder at the price offered in the takeover bid. A bidder can achieve 100% without using a squeeze-out by using a scheme of arrangement (see answer to question number 7 below), which is usually the more common route for implementing a take-private transaction in the UK.

## 2

### What are the requirements as to offer price:

- A. in relation to minimum offer price
- B. form of offer consideration

Except where the bidder or anyone acting in concert with the bidder acquires or has acquired any interest in securities of the target, there are no restrictions on the nature of consideration or price at which the bid can be made. An acquisition of securities may impact on the nature and level of consideration that the bidder may offer in a takeover bid as follows.

- If the bidder (or any person acting in concert with it) acquires any interest in shares during the offer period, any bid must be in cash or accompanied by a cash alternative at no less than the highest price paid by the bidder during the offer period and within the 12 months prior to the offer period.
- If shares carrying 10% or more of the voting rights are acquired in exchange for securities in the three months prior to the offer period and during the offer period, then the bidder will normally be required in its bid to offer the same class of securities to other target shareholders.
- If a mandatory offer is triggered, the offer must be in cash (or accompanied by a full cash alternative) at no less than the highest price paid by the bidder during the 12 months prior to the announcement of the offer.

## 3

### What is the nature of the evidence of funding capability required to be demonstrated prior to the launch of an offer? Is there a requirement that funding documents must be made public?

The UK Takeover Code ("**Code**") states that a bidder should only announce a bid after ensuring that it can fulfil in full any cash consideration. The UK Takeover Panel ("**Panel**") does not normally permit a bid to be subject to any financing condition and in practice the financing must be available on a "certain funds" basis from the time of the formal launch of the offer. The announcement of a firm intention to make a cash bid must include a "cash confirmation statement" by the bidder's financial adviser confirming that sufficient resources are available to the bidder to satisfy full acceptance of the bid. The financial adviser giving this confirmation could be required to provide the cash consideration if it did not act responsibly and take all reasonable steps to ensure that the cash was available. If the bid is to be wholly or partially funded by drawing down on debt facilities, the ability to draw down on such debt facilities must normally be wholly unconditional or conditional only on sufficient acceptances of the bid being received. The cash confirmation statement itself is all of the "evidence" required but (subject to certain limited exceptions or dispensations) all of the financing documents must be summarized in the offer document and, along with various other documents, must also be published in full (and unredacted) on a website.

## 4

### What conditions may be attached to the offer? Please state, in succinct terms, how the bidder may deal with regulatory and other third-party approvals/clearances and whether a bidder may specify a material adverse change clause.

Following consultation with the Panel, it is permissible to announce a possible offer, the making of which is subject to pre-conditions. Offers must not be subject to conditions or pre-conditions that depend solely on the subjective judgement of bidder directors or target directors or the fulfilment of which is in their hands. UK market practice is to include several very broadly drafted conditions that are objective but would in practice cover any material adverse change. The bidder will only be able to invoke a condition and lapse the offer with the consent of the Panel. A bidder should not invoke any pre-condition or condition (other than the acceptance condition or a condition relating to the scheme of arrangement timetable — see below) unless the circumstances that give rise to the right to invoke the condition or pre-condition are of material significance to the bidder in the context of the offer. The Panel adjudicates on whether the "material significance" test is met and applies a very high threshold for materiality. In practice, a bidder is extremely unlikely to be able to invoke any condition other than relating to shareholder acceptance levels or material regulatory approvals.

If an offer is within the statutory provisions for a possible Phase 2 reference to the Competition and Markets Authority (CMA) it must be a term of the offer that it will lapse if there is a Phase 2 reference to the CMA. A similar requirement applies where the offer falls within the jurisdiction of the European Commission. A bidder (except in the case of a mandatory offer) may make its offer conditional on there being no such reference. Where it is extremely unlikely that a material competition or other regulatory clearance can be obtained within the Code timetable, a bidder can (with Panel consent) make such clearance a pre-condition to launching the offer.

It is worth being aware that in response to the COVID-19 pandemic the UK Government has just introduced a new public interest consideration, which will allow the UK Government to intervene if a company that is directly involved in a pandemic response – for example, a vaccine research company or PPE manufacturer finds itself the target of a foreign takeover (this is in addition to the three other public interest conditions that allow the UK Government to intervene and which relate to national security; media plurality; and financial stability). A condition addressing this would be likely to be treated by the Panel as a regulatory condition that would be capable of being invoked more easily than a condition dealing with a non-regulatory material adverse change event.

## 5

### **When do parties to the offer have to notify the regulator or announce an offer? Are there any particular obligations on the parties prior to announcement?**

Before any public announcement of an offer, the Code requires absolute secrecy. The object of this rule is to avoid the risk of a false market being created in the securities of the target. An announcement is required by the Code in a number of specified circumstances, particularly when:

- a. After an approach has been made by or on behalf of a potential bidder to the target's board, there is rumor and speculation or an untoward movement in the target's share price (generally 5% up in a day or 10% up from the lowest price since the time of the approach).
- b. After a potential bidder first actively considers an offer but before an approach has been made to the target's board, there is rumor and speculation or an untoward movement in the target's share price and there are reasonable grounds for concluding that the bidder's actions (whether through inadequate security or otherwise) have led to the situation.
- c. Negotiations or discussions relating to a possible offer are about to be extended beyond a very restricted number of people. This is generally interpreted by the Panel as six parties, including potential providers of equity or debt finance, shareholders in the bidder or target, pension fund trustees, potential management team candidates and other third parties but not counting those who need to know within the bidder and target nor their immediate advisers. This can pose particular challenges for PE and consortium bids, though there is some scope for the Panel to allow a degree of flexibility in respect of how this "rule of 6" is applied.

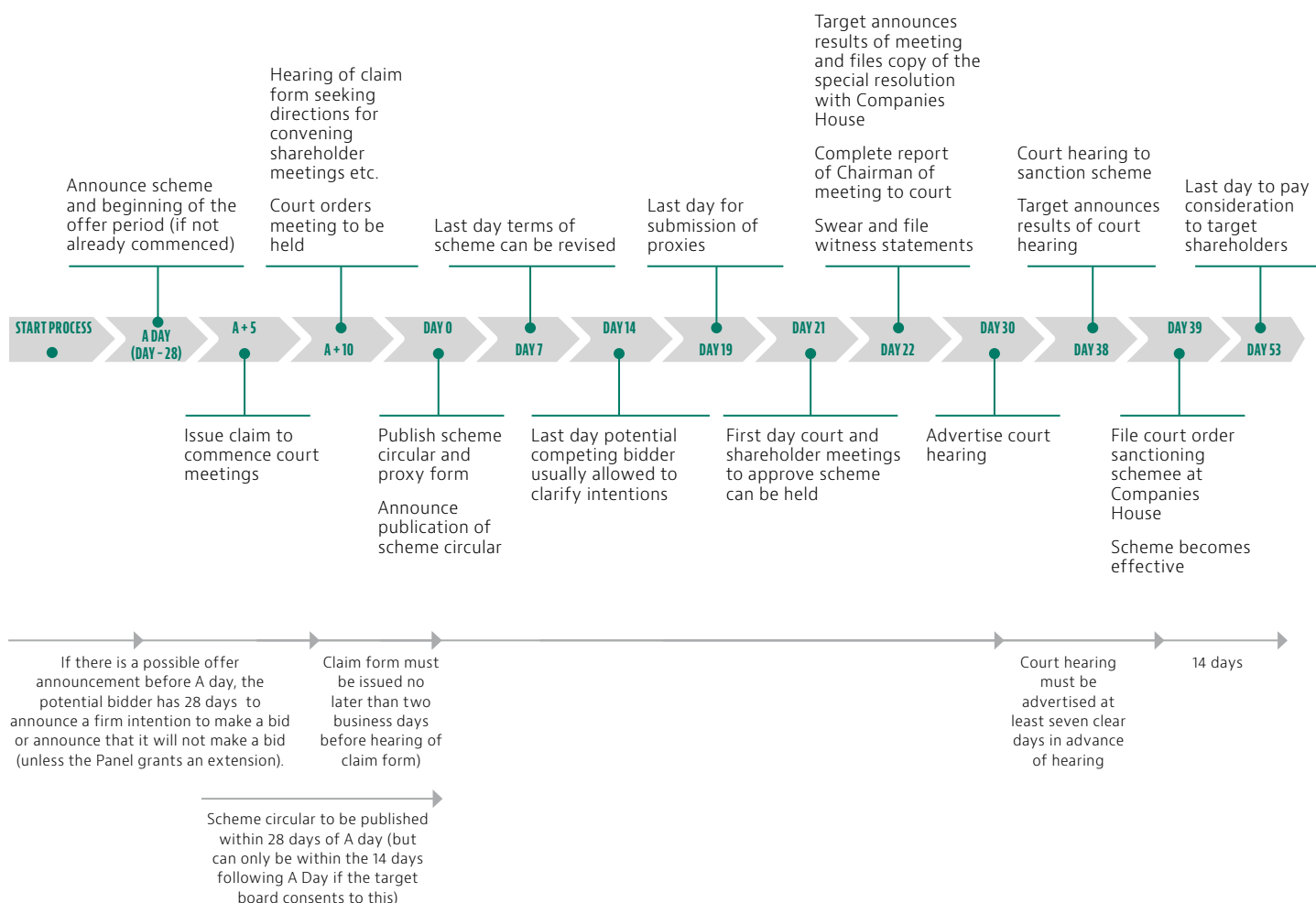
Before a potential bidder approaches the target board, the potential bidder is responsible for making any required announcement. Following an approach to the target board, the target will be responsible for making any required announcement unless it has unequivocally rejected any approach. In cases of doubt, the Panel should be consulted.

Such an announcement, known as a "possible offer announcement," need only be a short announcement stating, for example, that the target has received an approach "which may or may not lead to an offer being made for the company." Any announcement by the target must disclose the identity of all potential bidders who have approached it, unless such an approach has been unequivocally rejected and will specify a 28-day "put-up or shut-up" deadline by which the potential bidder must clarify its intentions either by stating that it won't make a bid or by making a firm intention announcement committing it to launch a formal bid.

# 6

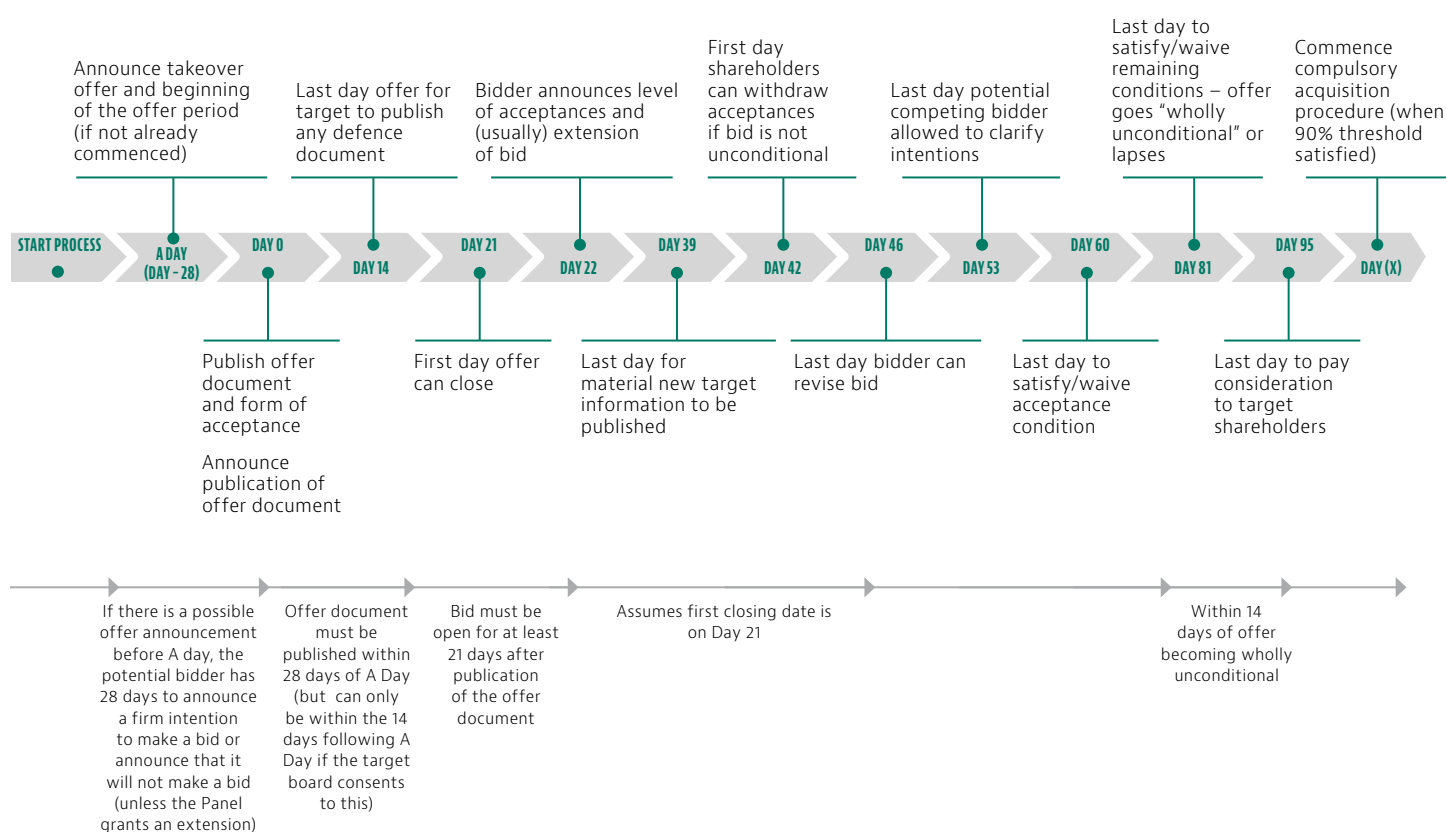
## What is the typical basic timeline for a takeover offer?

### Scheme of arrangement (indicative timeline - assuming court and shareholder meetings held on Day 21)





## Takeover offer (indicative timeline)



7

**Aside from general offers, what other methods are commonly used in take-private transactions? Please state the approval thresholds, requirements for delisting a company and how long these methods normally take.**

Takeover bids in the UK are made by way of a contractual offer, which may be a voluntary offer or a mandatory offer, or by way of a statutory, court approved scheme of arrangement. Under a scheme of arrangement, a takeover can be effected by the passing of resolutions by the shareholders of the target company and with the approval of the court. A scheme requires the approval of a majority in number representing 75% in value of the target shareholders voting on the necessary resolutions. However, once approved, all shareholders are bound by the scheme. A scheme is a process promoted and undertaken by the target, requiring the full co-operation of the target and cannot, therefore, be used in hostile situations. The majority of takeover bids in the UK are implemented by way of a scheme of arrangement, as are the vast majority of take-private transactions because once the requisite 75% approval has been obtained the bidder acquires 100% from the scheme becoming effective. This eliminates the risk of minority shareholders that could, for example, challenge the re-registration of the target as a private limited company, which is essential for security to be granted to lenders.

8

**Is it possible to obtain undertakings from shareholders to support the transaction (i.e., to accept the offer or vote in favor of a proposal)? If yes, when would a bidder approach such shareholders? Aside from obtaining undertakings to support the transaction, what other deal protections and other means are available to the bidder to secure the support of major shareholders or management?**

On a recommended bid, it is market practice for the target directors, who will generally hold shares and/or options in the target, to give “hard” irrevocable undertakings to support the bid. Such undertakings remain binding even in the event of a competing bid. It is also common for bidders to seek “soft” irrevocable undertakings from the target’s major shareholders. These undertakings lapse if a higher competing bid is made above a negotiated threshold. Where these cannot be obtained, the major shareholders may instead be willing to provide non-binding letters of intent in support of the bid. Irrevocable undertakings and letters of intent must be disclosed publicly. In terms of timing, major (non-director) shareholders would generally only be approached within the 48 hours or so prior to the formal launch of the offer.

Aside from such undertakings, and subject to other limited exceptions, the Code generally prohibits inducement fee agreements and other deal protection measures including exclusivity/“no-shop” agreements, implementation agreements and arrangements with a similar or comparable financial or economic effect as an inducement fee.

A bidder may derive some comfort from the restrictions on frustrating action to which the target board is subject from an early stage. During the course of a bid, or before the commencement of an offer period, if the board of the target has reason to believe that a bona fide bid might be imminent, the target board must not take steps which could effectively frustrate the bid. It may not issue shares, options or convertible securities, sell or acquire material assets or enter into contracts outside the ordinary course of business, without shareholder consent. If there is any doubt as to whether a proposed action may be caught by this restriction, the Panel should be consulted. The Panel may consent to such proposed action being taken without shareholder consent if, for example, it is in pursuance of a pre-existing contract or obligation.

9

**Are there any particular restrictions on management incentivization in a public-to-private transaction or treating certain shareholders differently from others?**

All shareholders of the same class must be offered equivalent treatment by a bidder and, subject to very limited exceptions, special deals for certain shareholders are prohibited. In a take-private transaction, it is common for the bidder to wish to retain senior management of the target and to enter into incentivization arrangements post-completion of the acquisition. It is very common for management individuals to hold shares in the target and the Panel recognizes that it is legitimate to incentivize management in their capacity as such, but this is subject to transparency requirements and to additional safeguards.

Where the bidder has entered into, or even had discussions about the potential to enter into, any form of management incentivization arrangements with management, details of the arrangements and/or discussions will need to be disclosed publicly and the Panel's consent to the arrangements must be obtained. As a condition of its consent, the Panel may, depending on the nature of the arrangements, require: (a) that the target's financial adviser publicly states that, in its opinion, the arrangements are fair and reasonable; and (b) that such arrangements are approved by a vote of independent shareholders at a general meeting of the target.

For these reasons, it is fairly common (though not universal) in the UK market for bidders to wait until completion of the bid before entering into discussions with management about their incentivization arrangements going forward.

## 10

### **Does the existence of target management in a public-to-private transaction present any other particular challenges in the process?**

Where the bidder intends to involve management in the bid and in the target company going forward, particular challenges arise from the rules relating to conflicts and to equality of information to competing bidders.

The target board is required to state publicly its views on the offer, with reasons, and whether they would recommend that shareholders accept it. In practice, on receipt of an approach from a bidder, the target board will have to form a view on whether they would be minded to support the bid, give access to due diligence and recommend acceptance. Any members of management who are target directors will be conflicted from being involved in these decisions and in practice a target board in this situation will form an independent committee of the other directors for these purposes.

The Code requires all actual or potential competing bidders to be given (on request) the same information by the target. This rule also extends to information disclosed other than in writing, such as site visits and meetings with the target's management. This poses particular challenges where members of the target's management are also part of the bidder team. In practice, the way in which this rule is applied in that context focuses on information passed by the management team to the PE bidder and finance providers. Management are expected to co-operate with the independent committee to identify and manage this universe of information.

## 11

**Are there any other particular challenges or sensitivities that a bidder in a public-to-private transaction might face in your jurisdiction?**

The other key challenges/sensitivities in the UK relate to identifying and managing “concert parties” of PE bidders, disclosing future intentions for the target business and agreeing with the Panel on which individuals should take responsibility for the offer documentation on behalf of the bidder.

The Code contains provisions requiring persons who “act in concert” to be treated as one person. Persons are treated as acting in concert where, under an agreement or understanding (however informal), they co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company. Persons will also be presumed and/or deemed to be acting in concert where they have any of a number of specified relationships with one another, particularly where there are “associated” companies (with a 20% shareholding threshold being applied). This can be challenging in the context of a PE bidder with a number of portfolio companies, a range of managed funds and various limited partners who will need to be assessed for these purposes. The position can be yet more challenging with sovereign wealth funds. It is usually necessary to undertake a detailed analysis and to engage in substantive discussions with the Panel to agree the extent of the concert parties and the steps expected of the bidder to manage them.

An area that can be particularly sensitive for PE bidders relates to the requirement for the offer documentation to disclose the bidder’s intentions regarding the future business of the target and its employees and pension arrangements. A number of specific areas must be covered, including, for example, plans relating to any research and development function, location of places of business including headquarters and, in particular, the continued employment (or otherwise) of employees and management. The disclosure on these intentions should be pre-agreed with the Panel, who will push for meaningful and specific disclosure, particularly regarding any proposed headcount reductions. This can feel uncomfortable for PE bidders not familiar with UK public M&A and should be focused on from an early stage as problems can arise from inconsistencies between internal presentations, discussions with the target board and the public disclosure. The bidder must make an announcement 12 months after the end of the offer period, confirming whether it complied with its disclosed intentions, and must justify to the Panel and non-compliance by reference to material changes in circumstances.

The Code expressly requires the directors of the bidder individually to accept responsibility for the information contained in the offer documentation and to state “that to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case) the information contained in the document is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the import of such information.” For corporate bidders, the directors of the ultimate holding company of the bidder, as well as of the bidding entity itself, are required to give these responsibility statements. For PE bidders, it will be necessary to agree with the Panel who the appropriate individuals should be for these purposes; usually it is the deal team and key (but not all) members of the investment committee.

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