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The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
March 2019

ISBN 978-1-912509-60-7
ISSN 1752-3362

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf

Country Question and Answer Chapters:

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The Companies Act No 71 of 2008 (Companies Act) has regulated all takeover and public M&A activity in South Africa since 1 May 2011. The Companies Act and the regulations thereto contain provisions regulating takeovers and mergers. These are collectively known as the Takeover Regulations. The Financial Markets Act No 19 of 2012 (FMA) is also a key statute and, among other things, contains the South African Insider Trading and Market Abuse Legislation. Alongside the FMA, the recently enacted Financial Sector Regulation Act No 9 of 2017 (FSRA) aims at restructuring the financial regulatory system in South Africa whilst increasing and reinforcing stability in the financial sector. This statute should be considered when implementing a M&A transaction in the financial services sector.

The Listing Requirements of the Johannesburg stock exchange, operated by the JSE Limited (JSE), apply if:

- The bidder's or target's shares are listed on the JSE. Under the Listing Requirements, the bidder's shareholders must approve an acquisition if the offer consideration (and/or dilutionary effect) is larger than 25% of the market capitalisation of the bidder.
- Any new shares being offered as part of the bid consideration are to be listed on the JSE.

Competition law (anti-trust law) in South Africa is somewhat unique as, unlike in other jurisdictions, the Competition Act No 89 of 1998 (Competition Act) requires, in addition to a substantial impact on competition, that the competition authority review public interest objectives as part of the assessment of competition issues in relation to a merger. Pre-implementation approval under the Competition Act is mandatory for all transactions categorised as "intermediate" and "large" mergers. A merger is defined in detail in the Competition Act and is given further meaning through case law, but entails, in essence, the acquisition of control by one firm over another. A particular merger will require notification to the South African Competition Authorities in the prescribed manner and form where the requisite jurisdiction is present (that is, the transaction constitutes economic activity in or having an effect within South Africa), and that the applicable monetary thresholds are satisfied (based on the turnover and asset values attributable to the transaction parties).

Factors that will be taken into account in the merger approval process are, firstly, whether or not the transaction will prevent or lessen competition (which is an assessment of the usual competition law considerations applied by regulators worldwide). Secondly, the impact of the proposed transaction will be assessed from a public interest perspective, taking into account the effect of the proposed transaction on:

- A particular industrial sector or region.
- Employment.
- The ability of small businesses or firms controlled or owned by historically disadvantaged individuals to become more competitive.
- The ability of national industries to compete in international markets.

While these public interest considerations are afforded equal statutory weight to the more orthodox anti-trust considerations under, and in terms of, the Competition Act, recent decisions of the Competition Tribunal require a causal nexus between a proposed merger and a particular public interest concern in order for the latter to be taken into account as part of the merger approval process.

1.2 Are there different rules for different types of company?

The Takeover Regulations apply to "regulated companies" when they conduct "affected transactions". "Regulated companies" are defined as:

- Public companies.
- State-owned companies subject to certain exceptions.
- Private companies, but only if 10% of the issued securities of the relevant private company have been transferred (other than by transfer between or among related or inter-related persons) within a period of 24 months immediately before the date of a particular transaction, or the memorandum of incorporation of the private company expressly provides that the company and its securities are subject to the Takeover Regulations.

An "affected transaction" is defined in detail in the Companies Act, but in essence includes a fundamental transaction (i.e.: disposal of majority of assets or undertakings; amalgamation or merger; and scheme of arrangement), mandatory offers and squeeze-outs.

Takeovers are regulated by the Takeover Regulation Panel (TRP) established under the Companies Act. The TRP is an independent body that functions as an organ of state within the public administration but as an institution outside the public service. The JSE also has influence over transactions and will ensure compliance with its Listing Requirements. The Competition Authorities will ensure compliance with the Competition Act.

1.3 Are there special rules for foreign buyers?

South Africa does have exchange control legislation. A person cannot transfer any shares to a non-resident without the approval of the exchange control department of the South African Reserve Bank (SARB), which must be obtained through an authorised bank. An authorised bank is a bank in South Africa specifically authorised by the SARB for, *inter alia*, the purpose of regulating foreign-owned shares. Approval is usually given, provided that fair consideration for the shares has been received in South Africa.

There are no exchange control limitations on non-residents purchasing shares in a listed company. In addition, there are no restrictions on the payment of dividends by listed companies to non-residents or to the repatriation of capital to foreign investors.

In the event that a foreign investor structures a transaction in South Africa, exchange control approval may be required, depending on how the transaction is structured and financed. There are potential limitations on the acquisition of agricultural land by way of the Regulation of Agricultural Land Holdings Bill of 2017, where acquisition of agricultural land by foreigners may become prohibited if the Bill is passed into law.

It should be noted in particular that South Africa does not have a dedicated foreign investment approval board. Domestic stakeholders who may wish to challenge a foreign bidder would have to do so under the existing laws and, although arguably not designed for this purpose, the main focus area tends to be the "public interest" test under the competition (anti-trust) laws.

1.4 Are there any special sector-related rules?

Certain industries (for example, broadcasting) have industry-specific legislation applicable to them which precludes foreign buyers from holding above a threshold stake either at all or without obtaining the consent of the relevant minister.

B-BBEE

Broad-based black economic empowerment (B-BBEE) is a policy of the South African government that is aimed at increasing participation by previously disadvantaged South Africans in economic activities. The B-BBEE Act No 53 of 2003 (B-BBEE Act), as amended, is the primary legislation through which this B-BBEE policy is implemented. In terms of the B-BBEE Act, B-BBEE consists of measures and initiatives that are aimed at increasing levels of equity ownership by black people in businesses operating in South Africa, increasing the numbers of black people who participate in management roles in business, improving the skills of black employees, assisting small and medium businesses that are majority-owned by black people, and procuring goods and services from businesses that are good contributors to B-BBEE and corporate social investment.

In addition to the B-BBEE Act, B-BBEE is governed by the generic codes of good practice (Generic Codes), as well as various sector-specific codes (Sector Codes) promulgated under the B-BBEE Act (collectively, the Codes). These Codes set out the details of how B-BBEE scores are measured on each of the different elements identified above, namely: (i) ownership of entities; (ii) board participation, management control and employment equity; (iii) skills development of employees and unemployed people; (iv) enterprise and supplier development, including preferential procurement aimed at ensuring that black people benefit from South African procurement of goods and services; and (v) socio-economic development contributions. Generally, companies are scored, in terms of a scorecard set out in the Codes, on the extent to which they meet the specified targets. However, where a Sector Code is applicable to the industry within which a measured entity operates, the measured entity must be measured only in terms of that sector's scorecard. Some of the industries that are governed by a specific Sector Code include, but are not limited to, the financial, mining, tourism and telecommunications and broadcasting industries.

Over the past three years, the B-BBEE landscape in South Africa has been completely overhauled, and has become more stringent. Among the most significant changes has been the establishment of the B-BBEE Commission, whose primary task includes overseeing, supervising and promoting adherence to the B-BBEE Act in the interest of the public. Although there is no legal obligation for a private enterprise to comply with the Codes, it is important for companies that wish to do business with the public sector or obtain licences or concessions from the government to ensure that they score as highly as possible in terms of the applicable scorecard. It is also notable that in an effort to assess the state of transformation of publicly listed companies on the JSE, the B-BBEE Act requires that all companies listed on the JSE report to the B-BBEE Commission annually on their compliance with B-BBEE. As a consequence, the JSE also amended the JSE listing requirements by placing continuing obligations on JSE-listed companies to publish such B-BBEE compliance reports on their company websites and, furthermore, to make an announcement on the Stock Exchange News Service that this has been done.

B-BBEE therefore has a cascading effect and we are increasingly seeing most companies placing empowerment obligations on their service providers. B-BBEE compliant entities will give preference to service providers who have good B-BBEE credentials, so as to increase their own B-BBEE credentials. Accordingly, compliance with the Codes is often more of a commercial imperative than a legal one.

1.5 What are the principal sources of liability?

South Africa has a sophisticated regulatory environment in the financial services industry. Compliance with laws can, accordingly, be somewhat burdensome and may potentially expose bidders or offerees to liability if laws are not complied with, although the liability regime is consistent with developed economies. By and large, however, the laws are well articulated, grounded in public interest and transparent to participants, particularly where good advice is obtained from advisers.

There is scope for interested stakeholders, such as minority shareholders and/or trade unions, to have an influence on the process, but this can have a delaying effect. However, as mentioned above, the rights of these interested stakeholders are statutory and grounded in public interest.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

General offer

This involves an individual offer to every shareholder (no meeting takes place to approve the offer). Where the offer is accepted by shareholders holding at least 90% of the shares which are subject to the offer, the bidder is entitled, and may be obliged, to acquire the remaining shareholder class. This is known as a "squeeze-out". Partial offers are also permitted where control is acquired but the amount is less than 100%. A key advantage to a general offer is that it does not trigger an appraisal right for dissenting shareholders (which is particularly useful when all or part of the consideration is not cash).

Scheme of arrangement

Under the previous Companies Act (No 61 of 1973), a scheme of arrangement required the sanction of a court: first, to propose the scheme of arrangement and convene the scheme meeting; and secondly, to have the scheme of arrangement sanctioned after shareholders had approved it at the scheme meeting. In terms of the (current) Companies Act, subject to the provisions set out below, no court order is required as a matter of course to propose a scheme of arrangement or sanction it. In other words, a scheme of arrangement has become less administratively burdensome in terms of the Companies Act.

The board of the target company proposes a scheme of arrangement and it is voted on by a special resolution of the target company. The Companies Act prescribes the documentation and information which the target company must provide to shareholders, in order for the shareholders to have the requisite information to vote on the scheme of arrangement.

Despite the special resolution having been passed by the target company, a company may not proceed to implement the special resolution without court approval if dissenting shareholders successfully petition a court in accordance with their rights as prescribed under the Companies Act.

In this regard, a company may not proceed to implement the resolution without the approval of a court if the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution; or the court, on application within the prescribed time periods by any person who voted against the resolution, grants that person leave to apply to a court for a review of the transaction.

An acquirer may also make an offer for the greater part of the assets or undertaking (i.e. business) of the target company, the disposal of which would require a special resolution of shareholders adopted in a similar manner to the resolution required for the scheme of arrangement as set out above.

2.2 What advisers do the parties need?

Generally speaking, parties to an M&A transaction will each appoint legal and financial advisers and, in some cases, public relations consultants. Auditors are also appointed to the extent that the financial information to be disclosed requires review or audit (commonly *pro forma* accounts). The independent board of the offeree company is required to obtain the advice of an independent expert, whose advice must be communicated to the offeree shareholders. When offering cash, an offeror is obliged to confirm that such cash will be available by providing the TRP with either 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 favour of the holders of the offeree shares for the sole purpose of satisfying the cash commitment.

2.3 How long does it take?

The timetable begins with the publication of a firm intention announcement.

- A circular must then be posted by the offeror within 20 business days after publication of the firm intention announcement.
- A general offer opens the day after the offer circular is posted.
- A general offer must remain open for at least 30 business days after the opening date of the offer.
- Within 20 business days after the offer circular has been posted, the independent board must post the offeree response circular.
- A general offer terminates unless:
  - it has been declared unconditional as to acceptances before midnight on the 45th business day after the opening of the offer;
  - the independent board has consented to an extension; or
  - a firm intention of a competing offer has been announced.

Unfortunately, none of the takeover methods have a time advantage over the others, as most takeovers are delayed by the requirement to obtain competition approval prior to implementation of the relevant transaction. Competition approval in South Africa usually takes about three to four months for large mergers, resulting in a delay to the timetables for general offers, schemes of arrangement, and amalgamations and mergers. As a result of this delay, there is no timing advantage from any particular takeover method.

2.4 What are the main hurdles?

It is arguable that the main hurdles in any M&A transaction relate generally to obtaining comfort that there will be a sufficient level of target shareholder support for an offer, as well as the fact that any regulatory approvals that may be required will, in fact, be obtained. Offerors generally want to achieve a high level of comfort on these items prior to proceeding with their bid. As part of launching any bid, a cash confirmation is required which, in terms of the Companies Act, requires a bank guarantee (which can be costly) or a separate escrow arrangement.

2.5 How much flexibility is there over deal terms and price?

There is a stringent principle in South African company law that the holders of the securities in the same class in the target company are afforded equivalent treatment. This would not, however, exclude, for example, the offeror providing an election to shareholders, provided that the same election is given to all shareholders – such as a share offer with a cash alternative. There is no prohibition of obtaining irrevocable undertakings from certain shareholders as to which election they will make, but caution must be taken regarding whether or not such persons may become concert parties under the Takeover Regulations.

2.6 What differences are there between offering cash and other consideration?

In a cash offer, offeree shareholders are protected by the requirement for the offeror to have a cash confirmation by way of a bank guarantee or by way of an escrow arrangement. Where other consideration is offered, it generally takes the form of securities, and offeree shareholders in this regard are protected by the enhanced level of additional disclosure required relating to the securities offered in consideration for the target shares. An offeror offering securities is required to disclose historical audited financial statements as well as other information relating to the offeror securities, including interests in the offeree securities, interests of directors and the like. Offeree shareholders in these circumstances are protected by enhanced disclosure. Depending on the offeror, additional disclosure may also be required by the stock exchange (the JSE) and, in some cases, it may require a prelisting statement or a revised 'listing particulars' document.

2.7 Do the same terms have to be offered to all shareholders?

Consideration can take the form of cash or securities. However, if the offer is made and the offeror has acquired securities in the target company within a six-month period before the commencement of the offer period, the offer consideration per security to the target shareholders of the same class must be:

- Identical to or, where appropriate, similar to the highest consideration paid for those acquisitions.
- Accompanied by a cash consideration of no less than the highest cash consideration paid per security, if securities that carry 5% or more of the voting rights were acquired for cash.

There are additional disclosure requirements if the offer consideration takes the form of payment in securities of the offeror.

2.8 Are there obligations to purchase other classes of target securities?

Yes. If the company has more than one class of issued "securities" and an offer is made by a person or persons which would result in that person or persons exercising more than the prescribed percentage (35% of the general voting rights associated with all issued securities of the company), then that person or those persons acting in concert must make a comparable offer to acquire securities in each class of issues securities of the company. "Securities" is broadly defined, but does not include any instrument issued by a regulated company, unless that instrument:

- has associated with it the right to vote generally at a general shareholders' meeting; or
- is convertible into an instrument that has associated with it the right to vote generally at a general shareholders' meeting.

2.9 Are there any limits on agreeing terms with employees?

Insofar as employees are also shareholders, the rules mentioned above about affording all shareholders equivalent treatment would apply to them in their capacity as shareholders. In their capacity as employees, the anti-trust authorities (the Competition Commission and the Competition Tribunal in South Africa) take into consideration employees and, in particular, retrenchments under the category of "Public Interest" when weighing up public interest arguments in favour of or against a proposed merger or acquisition. Employees would generally be protected by a sophisticated body of employment law in South Africa and may also be subject to constraints – i.e. insofar as they are also directors, they will be subject to fiduciary duties.

2.10 What role do employees, pension trustees and other stakeholders play?

In terms of the Takeover Regulations, there is no requirement to obtain approvals from the above-mentioned categories. Registered trade unions may also bring a derivative action to protect the legal interests of the company under the laws applicable to derivative actions in the Companies Act.

2.11 What documentation is needed?

A firm intention announcement is required when a mandatory offer is triggered or when an offeror has communicated a firm intention to make an offer and is ready, able and willing to proceed with the offer. A firm intention announcement must be made immediately when the board of the target company has received a formal written offer, or an offeror is obliged to make a formal offer, having triggered the requirements of a mandatory offer. Thereafter, a circular must be posted by the offeror within 20 business days after publication of the firm intention announcement. A general offer opens the day after the circular is posted and must remain open for at least 30 business days after the opening date of the offer. Within 20 business days after the offer circular has been posted, the independent board must post the offeree response circular.

Shareholders typically receive two key documents; namely, the offeror circular and the offeree circular (unless they are combined as set out above). The Takeover Regulations prescribe the information that must be contained in an offeror circular. Depending on the nature of the transaction, this may also include a report by an independent expert on the fairness of the offer. Within 20 business days of the offeror circular being posted, the offeree board is required to post its circular. Likewise, the Takeover Regulations prescribe what information is required to be contained in the offeree circular.

There are no material differences if the bid is hostile or there are competing bidders. In friendly transactions, it is market practice to combine the offeror and offeree circulars. This is not the case in a hostile or competing bid environment. Neither an amalgamation and merger, nor a scheme of arrangement, can be done on a hostile basis.

2.12 Are there any special disclosure requirements?

The process and content of disclosure is well-regulated in terms of the Takeover Regulations. All announcements must be approved by the TRP and the firm intention announcement, offer document and response circular have prescribed minimum contents as set out in the Takeover Regulations.

A firm intention announcement must contain the following information:

- The identity of the offeror and any concert parties.
- The terms of the offer, including, but not limited to, the type of offer proposed and the mechanics of implementation.
- The classes of securities affected.
- The consideration offered.
- The *pro forma* earnings and asset value per offeree security.
- Conditions as to acceptance of the offer or any other conditions.
- Details of the cash guarantee or cash confirmation provided to the TRP.
- Confirmation that the offeror has sufficient securities to settle any consideration payable in securities or has a condition to acceptance regarding the increase in authorised share capital.
- Estimated timetable.
- If known, the details of any beneficial interest in the target company held by the offeror or any person acting in concert with the offeror, as well as any party who has provided an irrevocable undertaking.

2.13 What are the key costs?

In addition to professional advisory fees, the TRP charges certain statutory fees in accordance with the Companies Act and anti-trust (competition) approval is commonly required, and this incurs both a regulatory filing fee and professional advisory fees. In addition to shareholder approvals, where required (e.g. a scheme of arrangement), approvals from relevant regulators will be required and potentially from the stock exchange. The relevant regulators are the TRP, commonly the anti-trust authorities (Competition Commission and Competition Tribunal in South Africa) and potentially other sector-related specific approvals, such as for the broadcasting industry or the banking, insurance or mining sectors, by way of example.

2.14 What consents are needed?

In addition to shareholder approval, discussed in question 2.15 below, the key consents required will be regulatory in nature (i.e. competition authority or some sector-specific regulatory body such as insurance, banking, mining or broadcasting regulators and the like). Naturally, an M&A transaction often triggers a change of control and, accordingly, the offeree's contractual arrangements may need to be analysed to see whether any contractual rights are triggered in this regard.

2.15 What levels of approval or acceptance are needed?

The prescribed percentage in terms of the Takeover Regulations is 35% of the voting securities of a company; at which point, the offeror (and persons acting in concert with the offeror) is deemed, for the purposes of the Takeover Regulations, to have obtained control of the target company and will be required to make a mandatory offer.

In addition, in terms of section 124 of the Companies Act, if an offer for the acquisition of any class of securities of a regulated company has been accepted by the holders of at least 90% of that class of securities (other than any such securities held by the offeror before making the offer), the remaining minorities can be expropriated at the same price in terms of the compulsory acquisition and squeeze-out regulations.

2.16 When does cash consideration need to be committed and available?

When the offer consideration is wholly or partly cash, a bidder needs to have funding in place at the commencement of the offer process. The firm intention announcement has to contain details of the cash guarantee or cash confirmation that has been provided by or on behalf of the bidder to the TRP. A party is not allowed to make a bid without being in the position to fulfil its obligations to carry out the bid. Note that the requirement for the guarantee or cash confirmation is fairly stringent and must be provided in the form of either (i) an irrevocable unconditional guarantee issued by a South African registered bank, or (ii) an irrevocable unconditional confirmation from a third party that sufficient cash is held in escrow, in favour of the offerees, for the sole purpose of satisfying the cash offer commitment.

3 Friendly or Hostile

3.1 Is there a choice?

Yes; however, note that hostile bids cannot be done by way of a scheme because a scheme is required to be proposed by the target board. Under South African law, both options are available; however, hostile bids are less frequent, although not uncommon.

3.2 Are there rules about an approach to the target?

Yes. As mentioned above, the approach is triggered by an offer or a firm intention to make an offer, followed by the offer circular and the response circular.

3.3 How relevant is the target board?

The views of the target board are certainly relevant and the independent board must publish a response circular setting out its views on the offer within the prescribed time period.

As a result of the restrictions of frustrating actions detailed above, there are limited avenues open to a target board to defend a hostile bid. Such bids can, however, be defended on technical grounds – that is, non-compliance with legal requirements or by using a delaying tactic in objecting to the competition authorities or industry regulators (for example, insurance, banking, mining or broadcasting).

3.4 Does the choice affect process?

Yes; however, as mentioned, hostile bids are rare in a South African context and only a handful have succeeded over recent years. One of the key reasons for this is that once a bid turns hostile, the option to follow a scheme of arrangement process is no longer available as this is seen to require the cooperation of the target board. This leaves only the offer process available to bidders, thus requiring a minimum of 90% in order to invoke a squeeze-out.

4 Information

4.1 What information is available to a buyer?

A target company is not obliged to give a bidder the right to conduct a due diligence exercise. However, if a target company does allow a potential offeror the right to conduct a due diligence exercise and provides information to the potential offeror, in terms of the Takeover Regulation, the target company must, on request, give the same information equally and as promptly to a less welcome, but *bona fide*, offeror or potential offeror. Where no information is given by the target company and no information can be obtained from the target company in terms of the equality of information provisions, only information available to the general public concerning the target will be obtainable. This includes:

- The target company's memorandum of incorporation.
- The target company's share register (including details of the company's share capital and shareholders).

- Directors' details.
- Any prospectus or circular previously published by the company.
- The target company's annual financial statements and interim report.

4.2 Is negotiation confidential and is access restricted?

This area is regulated by the FMA, the JSE Listings Requirements and the Takeover Regulations. In short, all negotiations between an independent board and the offeror must be kept confidential. Confidentiality must be observed before a cautionary announcement or firm intention announcement containing "price-sensitive information" is made. Price-sensitive information may be provided to selected persons on a confidential basis. If there is a leak of such information or a reasonable suspicion that such a leak has occurred, the information must immediately be disclosed in a cautionary announcement.

4.3 When is an announcement required and what will become public?

A firm intention announcement is an announcement that must be made when a mandatory offer is required or when an offeror has communicated a firm intention to make an offer and is ready, able and willing to proceed with the offer. A firm intention announcement must be made immediately when the board of a target company has received a formal written offer, or an offeror is obliged to make a formal offer having triggered the requirements of a mandatory offer. Mandatory offers are dealt with in greater detail in section 7.

4.4 What if the information is wrong or changes?

In some respects, this will be regulated by the proposed contract or offer between the offeror and the offeree. If the target information is not correct and there are walk-away terms for the offeror in this regard, these may be enforced, although note that no subjective conditions are permitted to be included in an offer. Depending on the materiality of the information that is incorrect, in some cases, it may be cured by a simple announcement or supplementary disclosure, and in other cases, it may result in the offer failing. There are provisions for revised offers under the Takeover Regulations. Listed companies are also obliged to announce any information or developments in their sphere of activity which would have a material impact on the price (i.e. price-sensitive information).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

A bidder is free to buy shares in the target company in the period leading up to a bid, subject to the insider trading laws. Note in this regard that inside information must come from an insider, and the bidder's own knowledge does not necessarily constitute inside information unless it is obtained from an insider. The bidder is required to disclose its acquisition to the target company if, by the time of acquisition, the bidder reaches any of the threshold limits of 5%, 10%, 15% or any further multiples of 5% of the issued securities of that class in the share capital of the target company.

It is important to note that stake-building may lead to an obligation to launch a mandatory offer. A bidder is required to launch a mandatory offer once it has acquired securities that, together with any other securities of the target company already held by that person, they are able to exercise at least 35% of the voting rights attached to the securities of that company. Up to the 35% threshold, the acquisition of shares is unregulated in terms of securities law.

5.2 Can derivatives be bought outside the offer process?

Yes, although note that instruments convertible into voting securities may be regarded as securities for certain purposes under the Takeover Regulations.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Please see questions 5.1 and 5.2 in this regard.

5.4 What are the limitations and consequences?

Once a bidder has acquired 35% of the voting rights of the shares in a target company, the bidder is obliged to give notice to shareholders stating that they are in a position to exercise 35% of the voting rights attached to the securities of the company and offering to acquire the remaining securities of all the shareholders on the terms and conditions set out in the Takeover Regulations.

6 Deal Protection

6.1 Are break fees available?

The payment of break fees is not uncommon in large transactions. The TRP will generally permit a break fee, provided that it does not exceed an amount equal to 1% of the value of the transaction.

It is permissible to grant potential offerors exclusivity. The prevailing view in the local market (although this has not been tested by a South African court) is that:

- "No shops" are probably enforceable.
- Directors' fiduciary duties would require them to deal with and entertain an unsolicited bid even if they have signed an exclusivity agreement with a prior bidder.

In order for a preferred bidder to succeed with the transaction, it is not unusual for it to seek irrevocable undertakings from major shareholders of the target company. In these circumstances, bidders need to be careful that the irrevocable undertakings do not extend beyond mere voting support as there is otherwise a risk that the parties could be seen to be acting in concert (that is, the supporting shareholder could be seen to become part of the offeror).

6.2 Can the target agree not to shop the company or its assets?

The target is able to conclude a transaction with a third party which it cannot revoke even if it gets a better offer; however, any such transaction would always be subject to the approval of shareholders. Insofar as directors of the target are concerned, they cannot fetter their discretion to recommend a better offer to the target's shareholders if one presents itself and, in doing so, recommend against voting for the proposal which has been accepted by the target. A more difficult question which has never been decided by the South African courts is whether directors could undertake to not actively seek alternative offers if they believed that the target would lose an attractive offer if they failed to do so. Although a moot point, we are of the view that such undertaking could be made, being an exercise rather than a fetter of the directors' discretion. Even if such 'non-procurement of offers' undertaking was given by the directors, they would still have a duty to recommend a better offer if an unsolicited one was made.

6.3 Can the target agree to issue shares or sell assets?

If a potential offeror and the directors of a target company are negotiating on a consensual basis, an offer in good faith must be regarded as being imminent. If the offer is imminent or is reasonably expected, the board of directors of the target company is bound by the restrictions on frustrating actions; namely, the board must not, without the approval of the TRP and shareholders (unless in terms of a pre-existing obligation or agreement entered into beforehand), take any action in relation to the affairs of the company that could effectively result in:

- A *bona fide* offer being frustrated.
- The holders of relevant securities being denied an opportunity to decide on the merits of the general offer.
- Issue any authorised but unissued securities.
- Issue or grant options in respect of any unissued securities.
- Authorise or issue, or permit the authorisation or issue of, any securities carrying rights of conversion into or subscription for other securities.
- Sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount except in the ordinary course of business.
- Enter into contracts otherwise than in the ordinary course of business.
- Make a distribution that is abnormal as to timing and amount.

6.4 What commitments are available to tie up a deal?

In order for a preferred bidder to succeed with a transaction, it is not unusual for it to seek irrevocable undertakings from major shareholders of the target. In terms of the Takeover Regulations, it is not, however, entitled to approach more than five shareholders and then only shareholders holding 5% or more of the shares of the target company. The major shareholders could, therefore, provide such undertakings and assist a preferred bidder to succeed. Subject to question 6.2 above, the directors of the target could give certain undertakings not actively to pursue competing offers. Moreover, if a scheme of arrangement is entered into or a sale of assets is concluded by the target company, the only avenue open to a competing offeror would be an individual offer to every shareholder through which it is more difficult to obtain a holding of all the shares in the target; that is, the agreement by the target to the acquisition, while not a guarantee that the approved bidder will succeed, is certainly an advantage in any contest that develops.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

A bid can be made subject to a number of pre-conditions; however, caution must be taken to ensure that the bid is not construed as a firm intention to make an offer. This is usually done by the offeror informing the target company that it intends to make a bid after a number of conditions (usually a due diligence) have been fulfilled. The bid is usually confidential at this stage.

There are no mandatory conditions that are required to be attached to a bid. All bids are subject to the Takeover Regulations and must comply with those regulations, and a breach may be subject to action by an interested party or by the TRP, but there are no mandatory conditions which arise. Bids are often subject to regulatory approval, which is particular to the relevant sector and occasionally subject to certain other commercial conditions, such as a material adverse change (MAC) condition, though MAC conditions in particular are viewed cautiously by the TRP to ensure that they do not create subjective optionality in favour of the offeror. All conditions must be objective and not within the control of the offeror.

7.2 What control does the bidder have over the target during the process?

Generally speaking, if a condition is not fulfilled, the offer will lapse unless the terms of the offer prescribe otherwise. Usually, the nature of the conditions is such that if they lapse, the offeror is not legally entitled to proceed, or it is commercially undesirable to do so. There may exist certain circumstances where a condition has been permitted by the TRP on the grounds that it is objective and not within the control of the offeror, but that if it lapses, the offeror may nevertheless agree to proceed. A MAC clause would be an example of such a condition.

Note that under competition (anti-trust) law, an acquiror may not pre-implement any notifiable transaction, which is sometimes known as "gun jumping" (i.e. a bidder cannot acquire control of the target prior to approval of a notifiable transaction). There are fairly stringent penalties for gun jumping (up to 10% of turnover) and although enforcement is common, the maximum penalty is seldom levied.

7.3 When does control pass to the bidder?

Control will pass to the bidder when the offer becomes unconditional and has been implemented. The precise date can be specified in terms of the scheme of arrangement, as read together with the Listings Requirements of the JSE.

7.4 How can the bidder get 100% control?

If, within four months after the date of an offer, it has been accepted by the holders of 90% of the class to whom the offer was made (excluding the shares held by the offeror), the offeror can, within a further two-month period, give notice to the remaining shareholders that it wishes to acquire their shares. If the offeror gives such notice, the offeror is entitled and obliged to acquire the shares of the remaining shareholders at the same price at which the original offer was made.

If an offeror has acquired 90% of the securities of any class, it is obliged to give the holders of such class notice that the offer has been accepted to that extent. Within three months after receiving the notice, any shareholder of that class may demand that the offeror acquire their shares on the same terms as applied to the original offer.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Once the offeree company has received a firm offer or a firm intention to make an offer, it must make an announcement which must generally contain information relating to the offer, the identity of the offeror, details of its existing holding of shares in the offeree, all material conditions attaching to the offer and details of any arrangements which exist between the offeror and the offeree. Precise disclosures and timing are both regulated in terms of the Takeover Regulations.

8.2 What can the target do to resist change of control?

As a result of the restrictions of frustrating actions detailed above, there are limited avenues open to a target board to defend a hostile bid. Such bids can, however, be defended on technical grounds – that is, non-compliance with legal requirements or by using a delaying tactic in objecting to the competition authorities or industry regulators (for example, insurance, banking, mining and broadcasting).

8.3 Is it a fair fight?

The South African regulatory regime generally favours a friendly bidder as opposed to a hostile bidder. A scheme of arrangement and/or an acquisition of the target's assets are not procedures available to a hostile bidder as the offeree board's consent is required to implement these. In addition, the approval threshold for a scheme is, in practicality and in law, lower than that required for a squeeze-out. A squeeze-out requires 90% of all offerees, whereas a scheme of arrangement requires 75% (of those at the meeting and voting).

The Takeover Regulations are considered to be a fair balance of protection for minority shareholders and achieving efficient economic activity in the economy.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The commercial terms of the offer are, in our view, the prime influence on the success or failure of a bid. In this regard, the price of the offer will obviously be a key factor influencing the outcome of the process, as well as other material commercial terms. The structure of the offer is key. Offers which can be implemented quickly have a much greater chance of success than offers which are structured in such a manner that the process takes too long. It is crucial for an offer's success that one avoids legal challenges by avoiding controversial features, as even if these challenges are not successful, they hold up the process, making its success more remote.

9.2 What happens if it fails?

Note in terms of the Takeover Regulations, if a bid fails or lapses after it has been announced or posted or is subsequently withdrawn, neither the offeror, nor any person acting in concert with the offeror, shall be entitled to make a further offer for a period of 12 months after the date on which the offer was withdrawn or lapsed.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

The relatively recent introduction of the Companies Act has made some changes to takeover regulation in South Africa and has introduced, in particular, the concept of a statutory merger and the concept of dissenting shareholder appraisal rights. As with any new piece of legislation, it will take time to refine Takeover Regulations and iron out any deficiencies in them. On the whole, the new Takeover Regulations are an improvement, filling in many of the gaps which existed under the prior regulations. Accordingly, the new Takeover Regulations have added further clarity and certainty, which should be beneficial to future M&A activity. Hostile takeovers are still rare in the South African environment, with many offerors shying away from them if at all possible. It is anticipated that this trend will continue. The concept of B-BBEE, as discussed in question 1.4, is currently a topical and political issue in South Africa, and is likely to remain so for the foreseeable future. The recently enacted FSRA, as discussed in question 1.1, should be considered when implementing a M&A transaction in the financial services sector.

Acknowledgment

The authors would like to thank Doron Joffe and Sanjay Kassen, directors of ENSafrica's corporate commercial department, for their invaluable assistance in the preparation of this chapter.

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