Corporate M&A
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Singapore: Law & Practice
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1. TRENDS

1.1 M&A Market
M&A activity in Singapore has seen a record deal volume of 828 M&A transactions in 2021, with an announced value of USD198.9 billion. One of the bigger deals in 2021 was Singapore-based Grab’s USD39.6 billion merger with Altimeter Growth Corp. Further, there was a total of seven de-SPAC (special purpose acquisition company) transactions amounting to USD42.8 billion while there was just one in 2020.

In the past 12 months, businesses have embraced cheap financing and pandemic recovery, with delayed pre-COVID-19 pandemic fundraising now in full swing. This has resulted in global M&A volumes topping USD5 trillion for the first time, with the overall M&A value standing at USD58 trillion, up 64% from 2020.

1.2 Key Trends
Beyond the record period of deals in 2021 noted in 1.1 M&A Market, Singapore-targeted M&A activity also amounted to a combined value of USD94.7 billion, up 97.8% compared to 2020.

1.3 Key Industries
In Singapore, the technology industry was the leading M&A sector for nine consecutive months, between August 2020 and April 2021, with media taking the spot as the most targeted sector in May 2021 and notable high-value deals from the TMT sector.

The technology sector (47%) reigned supreme in 2021 with a total deal value of USD93.7 billion with the healthcare (20%) and real estate (15%) sectors following behind in terms of M&A deal value.

Impacted Sectors
Many industries have been badly affected by the COVID-19 pandemic, such as the aviation, tourism, food services, land transport and arts and culture sectors. The Singapore government has hence introduced financial measures such as the resilience budget to help these sectors, in addition to broad-based support for the whole economy.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company
Asset or Share Acquisition
Generally, the acquisition of a company in Singapore can be effected by way of a share acquisition or the acquisition of the business or assets of the company.

An asset or share acquisition is commonly effected by entering into a sale and purchase agreement. Before executing the agreement, parties may enter into a letter of intent or term sheet, which will typically set out the agreed key terms of the transaction. Such a preliminary document may be expressed as non-legally binding, except for certain obligations such as confidentiality or exclusivity.

The primary techniques to acquire a company’s shares in Singapore include:

- making a general offer for a company’s shares pursuant to the Singapore Code on Takeovers and Mergers (Takeover Code);
- entering into a scheme of arrangement under of the Companies Act 1967, Section 210; and
- entering into a scheme of amalgamation under the Companies Act 1967, Section 215A-K.

General Offer
General offers for shares in a Singapore public company are regulated under the Takeover
Code. General offers take the form of mandatory offers, voluntary offers or partial offers.

**Mandatory Offer**
Under the Takeover Code, a bidder is required to make a mandatory offer for all the shares in a Singapore public company where the acquisition of shares by the bidder results in the shareholdings of the bidder and any parties acting in concert with it exceeding certain thresholds. The mandatory offer rules under the Takeover Code apply when:

- the bidder acquires shares, and this results in the bidder and its concert parties owning 30% or more of the target company’s voting rights; or
- where the bidder who, together with its concert parties hold between 30% and 50% of the target company’s voting rights, acquires more than 1% of the target company’s voting rights in any six-month period.

**Voluntary and Partial Offers**
An offer that does not trigger the mandatory rules under the Takeover Code is a voluntary offer governed by Rule 15 of the Takeover Code. A voluntary offer must be conditional on the bidder and its concert parties acquiring more than 50% of the target company. A higher percentage acceptance threshold may be stipulated, subject to the consent of the Securities Industry Council (SIC).

A bidder makes a partial offer by making a voluntary offer for a portion of the target company’s shares. All partial offers must be approved by the SIC, and it will generally grant consent for partial offers that do not result in the bidder and its concert parties holding more than 30% of the target company’s voting rights.

**Scheme of Arrangement**
A scheme of arrangement under the Companies Act 1967, Section 210 is a legislative procedure that allows a company to be restructured. A scheme is typically organised as a transfer of shares from the shareholders of the target company to the acquirer, and in consideration of the share transfer the acquirer pays cash or issues new shares in the acquiring company to the shareholders of the target company. An alternative scheme is where the target company cancels its existing shares and issues new shares in the target company to the acquirer.

To pass a scheme of arrangement, the scheme must be approved by the requisite statutorily prescribed majority at the scheme meeting and must be sanctioned by the High Court. A scheme that has been successfully passed will be binding on all shareholders of the target company.

**Amalgamation**
A scheme of amalgamation under the Companies Act 1967, Section 215A-K is a legislative procedure that allows two or more Singapore-incorporated companies to amalgamate and continue as one company. The amalgamated company may be one of the amalgamating companies or a new company, and all property, rights, privileges, liabilities and obligations of each of the amalgamating companies will be transferred to the amalgamated company. The amalgamation may be carried out without a court order, subject to certain conditions being satisfied, including obtaining the requisite shareholder approvals and the provision of solvency statements by the directors of the amalgamating companies.
2.2 Primary Regulators
The primary regulators of M&A activity in Singapore are:

- the SIC, which administers the Takeover Code;
- the Singapore Exchange Securities Trading Limited (SGX), which administers the listing rules applicable to companies listed on the SGX;
- the Monetary Authority of Singapore (MAS), which administers the Securities and Futures Act 2001;
- the Accounting and Corporate Regulatory Authority (ACRA), which administers the Companies Act 1967; and
- the Competition and Consumer Commission of Singapore (CCCS), which administers the Competition Act 2004.

2.3 Restrictions on Foreign Investments
There is no general restriction on the amount of shares that a foreign entity may own in a company incorporated in Singapore. However, there may be restrictions that limit or require prior regulatory approval for control or share ownership in companies in certain regulated industries that are perceived to be critical to national interests, such as banking, insurance, broadcasting, defence and newspaper publishing.

2.4 Antitrust Regulations
Business combinations in Singapore are subject to the Competition Act 2004, which contains, among others, the following provisions:

- Section 34, which prohibits agreements which have as their object or effect the prevention, restriction or distortion of competition within Singapore;
- Section 47, which prohibits conduct that amounts to the abuse of a dominant position in any Singapore market; and
- Section 54, which prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.

As the merger notification regime in Singapore under the Competition Act is voluntary, parties to a merger are not obliged to notify the CCCS of their proposed or completed business combinations. However, parties to a merger situation may do so where, following a self-assessment, they have concerns that the merger or anticipated merger has led to or may lead to a substantial lessening of competition in a Singapore market.

Whereas the CCCS can investigate mergers on its own initiative, it is unlikely to intervene in a merger situation that only involves small companies, ie, where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below SGD5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below SGD50 million.

Generally, the CCCS is also unlikely to investigate in a merger situation, unless the merged entity will have a market share of:

- 40% or more; or
- between 20% and 40% and the post-merger combined market share of the three largest firms is 70% or more.

2.5 Labour Law Regulations
Where the acquisition is structured as a transfer of the business undertaking of the target company, the automatic employment transfer provisions under Section 18A of the Employment Act 1968 may be applicable in respect of employees who are covered under the Employment Act at the time of the business transfer (EA employees),
ie, generally all employees. In particular, Section 18A provides for:

- an automatic transfer of the EA employees on the same terms as their existing employment contract, unless the acquirer and the EA employee agree to different terms;
- a continuation of the EA employee’s period of employment;
- a transfer of existing rights, powers, duties and liabilities of the target company in respect of the EA employees to the acquirer; and
- a requirement to notify the EA employees of the proposed business transfer.

Where the business transfer involves a transfer of foreign employees, the acquirer should consider if new work-pass applications would be required for the incoming foreign employees or if the transfer of foreign employees would affect work-pass quotas.

Where the acquisition is structured as a transfer of shares, the employees of the target company will continue to be employed by the target company and will be unlikely to be affected by the transfer of shares.

2.6 National Security Review
There is currently no regulatory body in Singapore that undertakes a national security review of acquisitions. However, regulatory approvals may be required for control or share ownership in companies in certain regulated industries that are perceived to be critical to national interests, eg, banking, insurance, broadcasting, defence and newspaper publishing.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments
One of the more significant legal developments relating to M&A is the renewal of the M&A allowance under Singapore’s M&A scheme. While originally set to lapse in 2020, it has been renewed to cover qualifying acquisitions made on or before 31 December 2025. Briefly, the M&A allowance is granted to acquiring companies that acquire the ordinary shares of another company, hence encouraging companies to grow their businesses.

Separately, enhancements to the continuous disclosure requirements on all listed companies and a new approach to quarterly reporting as per the SGX Mainboard Listing Rules (and the SGX Catalist Listing Rules) have been implemented, effective from 7 February 2020. Generally, such enhancements apply to areas that are of high investor interest such as interested person transactions, significant financial assistance, significant transactions and secondary fund-raising; and in line with a more targeted risk-based approach, only companies associated with higher risks will be subjected to quarterly reporting requirements.

3.2 Significant Changes to Takeover Law
One of the more significant changes to takeover law are the amendments to the Companies Act 1967 and the Limited Liability Partnerships Act 2005, which aim to reduce opportunities for the misuse of corporate entities for illicit purposes. The Corporate Registers (Miscellaneous Amendments) Act 2022 has been passed by Parliament on 10 January 2022 and assented to by the President on 8 February 2022. The following changes relevant to takeover law have been made and will come into operation on a
date that the Minister appoints by notification in the Government Gazette:

- specification of a 30-day timeframe for foreign companies to update the register of members;
- clarification that Singapore-incorporated companies should update their registers of nominee directors within seven calendar days after receiving the information and particulars;
- requirement to enter particulars of individuals with executive control in their registers of controllers, if no individual or legal entity having significant interest in or control over the company or limited liability partnerships (LLPs) has been identified; and
- requirement for local and foreign companies to keep non-public registers of nominee shareholders.

These are primarily focused on the transparency of ownership and control of companies and LLPs and are in line with international standards for combating money laundering, terrorism financing and other threats to the integrity of the international financial system.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

It is not uncommon for bidders to build up some shareholding stake in a company prior to launching an offer. A 10% ownership stake in the target company could be used to prevent a rival bidder from a compulsory acquisition of the minority stake in the company. A bidder may also seek to obtain a 25% ownership stake to effectively veto a rival scheme of arrangement or amalgamation.

Bidders seeking to build a significant stake in a target company generally need to comply with the following:

- rules relating to mandatory offers (see 2.1 Acquiring a Company) and minimum offer prices under the Takeover Code;
- substantial shareholding disclosure requirements (see 4.2 Material Shareholding Disclosure Threshold); and
- insider trading prohibitions, in particular where the bidder comes into possession of confidential and price-sensitive information relating to the listed company, eg, after commencing due diligence on the company.

A bidder may concurrently seek to obtain contractual undertakings from existing shareholders to accept its proposed offers or to vote in favour of their scheme. Such irrevocable undertakings may potentially be aggregated as part of the bidder’s ownership stake in the target company, which may potentially trigger the mandatory offer rules under the Takeover Code (among other requirements).

4.2 Material Shareholding Disclosure Threshold

Under the Securities and Futures Act, a party who acquires an interest in 5% or more of the voting shares (a “substantial shareholder”) in a company incorporated and listed in Singapore is required to notify the company of its interest in writing within two working days of becoming aware that it is or had been (if it ceased to be one) a substantial shareholder.

In addition, the substantial shareholder is required to notify the company in writing if there are subsequent discrete 1% changes in the substantial shareholder’s interests or if they cease to be a substantial shareholder, within two working days after they become aware of the change. The substantial shareholder disclosure requirements also apply to corporations that are incorporated overseas, but with a primary listing on approved exchanges in Singapore.
From a competition law perspective, merger parties may voluntarily notify CCCS of their merger or anticipated merger if, after conducting a self-assessment, they have concerns that the merger or anticipated merger has led to or may lead to a substantial lessening of competition in a Singapore market.

4.3 Hurdles to Stakebuilding
It is open to a company to introduce more (but not less) stringent reporting thresholds, eg, in its constitution. Apart from the general restrictions that may be applicable to stakebuilding (see 4.1 Principal Stakebuilding Strategies), the acquirer should be mindful of statutory limits or regulatory approvals required for having control or share ownership in companies in certain regulated industries, such as banking, insurance, broadcasting, defence and newspaper publishing.

4.4 Dealings in Derivatives
Dealings in derivatives are allowed, and are generally subject to the same restrictions as dealings in capital markets products (which include shares) under the Securities and Futures Act 2001.

Under the Takeover Code, a person who has acquired or written any option or derivative that causes them to have a long economic exposure, whether absolute or conditional, to changes in the price of securities, will normally be treated as having acquired those securities for the purposes of the mandatory offer rules.

Where the acquirer triggers the mandatory offer requirement under the Takeover Code as a result of acquiring such options or derivatives (among others), the acquirer must consult the SIC to determine if a mandatory offer is required, and, if so, the terms of the offer to be made.

4.5 Filing/Reporting Obligations
Dealings in derivatives in respect of certain securities of the target company subject to the Takeover Code during the offer period must be publicly disclosed. Full details of the dealings in derivatives should be provided so that the nature of the dealings can be fully understood. This should include, at least, the number of reference securities to which they relate (where relevant), the maturity date or if applicable, the closing-out date and the reference price.

Separately, under the Securities and Futures Act and the Securities and Futures (Reporting of Derivatives Contracts) Regulations 2013, a specified person who is a party to a specified derivatives contract (which includes a derivatives contract the value of which is determined by reference to the value of underlying stock or shares, among others) is required to report certain prescribed information to a licensed trade repository or licensed foreign trade repository in respect of the derivatives contract.

There are no specific filing/reporting obligations for derivatives under competition laws in Singapore.

4.6 Transparency
For public M&A transactions subject to the Takeover Code, an offer document, which should be despatched no later than 21 days after the offer announcement, should disclose the bidder’s plans relating to the target company and its employees, including:

- its intentions regarding the business of the target company;
- its intentions regarding any major changes to be introduced in the business, including any redeployment of the fixed assets of the target company;
- the long-term commercial justification for the proposed offer; and
5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

If the target company is approached, the responsibility for making an announcement will normally rest with the bidder or potential bidder. However, once an approach has been made to the board of the target company, the primary responsibility for making an announcement will typically rest with the target company’s board.

The target company’s board is required to make an announcement in any of the following circumstances:

- it receives notification of a firm intention to make an offer from a serious source;
- if, after the bidder has approached the target company, the target company is the subject of rumour 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;
- negotiations or discussions between the bidder or the target company are about to be extended to include more than a very restricted number of people; or
- it is aware of negotiations or discussions between a potential bidder and the shareholders holding 30% or more of the voting rights of the target company or when the target company’s board is seeking potential bidders, and:
  (a) the target company is the subject of rumour 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; or
  (b) more than a very restricted number of potential bidders are about to be approached.

SGX Mainboard Listing Rules

Furthermore, a company listed on the SGX Mainboard must announce any information known to it or any of its subsidiaries or associated companies which is necessary to avoid the establishment of a false market in its securities or would be likely to materially affect the price or value of its securities as prescribed under the SGX Mainboard Listing Rules. However, the announcement need not be made if:

- a reasonable person would not expect the information to be disclosed;
- the information is confidential; and
- one or more of the following applies:
  (a) the information concerns an incomplete proposal or negotiation;
  (b) the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
  (c) the information is generated for the internal management purposes of the entity; or
  (d) the information is a trade secret.

According to the Corporate Disclosure Policy under the SGX Mainboard Listing Rules, a frank and explicit announcement is required if rumours indicate that material information has been leaked. If rumours are false or inaccurate, they should be promptly denied or clarified.

5.2 Market Practice on Timing

As mentioned in 5.1 Requirement to Disclose a Deal, for public M&A transactions that are subject to the Takeover Code, the responsibility for making an announcement on the potential deal will normally rest with the bidder or potential bidder, before the board of the target company is approached.
In terms of timing, the bidder or potential bidder must make an announcement:

- when the target company is the subject of rumour 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, and there are reasonable grounds for concluding that it is the potential bidder’s actions which have directly contributed to the situation; or
- immediately upon an acquisition of shares which triggers the mandatory offer thresholds under the Takeover Code. In particular, within 30 minutes of incurring an obligation to make a mandatory offer under the Takeover Code, the bidder must either make the announcement or request the securities exchange for a temporary halt in the trading of the target company’s shares and make an announcement before such a trading suspension is lifted.

Where an approach has been made to the board of the target company, the board must make an announcement following the occurrence of any of the circumstances as set out in 5.1 Requirement to Disclose a Deal.

5.3 Scope of Due Diligence
There is no standard process on carrying out due diligence under Singapore laws, and the level of information and documents provided will depend on the nature of the transaction and the relevant parties.

Public M&A Transactions
In general, for public M&A transactions, the scope of the legal due diligence process is likely to be affected as follows:

- under the SGX Mainboard Listing Rules, a target company listed on the SGX Mainboard is subject to continuing disclosure require-
ments and generally should not selectively provide any person with material information that would place the person in a privileged dealing position;
- under the Takeover Code, any information given to one bidder must, on request, be furnished equally and promptly to any other bidder;
- where a bidder comes to possess confidential and materially price-sensitive information, any further dealings with the shares of the target company may give rise to insider dealing concerns; and
- in the context of negotiations on mergers, an exchange of commercially sensitive information which has the object or effect of restricting competition may potentially infringe the Competition Act.

In view of the above legal restrictions, the bidder often will have to rely on publicly available information. This includes:

- information available on public registers, such as lodgements with the Accounting and Corporate Regulatory Authority (ACRA), and the register of directors and shareholders;
- the target company’s constitutional documents;
- where the target company is listed, on-going disclosures of material information or events relating to the listed company;
- any prospectuses or shareholder circulars;
- financial information such as annual financial reports; and
- research reports published by financial analysts.

Private M&A Transactions
For private M&A transactions, the scope of due diligence tends to be broader as the target company would not be subject to restrictions that apply to public companies. Depending on time or budgetary constraints, the due diligence may
include the following relating to the target company:

- corporate organisational documents and records;
- shareholder agreements;
- banking and finance documents;
- material contracts with suppliers and customers;
- employee matters;
- litigation;
- the company’s assets and properties;
- insurance; and
- regulatory matters (e.g., licences, permits, registrations and approvals).

There is also an increased interest in environmental, social and governance (ESG) due diligence. In particular, the SGX has mandated mandatory climate reporting on a “comply or explain” basis in issuers’ sustainability reports from the financial year commencing 2022. Board diversity policies must also be disclosed in annual reports. The shift towards ESG matters in M&A investments was also seen in the recent investment ventures by Singapore’s state investor, Temasek, in renewable energy.

Impact of the COVID-19 Pandemic
The COVID-19 pandemic has hindered certain due diligence processes, such as onsite due diligence, and physical meetings and inspections. This is particularly so for cross-border deals in light of international border closures and entry restrictions.

Further, the uncertainty caused by the COVID-19 pandemic has necessitated enhancing the scope of due diligence, to help fill in gaps in information and knowledge. This may include making more extensive enquiries on supply chain and revenue risks, reliance on government support schemes, contractual termination rights, employment issues and scope of insurance policies.

The recent case of Dathena Science Pte Ltd v JustCo (Singapore) Pte Ltd [2021] SGHC 219 (“Justco”) reinforces the importance for parties to review contracts in view of the COVID-19 pandemic measures as part of its due diligence. Briefly, the High Court of Singapore had found that restrictions such as circuit breaker measures implemented by the Singapore government could result in contractual termination or discharge by frustration.

5.4 Standstills or Exclusivity
In general, exclusivity agreements and similar arrangements are often requested, but standstill agreements are not as common. However, in negotiating for exclusivity arrangements, the target company should note its duty under the Takeover Code not to take any action that could frustrate a bona fide offer or deny its shareholders an opportunity to decide on its merits.

Under the Takeover Code, standstill agreements between a company, or the directors of a company, and a shareholder which restrict the shareholder/directors from either offering for, or accepting an offer for, the shares of the company or from increasing or reducing shareholdings, may result in the parties acting in concert.

5.5 Definitive Agreements
The terms and conditions of any public takeover will be contained in the bidder’s offer announcement and offer document or in the target company’s scheme document (where a scheme of arrangement or amalgamation is used). Under the Takeover Code, the offer document must set out clearly:

- the price or other consideration to be paid for the securities;
- all conditions attached to acceptances, in particular whether the offer is conditional upon acceptances being received in respect of a minimum number and the last day on
which the offer can become unconditional as to acceptances; and
• a statement whether or not the bidder intends to avail itself of powers of acquisition.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale
Assuming there is no competing offer, the acquisition of a public company would typically take around six months from the public announcement of the offer by the bidder to the completion of the acquisition of the target company’s shares under the Takeover Code.

For share acquisitions of a private company, the transaction process may take around three to six months to complete, although the time required would, ultimately, depend on a multitude of factors, such as whether there are any competing proposals, the size of the target company, the transaction structure, the complexity of the transaction and the extent of due diligence conducted on the target company. For the acquisition of assets, the transaction process could be longer, owing to the need for additional third-party consents to be obtained for the assets transfer.

Impact of the COVID-19 Pandemic
Like many other countries, to tackle the COVID-19 pandemic, the Singapore government has imposed safe distancing measures on businesses, and travel restrictions. There were also government mandated “circuit breakers” preventing people from leaving their homes unless for essential activities. These measures have impacted both domestic and cross-border deals, not only in terms of due diligence processes, but also signing and closing mechanics, such as obtaining signatures, and legalising and notarising documents. Physical closing may be practically impossible in some cases.

However, the COVID-19 (Temporary Measures) (Alternative Arrangements for Meetings for Companies, Variable Capital Companies, Business Trusts and Debenture Holders) Order 2020 has prescribed for alternative arrangements which enable various types of entities to convene, hold or conduct meetings through electronic means, even if this is not allowed under the written law or legal instrument which provides for the meeting. The Ministry of Law announced on 6 April 2021 that it will give at least six months’ advance notice before such alternative arrangements cease to be available.

6.2 Mandatory Offer Threshold
The mandatory offer thresholds under the Takeover Code apply to public companies, and these are triggered when:

• the bidder acquires shares, and this results in the bidder and its concert parties owning 30% or more of the target company’s voting rights; or
• where the bidder who, together with its concert parties hold between 30% and 50% of the target company’s voting rights, acquires more than 1% of the target company’s voting rights in any six-month period.

Parties may request that SIC waive this requirement when the acquisition of voting rights arises as a result of the issue of new securities as consideration for an acquisition or a cash injection or in fulfilment of obligations under an agreement to underwrite the issue of new securities. Very broadly, a grant of waiver will be subject to a whitewash resolution, ie the approval of a majority of holders of voting rights of the offeree company at a general meeting, before the issue of new securities to the offeror, of a resolution by way of a poll to waive their rights to receive a
general offer from the offeror and parties acting in concert with the offeror.

In relation to the relatively new rule allowing dual-class share structures, under the Takeover Code, when there is a conversion of multiple voting shares to ordinary voting shares (“conversion”) or a reduction in the voting rights attached to each multiple voting share (“reduction”), any resulting increase in the percentage of voting rights held by a shareholder and persons acting in concert with them will be treated as an acquisition and the shareholder or group of shareholders acting in concert could become obliged to make an offer. However, SIC will not normally require an offer if the shareholder:

• is independent of the conversion or the reduction;
• has not acquired any additional voting rights in the company from the date they become aware that the conversion or the reduction is imminent; and
• has not exercised their voting rights in excess of the conversion or the reduction.

6.3 Consideration
For takeovers and mergers involving private companies, consideration more commonly takes the form of cash. Selection of the form of consideration depends on factors such as the availability of financing to the buyer and the tax implications of the payment method.

For public companies, consideration for a general offer can take the form of cash, securities (typically the bidder’s shares) or a combination of the two. However, under the Takeover Code, where the mandatory offer thresholds are triggered, the consideration must be in cash or be accompanied by a cash alternative at not less than the highest price paid by the bidder or any person acting in concert with it for voting rights of the target company during the offer period and within six months prior to its commencement. When voting rights have been acquired for a consideration other than cash, the offer must nevertheless be in cash or be accompanied by a cash alternative of at least equal value, which must be determined by an independent valuation.

Furthermore, except with the SIC’s consent, a cash offer is required where:

• the bidder or any party acting in concert with it has bought for cash, during the offer period and within six months prior to its commencement, shares of any class under offer in the target company carrying 10% or more of the voting rights of that class; or
• in the view of the SIC there are circumstances which render such a course necessary.

Where there is high valuation uncertainty, some common tools used to bridge valuation gaps include deferred consideration, price adjustments based on completion accounts and earn-outs. On the flipside, sellers should consider whether any form of security in respect of the buyer’s payment obligations, such as a parent company or bank guarantee, a charge over the buyer’s assets or a cash escrow, is necessary.

6.4 Common Conditions for a Takeover Offer
For public takeovers all general offers are subject to a minimum level of acceptance. For mandatory and voluntary offers, the offer must be conditional upon the bidder receiving acceptances in respect of voting rights in the target company, which, together with voting rights acquired or agreed to be acquired before or during the offer, will result in the bidder and any party acting in concert with it holding more than 50% of the voting rights. Separate approval thresholds apply for partial offers.
In relation to mandatory offers, bidders cannot impose any other condition or a higher level of acceptance (above 50%).

In relation to voluntary offers, bidders may other conditions, provided that fulfilment of such conditions does not depend on the bidder's subjective interpretation or judgment, or lie in the bidder's hands. Normal conditions such as shareholder approval for the issue of new shares and the SGX's approval for listing may be attached without reference to the SIC. The SIC should be consulted where other conditions would be attached. A condition requiring a level of acceptance higher than 50% needs to be approved by the SIC, and the bidder would need to demonstrate that it is acting in good faith in imposing a higher level of acceptance.

6.5 Minimum Acceptance Conditions
All general offers must be conditional upon the bidder receiving acceptances in respect of voting rights in the target company, which, together with voting rights acquired or agreed to be acquired before or during the offer, will result in the bidder and any party acting in concert with it holding more than 50% of the voting rights (see 6.4 Common Conditions for a Takeover Offer).

Voluntary offers that are conditional on a level of acceptance higher than 50% must be approved by the SIC, and the bidder would need to demonstrate that it is acting in good faith in imposing the higher level of acceptance. Where the bidder is seeking to privatise the target company, a 90% minimum acceptance condition is common, as it allows the bidder to avail itself of the compulsory acquisition procedure under the Companies Act.

In relation to partial offers, the SIC will normally consent to a partial offer that does not result in the bidder and persons acting in concert with it holding shares with 30% or more of the voting rights in the target company, and provided that the bidder complies with the conditions set out under the Takeover Code. The SIC will not consent to any partial offer that results in the bidder and persons acting in concert with the bidder, holding shares with not less than 30% but not more than 50% of the voting rights of the target company.

6.6 Requirement to Obtain Financing
For private takeovers and mergers, it is common for business combinations to be conditional on the bidder obtaining financing where cash consideration is involved.

For public takeovers and mergers, it is generally not permitted for business combinations to be conditional on the bidder obtaining financing. Where the offer is for cash, or involves an element of cash, the offer announcement as well as the offer document should include an unconditional confirmation by the financial adviser or by another appropriate third party that the bidder has sufficient resources available to satisfy full acceptance of the offer.

6.7 Types of Deal Security Measures
It is generally open to bidders to propose deal security measures. Where the Takeover Code applies, the target company should note its duty under the Code not to undertake any deal security measures that could frustrate a bona fide offer or deny its shareholders an opportunity to decide on its merits.

Two commonly used measures are exclusivity agreements and break fees.

Exclusivity Agreements
Exclusivity agreements hinder the target company’s board from proposing alternative bids to shareholders, by precluding it from actively shopping for or responding to other bidders during a certain period of time.
Break Fees
A bidder may negotiate break fees (imposed on the target company) or reverse break fees (imposed on a bidder), although these are less commonly used in acquisitions involving private companies. Break fees may not be enforceable if they constitute a penalty, as opposed to liquidated damages (i.e., a genuine pre-estimate of loss). Further, directors would need to ensure that agreeing to break fees would be in line with the fiduciary duties they owe to the company (e.g., to act in a bona fide manner in the company’s best interests).

In acquisitions involving a target company to which the Takeover Code applies, the SIC should be consulted at the earliest opportunity in all cases where a break fee or any similar arrangement is proposed. Further, the rules under the Takeover Code governing break fees must be complied with, e.g.:

• the break fee must be minimal, normally no more than 1% of the value of the target company calculated by reference to the offer price;
• the target company’s board and its financial adviser must provide, in writing, to the SIC:
  (a) confirmation that the break fee arrangements were agreed as a result of normal commercial negotiations;
  (b) an explanation of the basis (including appropriateness) and the circumstances in which the break fee becomes payable;
  (c) any relevant information concerning possible competing bidders, e.g., the status of any discussions, the possible terms, any pre-conditions to the making of an offer, the timing of any such offer, etc;
  (d) a confirmation that all other agreements or understandings in relation to the break fee arrangements have been fully disclosed a confirmation that they each believe the fee to be in the best interests of target company’s shareholders; and
  (e) any break fee arrangement must be fully disclosed in the offer announcement and the offer document. Relevant documents must be made available for inspection.

Impact of the COVID-19 Pandemic
The market uncertainty resulting from the pandemic has seen bidders trying to preserve their ability to avoid proceeding to closing to the fullest extent by including several general and bespoke closing conditions. Beyond involving obtaining consents or clearances from regulators or third parties, bidders may insert specific conditions connected with COVID-19 (e.g., there being no second wave of the virus or no material change in the relationship between the target and its key customers or suppliers), or more broadly, the adoption and implementation of risk management policies addressing risk assessment, reporting and mitigation.

Separately, bidders may also negotiate for a financing out provision, allowing it to walk away should it fail to obtain financing for the deal, although the target company is likely to resist this.

Regulations-wise, delays in obtaining consents or clearances because of issues arising from COVID-19 (such as changes in the working practices of governmental and regulatory bodies during circuit breakers) may lead to extended deal timetables.

6.8 Additional Governance Rights
Apart from its shareholding, additional governance rights such as board seats that a bidder may seek in respect of a target company generally need to be set out in the target company’s constitution.
6.9 Voting by Proxy
Shareholders are generally allowed to vote by proxy, subject to the restrictions under the Companies Act.

Unless the constitution otherwise provides,

- a proxy shall not be entitled to vote except on a poll;
- a shareholder shall not be entitled to appoint more than two proxies to attend and vote at the same meeting; and
- an appointment of two proxies will be invalid unless the shareholder specifies the proportions of their holdings to be represented by each proxy.

6.10 Squeeze-Out Mechanisms
The Companies Act, Section 215 provides a mechanism for the compulsory acquisition of shares. Where a bidder makes an offer that is approved within four months by shareholders holding not less than 90% of the shares that are the subject of the offer (excluding shares issued after the date of the offer and treasury shares), the bidder may within two months thereafter give notice in the prescribed manner to dissenting shareholders to acquire their shares.

Additionally, where the target company’s constitution provides for drag-along rights, minority shareholders may be required to accept the offer along with the exiting shareholders.

6.11 Irrevocable Commitments
Bidders may request for irrevocable undertakings from principal shareholders of the target company to accept the offer. These undertakings are usually given immediately before the offer is made, and it is common for them to provide an out for shareholders if a better offer is made.

For acquisitions of a target company to which the Takeover Code applies, information about the commitments (including in what circumstances, if any, they will cease to be binding, eg, if a higher offer is made) must be set out in the offer announcement and offer document. Relevant documents evidencing such commitments must also be made available for inspection.

7. DISCLOSURE

7.1 Making a Bid Public
For acquisitions of a target company to which the Takeover Code applies, once an approach has been made to the board, the primary responsibility for making an announcement typically rests with the board.

The target company’s board is required to make an announcement in any of the following circumstances:

- it receives notification of a firm intention to make an offer from a serious source;
- if, after the bidder has approached the target company, the target company is the subject of rumour 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;
- negotiations or discussions between the bidder or the target company are about to be extended to include more than a very restricted number of people; or
- it is aware of negotiations or discussions between a potential bidder and the shareholders holding 30% or more of the voting rights of the target company or when the target company’s board is seeking potential bidders, and:
  (a) the target company is the subject of rumour 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; or
(b) more than a very restricted number of potential bidders are about to be approached.

In some cases, under the Takeover Code, the bidder will be required to make an announcement of their intention to make an offer, before approaching the target company’s board, eg, where the target company is the subject of rumour or speculation about a possible offer, or there is undue movement in the target company’s share price or a significant increase in the volume of share turnover.

7.2 Type of Disclosure Required
For transactions to which the Takeover Code applies, the relevant disclosures under the Takeover Code must be made if the mandatory offer thresholds are triggered as a result of the issue of shares.

Where the issue of shares is made to a company listed on the SGX, the SGX Listing Rules mandates disclosures to the shareholders.

7.3 Producing Financial Statements
For public M&A transactions, under the Takeover Code, the offer document must contain financial information about the bidder, including the following:

- details, for the last three financial years, of turnover, exceptional items, net profit or loss before and after tax, minority interests, net earnings per share and net dividends per share;
- a statement of the assets and liabilities shown in the last published audited accounts;
- particulars of all known material changes in the financial position of the company subsequent to the last published audited accounts or a statement that there are no such known material changes;
- significant accounting policies together with any points from the notes of the accounts which are of major relevance for the interpretation of the accounts; and
- where, because of a change in accounting policy, figures are not comparable to a material extent, this should be disclosed and the approximate amount of the resultant variation should be stated.

The offer document should also state whether or not there has been, within the bidder’s knowledge, any material change in the target company’s financial position or prospects since the date of the last balance sheet laid before the target company in a general meeting and, if so, the particulars of any such change.

7.4 Transaction Documents
For transactions to which the Takeover Code applies, all offer announcements and offer documents must be made available publicly.

The offer document must include information such as:

- the offer consideration;
- all conditions attached to acceptances;
- a statement whether or not the bidder intends to avail itself of powers of compulsory acquisition;
- a statement as to whether or not any agreement, arrangement or understanding exists between the bidder or any person acting in concert with it and any of the directors, or recent directors, shareholders or recent shareholders of the target company having any connection with or dependence upon the offer, and full particulars of any such agreement, arrangement or understanding; and
- a statement as to whether or not any securities acquired pursuant to the offer will be transferred to any other person, together with the names of the parties to any such agree-
ment, arrangement or understanding, particulars of all securities in the target company held by such persons, or a statement that no such securities are held, and particulars of all securities that will, or may, be transferred.

8. DUTIES OF DIRECTORS

8.1 Principal Directors’ Duties
Directors have certain duties both at common law and under Section 157 of the Companies Act 1967. These duties are generally owed to the company, and not to its shareholders or other stakeholders. The duties of directors include the fiduciary duties to act in a bona fide manner in the best interests of the company, to avoid a conflict of interest, to act for proper purposes and to act with care, skill and diligence.

In the case of M&A transactions to which the Takeover Code applies, the board has certain responsibilities under the Code, including:

• giving shareholders sufficient information, advice and time to enable them to reach an informed decision on an offer, and not to withhold any relevant information from them;
• not taking any action that could frustrate a bona fide offer or deny its shareholders an opportunity to decide on its merits;
• ensuring that proper arrangements are in place to enable the board (as a whole) to monitor the day-to-day conduct of an offer so that each director may fulfil their responsibilities under the Code; and
• obtaining competent advice on any offer and making such advice known to its shareholders.

For companies listed on the SGX, the constitution of the company would provide that directors may not vote on matters in which they have a personal material interest.

8.2 Special or Ad Hoc Committees
It is increasingly common, especially in the case of management buyouts, for boards of directors to establish special or ad-hoc committees of independent directors so as to address issues of potential conflicts of interests and to ensure that the interests of shareholders are addressed fairly.

Whilst the board of directors may delegate the day-to-day conduct of an offer to a committee of directors or individual directors, the board as a whole remains responsible for ensuring that proper arrangements are in place to enable it to monitor the conduct so that each director may fulfil their responsibilities under the Takeover Code.

8.3 Business Judgement Rule
The Singapore courts are generally slow to interfere in commercial decisions taken by directors and generally acknowledge that they should not, with the advantage of hindsight, substitute those decisions with their own, where those decisions were made by directors in the honest and reasonable belief that they were taken in the company’s best interests.

8.4 Independent Outside Advice
Legal, financial and tax advisers are typically engaged to advise on the transaction structure and valuation, and more generally to manage the transaction.

In the case of M&A transactions to which the Takeover Code applies, the target company’s board must obtain competent independent advice on all offers, except partial offers that could not result in the bidder and persons acting in concert with it holding shares carrying 30% or more of the voting rights of the target company.

The substance of the advice must be made known to its shareholders and this is typically
done as part of the target company’s board’s circular to shareholders indicating its recommendation for or against acceptance of the offer. Where the offer is a management buy-out or similar transaction, or is being made by or with the co-operation of the existing controlling shareholder or group of shareholders, the target company’s board should appoint an independent adviser as soon as possible after it becomes aware that an offer may be made.

Where the offer being made is a reverse takeover and the bidder is incorporated in Singapore, or when the board faces a material conflict of interests, it must obtain competent independent advice on the offer. The substance of the advice must also be made known to its shareholders.

8.5 Conflicts of Interest
There are reported cases in recent years involving conflicts of interests in the context of takeovers and mergers. For instance, in 2017, the SGX reprimanded Singapore Post Limited (SingPost) for its non-compliance with the SGX Listing Rules, including its failure to accurately disclose that its then director had an interest in SingPost’s subsidiary, which had entered into an agreement to purchase all the shares in FS Mackenzie Limited (FSM Acquisition). The then director was the non-executive chairman and a 34.5% shareholder of the arranger for the FSM Acquisition.

The clarification announcement released by SingPost attributing the inaccuracy to an administrative oversight led to public commentaries questioning its corporate governance, including the then director’s independence, as well as whether the then director should have disclosed their interest to SingPost’s board, abstained from voting and recused themselves from the discussions on the FSM Acquisition.

It should be noted that, under the Takeover Code, the board of a Singapore-incorporated bidder must obtain competent independent advice when it faces a material conflict of interests and make known the substance of the advice obtained to its shareholders. A conflict of interest will exist where there are significant cross-shareholdings between the bidder and the target company, where there are a number of directors common to both companies, or where a common substantial shareholder in both companies is a director of or has a nominee director in either company.

Furthermore, directors who have an irreconcilable conflict of interests and those who have been exempted by the Council from making recommendations to shareholders on an offer should not join with the remainder of the board in the expression of its views on the offer.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers
Hostile tender offers are permitted in Singapore. However, they are relatively uncommon due to the concentrated shareholding structure of many Singapore-listed companies.

9.2 Directors’ Use of Defensive Measures
In a public M&A transaction, directors are prohibited under the Takeover Code from taking any action on the affairs of the offeree company that could effectively result in any bona fide offer being frustrated or the shareholders being denied an opportunity to decide on its merits. This is unless they have shareholder approval to do so, or they do so pursuant to a contract entered into earlier during the negotiation process.
Some of the actions that may constitute frustration are:

- the issue of any authorised but unissued shares;
- the issue or grant of options in respect of any unissued shares;
- the creation, issue or permitting of the creation or issue of any securities carrying rights of conversion into or subscription for shares of the company;
- the sale, disposition or acquisition or the agreement to sell, dispose of, or acquire assets of a material amount;
- the entry into contracts, including service contracts, otherwise than in the ordinary course of business; and
- the causing of the target company or any subsidiary or associated company to purchase or redeem any shares in the target company or provide financial assistance for any such purchase.

However, soliciting a competing offer and running a sale process for the company are not considered to be frustrating actions.

9.3 Common Defensive Measures
As frustrating actions are not permitted in a public M&A transaction (see 9.2 Directors’ Use of Defensive Measures), the defensive measures that the target company’s board may take are generally limited to soliciting competing offers or running a sale process for the company.

The board may also attempt to convince the shareholders not to agree to the offer in its circular(s) to the shareholders. This is especially so if the board believes that the company’s current share price does not reflect its intrinsic value resulting in a severe share price decline due to the market dislocation caused by the pandemic.

9.4 Directors’ Duties
Directors continue to owe fiduciary duties to the company pursuant to the Companies Act. Thus, they should have regard to what is best for the interests of the company and its shareholders, and not their own monetary, personal, familial, or other interests (see 8.1 Principal Directors’ Duties).

In public M&A transactions, the target company’s board is also usually obliged under the Takeover Code to obtain competent independent advice on any offer and the advice must be made known to its shareholders. This is especially so if the offer is a management buyout or other similar transaction being made with the co-operation of the existing controlling shareholder(s), due to the very real risk of a divergence of interests within the company.

9.5 Directors’ Ability to “Just Say No”
While directors may recommend, strongly even, that shareholders reject a takeover offer, and while they are permitted to take defensive measures, they are not permitted to frustrate a bona fide offer outright (see 9.2 Directors’ Use of Defensive Measures).

10. LITIGATION

10.1 Frequency of Litigation
Litigation in connection with M&A deals is not common in Singapore. One notable case involved the Noble Group, where Goldilocks Investment, an 8% minority investor, commenced legal action as part of its strategy to obtain a better deal for investors.

In connection with the protection of minority rights, the Securities Investors’ Association (Singapore) (SIAS), an advocacy charity for investors, which has been active since 1999, has expressly stated that its preferred approach to resolving
investors’ rights issues is in the boardroom and not in the courtroom. This is compounded by the fact that many minority investors tend to be “persons-in-the-street” without the resources necessary to finance litigation against relatively well-funded companies. They may also lack access to means such as class action lawsuits or litigation funding.

10.2 Stage of Deal
As litigation concerning M&A transactions is not common in Singapore, there is no established pattern in relation to the stage of a transaction at legal proceedings are commonly brought (see 10.1 Frequency of Litigation).

10.3 “Broken-Deal” Disputes
The COVID-19 pandemic has resulted in a volatile M&A climate, with buyers increasingly seeking to rely on material adverse change clauses. Given that such clauses have taken on unprecedented importance, it would be important for parties to give greater consideration in drafting such clauses to ensure that they reflect the intended allocation of risk between the parties, particularly in relation to the COVID-19 pandemic.

While it has yet to be seen how Singapore courts will read material adverse change clauses in light of COVID-19, the English High Court has retained the application of conventional contractual principles to establish the parties’ objective understanding of the extent to which the pandemic constitutes a material adverse effect. This was on the basis that M&A transactions are heavily negotiated contracts between sophisticated parties and lawyers, hence showing that even in the context of COVID-19, the courts will be reluctant to imply terms when there is any ambiguity.

Conversely, Singapore courts have held that COVID-19 restrictions may render contracts to be terminated by operation of law pursuant to the Frustrated Contracts Act 1959. In the Justco case, the High Court had found that agreements may be discharged by frustration given that such restrictions had rendered the contractual obligation radically fundamentally different from what was agreed between the parties.

Another potential area of dispute may concern clauses specifying the party responsible for any material changes in law. Given the implementation of new and changing legislation to curb COVID-19 and boost the economy, proper negotiation of such change of law clauses will be crucial especially if a target’s prospects in M&A will be negatively impacted.

Separately, it will be beneficial for parties to increasingly utilise due diligence technology to bridge any information gaps during this period of greater volatility in valuations.

11. Activism
11.1 Shareholder Activism
There has been a rise in shareholder activism in publicly listed companies.

In Singapore, the focus of shareholder activists tends to be on improving corporate governance and the protection of minority investors’ rights. The SIAS is also involved in this field by conducting investor education workshops and helping to monitor the corporate governance of companies.

Some recent notable instances of shareholder activism include:

- Pangolin Investment Management and other minority shareholders who consolidated a shareholding block of more than 10% to derail the privatisation of Challenger Tech-
nologies Ltd by voting against the voluntary delisting resolution at the general meeting;
• Investors of Hyflux Ltd’s perpetual securities and preference shares organised a public demonstration to rally support for the rejection of the company’s restructuring plan; and
• Unitholders of Sabana REIT setting up a website called ‘Save Sabana REIT’ and seeking regulatory intervention to disallow ESR Cayman from being the manager if the all-stock merger with ESR-REIT fails where Sabana REIT ultimately did not garner the required 75% approval for the merger to proceed.

There are also activist funds active in Singapore that seek to unlock greater value in target companies via shareholder activism. Judah Value Activist Fund, based in Singapore, announced in August 2018 that it was in the process of building a position in a local bank before crafting an open letter suggesting operational improvements.

Another activist fund, Quarz Capital Management, has made open requests to several firms, such as CSE Global and Sunningdale Tech, requesting a range of actions from cash discipline to dividend distribution.

11.2 Aims of Activists
There have been reported instances of shareholder activists seeking to encourage companies to enter into M&A transactions as a means to unlocking shareholder value, eg, in May 2017, activist fund Quarz Capital Management requested HG Metal Manufacturing to divest its stake in a competitor, BRC Asia. While HG Metal did not acquiesce on that occasion, it did subsequently divest its stake later that year.

Activists may be more likely to act when they think that there will be positive effects on the company’s bottom-line. Retail shareholder activists seem to be more interested in encouraging better corporate governance to protect their investments.

Despite a relative drop in activism during the first few months of the pandemic, where it was seen that campaigns globally fell around 25% in Q1 of 2020 compared to a year ago, trends in 2020 showed an uptick in campaigns from shareholder activists. In fact, during the pandemic, polls show that the percentage of first-time campaigns have remained consistent at 30% of total campaigns.

11.3 Interference with Completion
It is fairly uncommon for activists to seek to interfere with the completion of announced transactions in Singapore. However, there has been at least one reported instance of activist intervention in an announced deal, when Goldlocks Investment sought injunctions to prevent the Noble Group AGM from approving a deal (see 10.1 Frequency of Litigation).

In other cases, activists have sought board explanations for transactions that they believe to be questionable, eg, the board of Datapulse Technology was strongly challenged by shareholders on the company’s acquisitions of other firms at a recent AGM.
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