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A Cross-Border Guide to Public M&A Financing

February 2015

In this guide we set out key aspects of law and regulation relevant when financing a public takeover of a company in selected jurisdictions.

This guide describes the position as at 1 February 2015. It is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of the contacts listed or your regular Linklaters contact.

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Takeover methods

Offer: a public offer by the bidder to the target's shareholders to acquire all the shares they hold in the target. The offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Majority required for target control

Control:

- > 75% vote for eg changes to the articles of association, mergers, demergers;
- > 80% vote for eg a change of corporate purpose, authorisation to buyback own shares; and
- > more than 50% vote for other resolutions, eg appointment/dismissal of directors, approval of annual accounts.

Tax grouping: there is currently no income tax consolidation in Belgium.

Squeeze-out of minority shareholders

Procedure: squeeze-out of minority shareholders is possible within three months of closing provided:

- > the bidder holds at least 95% of the voting capital and 95% of the voting shares in the target following the offer; and
- > the bidder acquired target shares under the offer representing at least 90% of the voting capital subject to the offer. This second condition is only applicable for a voluntary offer and not a mandatory offer.

Price: same as offer consideration.

Mandatory offer threshold and price

Threshold: 30% of the voting rights (whether held directly or indirectly, alone or with any concert party) of a listed company.

Price: must be at least equal to the higher of:

- > the highest price paid by the bidder (and any concert party) during the 12 months prior to the offer announcement; and
- > the average trading price on the most liquid stock market where the shares are listed over the 30 calendar days prior to the event triggering the obligation to make the offer.

Certain funds for cash consideration

A bid cannot be conditional on funding. The bidder must have the necessary funds to fulfil any cash element of the offer. Funds may be held in an account with a credit institution or the bidder may enter into an irrevocable and unconditional committed facility agreement with a credit institution.

Restrictions on target support

Financial assistance: a Belgian limited liability company (NV/SA) must not advance funds, grant loans or give security with a view to the acquisition of its shares by third parties, unless the following conditions are met:

- > the transaction is approved by the board of directors on fair market terms;
- > the transaction is approved by the shareholders' meeting;
- > the transaction is justified in a special board report;
- > there is no reduction of the net assets below the amount of the paid-up share capital plus the unavailable reserves as a result of the financial assistance; and
- > an unavailable reserve is created on the liabilities side of its balance sheet.

Upstream guarantees: guarantor must receive direct/indirect corporate benefit. Risk must be proportionate to benefit and not exceed guarantor's financial capabilities.

Financing disclosure requirements

Details required to be publicly disclosed by the bidder include:

- > the financial situation of the bidder and financing arrangements for the bid (including the impact on the balance sheet, results and activities of the target and in case of a cash offer, an estimate of the impact of the takeover on the balance sheet and results of the bidder);
- > payment date and payment arrangements;
- > potential costs and taxes which may be due; and
- > evidence that certain funds are available and that a financial institution will arrange for acceptance of offers and the payment of the price.

There is no obligation to publish the financing agreements entered into in relation to the takeover offer or specific details of the fees paid or flex arrangements.

Syndication

Any information provided to potential financiers prior to the public announcement of the takeover offer will constitute inside information, unless this information is given in the normal course of the work, profession or function of the person giving the information. Accordingly, the number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement. However, there is no explicit legal limit on the number of potential financiers.

Syndication during the bid period should generally not cause any specific legal concerns.

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Takeover methods

Offer: a public offer by the bidder to the target's shareholders to acquire all the shares they hold in the target. The offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Statutory merger: following approval by 66.7% majority at the shareholders' meetings of both companies party to the merger, the shares of one company are automatically exchanged for shares in the other company.

Majority required for target control

Ordinary resolutions: (eg appointment of directors) require more than 50% of the votes cast.

Extraordinary resolutions: (eg amendment of the articles of association) require 66.7% of the votes cast.

Tax grouping: 95% of the target's share capital.

Squeeze-out of minority shareholders

Procedure: squeeze-out of minority shareholders is possible:

- > within three months of the closing of the offer, if the bidder holds at least 95% of the target's share capital and voting rights; or
- > following a buy-out offer by the controlling shareholder when the minority shareholders hold not more than 5% of the target's share capital and voting rights.

Price:

- > must include a cash alternative; and
- > the fairness of the price must be confirmed by an independent expert in almost all cases.

Mandatory offer threshold and price

Threshold:

- > 30% of share capital or voting rights (including shares held by concert parties); or
- > increasing a stake by 1% or more of the share capital or voting rights within 12 consecutive months if the shareholder (alone or in concert) already holds directly or indirectly between 30% and 50% of the share capital or voting rights.

Price: in general, the price must be at least equal to the highest price paid by the bidder or its concert parties over the 12 months prior to the event that triggered the mandatory tender offer.

Certain funds for cash consideration

French law requires the offer consideration to be guaranteed by the presenting bank. There is no stock exchange requirement for debt financing to be provided on a certain funds basis, but since the presenting bank guarantees the payment of the offer consideration, the terms of the financing will depend on the requirements of the presenting bank. The presenting bank may require the benefit of cash deposits or bank guarantees drawn under the financing or the ability to draw down on behalf of the borrower.

Restrictions on target support

Financial assistance: a French company and its French subsidiaries are prohibited from granting upstream guarantees or security for the acquisition facilities.

Upstream guarantees (for non acquisition debt): guarantor must receive direct/indirect corporate benefit. Risk must be proportionate to benefit and financial support given should not exceed guarantor's financial capabilities and companies involved must be part of a genuine group with a common strategy/objective.

Financing disclosure requirements

In general, the offer document will include a brief description of any related financing arrangements. There is no obligation to disclose copies of the underlying financing arrangements which relate to the offer guarantee provided by the presenting bank.

Syndication

Any information provided to potential financiers prior to the public announcement of the takeover offer may constitute inside information. Hence, the number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement. However, there is no strict legal limit on the number of potential financiers.

Syndication during the bid period should generally not cause any specific legal concerns.

03 Germany



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Takeover methods

Offer: a public offer by the bidder to the target's shareholders to acquire all the shares they hold in the target. The offer may either be supported by a positive reasoned statement by the target's management board recommending the takeover offer or "hostile" if not recommended.

Majority required for target control

Ordinary resolutions: (eg appointment and, in most cases, removal of shareholder representatives on the supervisory board) require more than 50% of the voting rights cast.

Special resolutions: (eg structural measures such as a merger or conclusion of a domination agreement and/or profit and loss transfer agreement) require 75% of the voting rights cast.

Domination: no right of the majority shareholder to instruct target management board on how to run the target's business unless a domination agreement is in place.

Tax grouping: requires a profit and loss transfer agreement between bidder and target to be in place.

Squeeze-out of minority shareholders

Procedure - court order: squeeze-out of minority shareholders by court order within three months after the end of the offer period if the bidder holds 95% of the target's voting rights.

Price: same as the offer consideration (if the offer has been accepted by less than 90% of the shares to which the offer relates, a valuation is necessary).

Procedure - shareholder resolution: squeeze-out of minority shareholders by resolution of target's shareholders if bidder holds 95% of the target's share capital (only 90% required if squeeze-out is part of an upstream merger of target).

Price: the higher of (i) the average market price over the three months prior to the squeeze-out and (ii) a price determined by a valuation.

Mandatory offer threshold and price

Threshold: 30% of the voting rights.

Price: must be at least equal to the higher of:

- > the highest price paid by the bidder (or any party acting in concert) during the six months prior to the offer being made; and
- > the average volume weighted market price over the three months prior to the offer announcement.

Certain funds for cash consideration

If the offer consideration is cash or includes a cash element, a confirmation by an independent investment services enterprise must be attached to the offer document stating that the bidder has taken all steps necessary to ensure availability of the funds to pay the offer price when due. If the bidder has not taken the necessary steps, any person who accepted the offer can sue the investment services enterprise for compensation. The investment services enterprise would not be liable if it is able to prove that it did not know that the bidder had not taken the necessary steps and that this lack of knowledge was not due to gross negligence on its part.

When debt financing is used, the financial services enterprise providing the confirmation will ensure that the debt terms, during the acceptance period, oblige the lenders to fund even if an event of default occurs (subject to limited exceptions).

Restrictions on target support

A German stock corporation (AG) is prohibited from providing any form of support (including the granting of security and guarantees) in connection with the financing of the acquisition of its own shares. The same applies to any subsidiary of the AG.

In addition, relatively strict capital maintenance rules apply to the AG which prohibit the distribution of assets, cash or other benefits to its shareholders other than by way of a dividend distribution resolved upon once a year by the general meeting. Such prohibition extends to the granting of security or guarantees securing shareholder debt. The limitations resulting from financial assistance and capital maintenance rules need to be considered on a case by case basis and may be avoided through (i) a merger of the AG and Bidco, (ii) the conclusion of domination and profit and loss transfer agreements, (iii) the change of legal form of the AG as well as other post-closing reorganisation measures (or a combination of these).

Financing disclosure requirements

Details required to be publicly disclosed include:

- > steps taken to ensure that the bidder has sufficient funds in place assuming that all target shareholders accept the offer;
- > information on expected consequences of the offer on the assets, financial and earnings position of the bidder; and
- > general statement on the expected overall transaction costs for the bidder.

There is no obligation to publish the financing agreements entered into in relation to the takeover offer or specific details of the fees paid or flex arrangements.

Syndication

Any information provided to potential financiers prior to the public announcement of the takeover offer may constitute inside information. Hence, the number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement. However, there is no strict legal limit on the number of potential financiers.

Syndication during the bid period should generally not cause any specific legal concerns.

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Takeover methods

Offer: a general offer by the bidder to the target's shareholders to acquire all shares they own in the target. The offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Majority required for target control

Ordinary resolutions: (eg appointment and removal of the directors) require more than 50% of the voting rights cast.

Special resolutions: (eg amendments to the articles of association) require 66.7% vote of the voting rights cast.

Squeeze-out of minority shareholders

Procedure: squeeze-out of minority shareholders is possible within three months of the end of the offer period if the bidder holds at least 95% of the voting rights and the intention to squeeze-out was stated in the offer document.

Price: shareholders must be offered either:

- > the same consideration as under the terms of the offer; or
- > in certain circumstances an amount determined by CONSOB (the Italian stock exchange commission).

Mandatory offer threshold and price

Thresholds: more than:

- > 30% of the voting rights; or
- > 25% of the voting rights if no other shareholders hold a higher percentage of voting rights,

or

- > the bidder increasing its shareholding by more than 5% of the voting rights in a 12 month period where the bidder already holds between 30% and 50% of the voting rights.

Price: must be at least equal to the highest price paid by the bidder (alone or in concert) during the 12 months prior to the offer being made.

Certain funds for cash consideration

Where the offer consideration is cash or includes a cash element:

- > the bidder must ensure that it has sufficient resources to satisfy full acceptance of the bid; and
- > before commencement of the offer period, the bidder must file with CONSOB a cash confirmation in the form of an unconditional commitment from an independent financial institution for the amount which would be required to satisfy full acceptance of the bid. It is necessary to confirm that the debt financing is committed and that the terms irrevocably oblige the lenders to make funds available even if an event of default occurs.

Restrictions on target support

Financial assistance: it is unlawful for an Italian company to give direct or indirect financial assistance for the acquisition of shares in itself or in its holding companies.

However, subject to certain conditions, such as shareholder approval, financial assistance may be provided up to an aggregate amount not exceeding the relevant company's distributable profits and available reserves.

Upstream guarantees: guarantor must receive adequate economic benefit for the guarantee and risk should be proportionate to benefit.

Financing disclosure requirements

Details required to be publicly disclosed by the bidder include:

- > the sources and amount of funds used for the acquisition;
- > the identities of the lenders financing the bid;
- > a description of the main terms and conditions of the facilities including interest, guarantees, undertakings and events of default. Changes to the margin, eg as a result of a ratchet or flex arrangements, must be described in general terms, but there is no requirement to specify the details of flex arrangements separately; and
- > any potential conflicts of interest among the bidder, its financial advisor and the lenders.

There is no obligation to publish the financing agreements entered into in relation to the takeover offer or details of fees payable in connection with those agreements.

Syndication

During the period prior to announcement:

- > information relating to the potential bid may constitute inside information; and
- > the bidder can be required to confirm its intentions regarding a potential bid if market rumours exist with regard to a possible takeover and there are irregularities in the market performance of the target's shares.

The number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement. However, there is no strict legal limit on the number of potential financiers.

Syndication during the bid period should generally not cause any specific legal concerns.

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Takeover methods

Offer: a general offer by the bidder to the target's shareholders to acquire all shares they own in the target. The general offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Majority required for target control

Control: in practice (subject to any higher quorum and majority requirements set out in the articles of incorporation):

- > 100% vote to redomicile the target;
- > 66.7% vote for amendments to the articles of association; and
- > more than 50% for ordinary resolutions.

Tax grouping: 95% of the target's share capital.

Squeeze-out of minority shareholders

Procedure: squeeze-out of minority shareholders is possible within three months of closing of the offer provided the bidder holds at least 95% of the voting rights and 95% of the voting shares in the target following the offer.

Price: the same consideration as under the terms of offer or cash. Cash must always be offered as an alternative.

Autonomous squeeze-out (ie separate to a takeover offer) is also possible in certain circumstances).

Mandatory offer threshold and price

Threshold: 33.3% of the voting rights (whether held directly or indirectly, alone or with any concert party) of a listed company.

Price: at least equal to the highest price paid by the bidder (and any concert party) during the 12 months prior to the offer announcement. If the bidder (and any concert party) purchases target shares between the offer announcement and the end of the offer period at a higher price, the offer price shall be increased to at least such price.

May be cash, shares or a combination. Cash alternative may be required if consideration shares are illiquid or the bidder has acquired 5% or more during a period beginning 12 months before the bid and ending on the closing of the offer.

Certain funds for cash consideration

Before announcement of the offer, the bidder must ensure that it is able to pay in full any cash consideration. There is no legal requirement for certain funds or for a third party to provide a cash confirmation. However, additional information might be requested by the Luxembourg regulator (the Commission de Surveillance du Secteur Financier).

Restrictions on target support

Financial assistance: a Luxembourg public limited liability company must not advance funds, grant loans or provide security with a view to the acquisition of its shares unless:

- > the transaction is approved by the board of directors on fair market terms;
- > the transaction is approved by the shareholders' meeting;
- > the transaction is justified in a special board report;
- > there is no reduction of the net assets below the amount of the paid-up share capital plus the unavailable reserves as a result of the financial assistance; and
- > an unavailable reserve is created on the liabilities side of its balance sheet.

The prohibition does not apply to any subsidiaries, but sufficient corporate benefit is still required.

Upstream guarantees: guarantor must receive consideration or there must be a balance between commitments of affiliates. Financial support should not exceed guarantor's financial capabilities and companies involved must be part of a genuine group with a common strategy/objective.

Financing disclosure requirements

The bidder is required to draw up and make public in good time an offer document containing the information necessary to enable the holders of the target company's shares to reach a properly informed decision on the bid, including information concerning the financing for the bid.

There is no legal requirement to publish the financing agreements entered into in relation to the takeover offer or specific details of the fees paid or flex arrangements.

Syndication

Any information provided to potential financiers prior to the public announcement of the takeover offer may constitute inside information. Hence, the number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement. However, there is no strict legal limit on the number of potential financiers.

Syndication during the bid period should generally not cause any specific legal concerns.

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Takeover methods

Offer: a public offer by the bidder to the target's shareholders to acquire all the shares they hold in the target. The general offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Majority required for target control

Resolutions: resolutions (eg appointment of directors) require more than 50% of the voting rights cast. The target's articles of association may provide higher thresholds for certain matters. Certain resolutions, (eg structural measures such as capital reduction or merger) require 66.7% of the voting rights cast if less than half the issued share capital is represented.

Tax grouping: legal and economic ownership of at least 95% of the shares in the nominal paid-in capital.

Squeeze-out of minority shareholders

Procedure: squeeze-out of minority shareholders within three months after the end of the offer period if the bidder holds 95% or more of the issued share capital and 95% or more of the voting rights.

Price: The Enterprise Chamber of the Court of Appeal in Amsterdam will determine a fair price. If 90% of shares have been tendered in the offer, the offer price will be presumed fair.

Alternative methods of squeeze out include effecting a legal merger between the target and the bidder, but a minority shareholder may seek to challenge this.

Mandatory offer threshold and price

Threshold: 30% or more of the voting rights.

Price: must be at a 'fair price'. This is:

- > the highest price paid by the bidder (or any concert party) for the shares in the 12 months prior to the offer announcement;
- > if the bidder did not acquire any such shares in that period, the average price of the shares during that 12 month period; or
- > if the bidder (or any concert party) acquires any such shares for a higher price in the period between the offer announcement and the end of the offer period, that higher price.

Certain funds for cash consideration

The bidder must have committed financing in place before the offer document is submitted to the Dutch securities regulator (AFM) for approval, ie within 12 weeks after the initial public announcement. There is no requirement for certain funds or for a third party to provide a cash confirmation.

The bidder must make a public announcement that it has the financial means available to pay the offer price in cash or that it has taken all reasonable measures to pay any other form of offer consideration (eg shares in an exchange offer).

Restrictions on target support

Financial assistance: a Dutch NV may not provide financial assistance, whether by way of a guarantee or security or otherwise to facilitate the acquisition or subscription by a third party of its shares or shares in its Dutch holding company.

The prohibition applies to non-Dutch as well as to Dutch subsidiaries of a Dutch target.

Upstream guarantees: guarantor must receive direct/indirect corporate benefit and granting of the guarantee must not jeopardise the guarantor's existence.

Financing disclosure requirements

Details required to be publicly disclosed include:

- > an announcement that the bidder has the financial means available to pay the offer price in cash or that it has taken all reasonable measures to pay any other form of offer consideration (eg shares in an exchange offer); and
- > a detailed description of how the offer price is financed (in the case of a cash offer) or what measures the bidder has taken to ensure an alternative form of financing is available.

Such public disclosure is not subject to review or approval by the Dutch securities regulator (AFM).

There is no obligation to publish the financing agreements entered into in relation to the takeover offer or specific details of the fees paid or flex arrangements.

Syndication

Rumours in the market, significant movements in the target's share price or other events indicating a potential public offer may trigger obligations to make a public announcement.

Any information provided to potential financiers prior to the public announcement of the takeover offer may constitute inside information. Hence, the number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement. However there is no strict limit on the number of potential financiers.

Syndication during the bid period should generally not cause any specific legal concerns.

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Takeover methods

Offer: a general offer by the bidder to the target's shareholders to acquire all the shares they hold in the target. The offer may be subject to certain limited conditions, which must correspond to a legitimate interest of the bidder and must not affect the normal functioning of the market; conditions within control of the bidder are not allowed (most common conditions include the determination of a minimum acceptance level and the bidder obtaining the necessary authorisations from the relevant authorities). Once the conditions are met, the bidder must acquire all accepting shares. Shareholders who do not accept are not bound.

The offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Majority required for target control

Ordinary resolutions: (eg appointment of directors) generally require more than 50% of the voting rights cast.

Special resolutions: (eg changes to articles of association, mergers, demergers) generally require 75% of the voting rights cast.

Tax grouping: for corporate income tax, at least 75% of the share capital, as long as such participating interest entitles the shareholder to more than 50% of the voting rights.

Squeeze-out of minority shareholders

Procedure: if, following the launch of the offer, the bidder reaches or exceeds, directly or indirectly, 90% of the voting rights in the share capital of the target before the offer closes and 90% of the voting rights in respect of shares subject to the offer, the bidder may, within the following 3 month period, squeeze-out minority shareholders.

Consideration: as for mandatory offers.

Mandatory offer threshold and price

Threshold: 33.3% of the voting rights unless the shareholder can show the Portuguese Securities Commission that it does not control the target. Otherwise 50% of the voting rights.

Price: at least equal to the higher of:

- > the highest price paid by the bidder or by any or its "connected entities" for target shares in the 6 months prior to the date of the offer announcement; and
- > the average weighted price of the shares during the same period. If the price cannot be so determined or is considered not justified or equitable by the Portuguese Securities Commission, the price will be calculated, at the bidder's expense, by an independent auditor.

Certain funds for cash consideration

Where the offer consideration is cash or includes a cash element, the bidder must provide a bank guarantee or documents showing that a cash deposit has been made with a credit institution securing payment of the cash consideration.

Although not expressly provided in law, debt financing has been accepted to fund the consideration, but it must be committed and the terms must oblige the lenders, during the bid period, to make funds available even if an event of default occurs (subject to certain limited exceptions).

Restrictions on target support

Financial assistance: it is unlawful for a Portuguese public limited liability company to give direct or indirect financial assistance for the purpose of the acquisition of its own shares. Financial assistance is defined widely and includes financial assistance given by way of guarantee, security, indemnity, release or loan.

Upstream guarantees: upstream guarantees are typically limited to avoid financial assistance and so as to ensure there is sufficient corporate benefit.

Financing disclosure requirements

Details required to be publicly disclosed include:

- > details of any guarantees of the bidder's payment obligations in respect of the bid, including the identity of the guarantor and amount of the guarantee;
- > the financial situation of the bidder and financing arrangements for the bid, including the identity of the lenders and how the bidder expects to repay the debt, but not including details of financing fees or flex arrangements;
- > effects of the financing on the target and whether debt service depends on the business of the target. If so, the bidder must also include a detailed description of the financing arrangements.

Financing documents are not required to be publicly disclosed, but it is common for the Portuguese Securities Commission to require copies prior to the announcement of the offer (which it will not make public).

Syndication

Prior to announcement, to control the number of people who know about the bid, the bidder must keep a list of the people aware of the bid. Any information provided to potential financiers prior to the public announcement of the takeover offer may constitute inside information. Hence, the number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement. However there is no strict limit on the number of potential financiers.

After announcement, none of the bidder, its officers, directors, employees or advisers may make public any information relating to the bid which was not made public by the bid announcement.

Syndication during the bid period should generally not cause any specific legal concerns.

08 Spain



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Takeover methods

Offer: a general offer by the bidder to the target's shareholders to acquire all the shares they hold in the target. The general offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Majority required for target control

Control: control is achieved by holding more than half of the votes in the target's share capital or the ability to appoint the majority of the members of the board of directors. Higher thresholds apply for particular matters.

Tax grouping: the controlling entity must be the direct or indirect owner of at least 70% of the shares in the listed target company.

Squeeze-out of minority shareholders

Procedure: if the bidder has acquired 90% of the voting capital of the target through acceptance of the offer it may squeeze-out minority shareholders.

Consideration: must be the same consideration as under the terms of the offer.

Mandatory offer threshold and price

Threshold: 30% of the voting rights (or having acquired less than 30% of the voting rights, the bidder appoints directors amounting to half of the target's board within 24 months).

Price: must be at least equal to the highest price paid by the bidder (alone or in concert) for the target's shares during the 12 months prior to the offer being made.

If no acquisition of shares has been made during the 12 months prior to the offer being made, Spanish law requires certain valuation mechanisms to be taken into account to set the price.

Certain funds for cash consideration

Where the offer consideration is cash or includes a cash element, the bidder must provide a bank guarantee or documents showing that a cash deposit has been made with a credit institution securing payment of the cash consideration.

Restrictions on target support

Financial assistance: it is unlawful for a Spanish public limited liability company or any of its direct or indirect subsidiaries incorporated in Spain to give direct or indirect financial assistance for the purpose of the acquisition of shares in itself or in its direct or indirect shareholder. Financial assistance is defined widely and includes financial assistance given by way of guarantee, security, indemnity, release or loan.

Upstream guarantees: upstream guarantees are typically limited to avoid financial assistance and because an unlimited guarantee makes it difficult to demonstrate corporate benefit.

Financing disclosure requirements

Details required to be publicly disclosed include:

- > details of any guarantees of the bidder's payment obligations arranged by the bidder to settle the bid, including the identity of the guarantor and amount of the guarantee;
- > the financial situation of the bidder and financing arrangements for the bid, including the identity of the lenders and the provisions made by the bidder for the purposes of debt service; and
- > the effects of the financing on the target. The bidder must state whether debt service will rely on the business of the target. If so, the bidder must also include a detailed description of the financing arrangements.

There is no obligation to publish the financing agreements entered into in relation to the takeover offer or specific details of the fees paid or flex arrangements.

Syndication

Any information provided to potential financiers prior to the public announcement of the takeover offer may constitute inside information. Hence, the number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement.

After announcement, none of the bidder, its officers, directors, employees or advisers may make public any information relating to the bid which was not made public by the bid announcement.

Syndication during the bid period should generally not cause any specific legal concerns.

09 Sweden



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Takeover methods

Offer: a general offer by the bidder to the target's shareholders to acquire all shares they own in the target. The offer may be subject to certain limited conditions (which usually should not include the availability of financing, but should include a minimum acceptance level), and once met, the bidder must acquire all accepting shares. Shareholders who do not accept are not bound. The offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Legal merger: a legal merger, where the consideration is shares in the acquiring company, can be carried out if a majority representing 66.7% of the votes as well as the shares represented at a shareholders' meeting is obtained. Note that the surviving company (or any of its group companies) may not vote for its shares at the shareholders' meeting of the transferring company.

Certain funds for cash consideration

There is no formal requirement for certain funds or for a third party to provide a cash confirmation, but the bidder (and its financial advisors) must ensure that committed financing is in place prior to the offer being launched and during the offer period.

Majority required for target control

Ordinary resolutions: (eg appointment and removal of directors) require more than 50% of the voting rights cast.

Special resolutions: (eg changes to articles of association) require 66.7% of the voting rights cast and the shares represented at the shareholders' meeting. Resolutions affecting shareholder rights, such as altering the legal relationship between different share classes, require higher approval thresholds (eg approval by all shareholders present at the general meeting who in turn represent at least 90% of the shares in the company).

Tax grouping: tax consolidation by way of exchanging group contributions is generally available between Swedish companies provided that a number of requirements are met, of which one is more than 90% ownership.

Restrictions on target support

Financial assistance: a Swedish company cannot provide financial assistance for the purchase of its, or any of its Swedish parent companies', shares. If the target is a Swedish limited liability company, it and its Swedish subsidiaries may not provide guarantees or grant security for debt incurred by a bidder. The restriction does not apply in the situation where the creditors are deemed to have taken on a real credit risk, which is generally the case if guarantees and security are granted 30 - 45 days after the acquisition.

Upstream guarantees: a Swedish company is generally prohibited from granting upstream guarantees unless the beneficiary is, or is a subsidiary of a company, incorporated within the EEA. Upstream guarantees where there is no corporate benefit could be considered a transfer of value, in which case they will be limited to the distributable funds of the guarantor/pledgor.

Squeeze-out of minority shareholders

Procedure: squeeze-out of minority shareholders following an offer is possible if the bidder has acquired 90% of the target's shares. In this situation, minority shareholders are also entitled to compel the majority shareholder to purchase its shares.

Consideration: shareholders must be offered the same consideration as set out under the terms of the offer.

Financing disclosure requirements

Details required to be publicly disclosed by the bidder include:

- > the financing arrangements for the bid (including the main terms and conditions for the financing);
- > the extent to which a bidder has obtained commitments of acceptance from shareholders in the target; and
- > the extent to which the target has agreed to any bid related arrangements (containing any obligations from the target towards the bidder, but not including any confidentiality or non-solicitation agreements).

Other than the above, there is no obligation to publish the financing agreements entered into in relation to the takeover offer or specific details of the fees paid or flex arrangements.

Mandatory offer threshold and price

Threshold: 30% of the voting rights.

Price: must be at least equal to:

- > the highest price paid by the bidder (or any concert party) for the target shares during a period of six months prior to the date of the offer;
- > the highest price paid by the bidder (or any concert party) during the period the offer remains open for acceptances; or
- > the highest price paid by the bidder (or any concert party) during a period of six months after the payment of the offer consideration.

Type: cash, shares or a combination of both. A cash alternative is always required.

Syndication

During the period prior to announcement of the bid, Swedish market abuse rules emphasise the need for secrecy and security. The number of financiers approached prior to the public announcement of the takeover offer should be limited, closely monitored and governed by a non-disclosure agreement. However there is no strict limit on the number of potential financiers.

Syndication during the bid period should generally not cause any specific legal concerns.

10 United Kingdom



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Takeover methods

Offer: a general offer by the bidder to the target's shareholders to acquire all shares they own in the target. The offer may be subject to certain limited conditions (which usually must not include the availability of financing, but must include a minimum acceptance level), and once met, the bidder must acquire all accepting shares. Shareholders who do not accept are not bound. The offer may be recommended by the target board, or "hostile" if not recommended.

Scheme of arrangement: a process which may be used to implement an offer. A scheme is initiated by the target and must be approved by the court and a majority in number of target shareholders representing 75% in value of the voting rights cast – but once approved binds all target shareholders. Because of the target's involvement, usually only available for a recommended offer.

Certain funds for cash consideration

Where the bid consideration includes a cash element, the bidder's financial adviser must confirm, as at the firm bid announcement, that the bidder has sufficient resources to satisfy full acceptance of the cash element of the bid. The financial adviser must act responsibly and take all reasonable steps in giving the cash confirmation, otherwise it may have to provide the funds itself in the event the bidder does not have the funds.

Debt financing may be used to fund the consideration, and it does not have to be drawn prior to completion – but the financial adviser will check that the financing is committed and that the terms oblige the lenders, during the bid period, to make funds available even if an event of default occurs (subject to certain limited exceptions).

Majority required for target control

Ordinary resolutions: (eg appointment and removal of directors) require more than 50% of the voting rights cast.

Special resolutions: (eg changes to articles of association) require 75% of the voting rights cast.

Tax grouping: generally for direct taxes, 75% of "ordinary share capital" plus entitlement to 75% (or sometimes 50%) of profits available for distribution and assets on a winding up.

Restrictions on target support

Financial assistance: it is unlawful for an English public company or any of its English subsidiaries to give direct or indirect financial assistance for the acquisition of shares in that public company. As a result, the target and its subsidiaries may not give guarantees or security to support debt incurred by the bidder to fund the acquisition.

The restriction will generally not apply if:

- > the target is re-registered as a private company; or
- > the financial assistance arises pursuant to a scheme of arrangement.

Upstream guarantees: a private company and its subsidiaries may generally give unlimited upstream guarantees and security for debt incurred by an acquiror provided in each case that the board of the guarantor is satisfied that there is sufficient corporate benefit.

Squeeze-out of minority shareholders

Procedure: squeeze-out of minority shareholders following an offer is possible if the bidder has acquired, or unconditionally contracted to acquire, 90% of the target's shares to which the offer relates and 90% of the voting rights carried by the shares.

If a bid is effected by way of a scheme of arrangement, no squeeze out is required as all shareholders will be bound.

Price: shareholders must be offered the same consideration as set out under the terms of the offer.

Financing disclosure requirements

Details required to be publicly disclosed by the bidder include:

- > the financial situation of the bidder and financing arrangements for the bid, including interest rates, representations, covenants, events of default and other material terms;
- > estimated aggregate fees and expenses, together with the estimated fees and expenses of advisers to each party to the bid by category (including the maximum and minimum amounts payable as a result of success, incentive or ratchet mechanisms);
- > details of any significant change in the bidder's financial or trading position, or in the amount of fees payable.

The financing documents for the bid, including fee letters, must be published on a website. Flex arrangements may need to be disclosed.

Mandatory offer threshold and price

Threshold: 30% of the voting rights.

Price: must be at least equal to the highest price paid by the bidder (alone or in concert) for the shares during the 12 months prior to the offer being made.

Syndication

During the period prior to announcement of the bid:

- > the Takeover Code emphasises the need for secrecy and security (bidders may approach up to six potential financiers and disclosure must be closely monitored and governed by a non-disclosure agreement); and
- > the Takeover Code also forces a bidder to announce a possible bid in certain circumstances (including if there is a leak) and then the bidder must either "put up" (ie announce a firm bid) within 28 days or "shut up" (ie withdraw for at least 6 months).

As a result, any initial commitments to provide debt financing will need to be underwritten by a very small number of lenders, and the debt cannot be put to general syndication.

Syndication during the bid period should generally not cause any specific legal concerns.

11 United States



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Takeover methods

Tender offer: a tender offer by the bidder to the target's shareholders to acquire all shares they hold in the target. The offer may be recommended by the board of directors of the target or "hostile" if not recommended.

Merger: a merger involves the statutory merger of one entity with another. A merger requires approval by the target's board of directors and shareholders (typically a simple majority). Because of the need for board approval, a merger cannot be completed on a "hostile" basis.

Majority required for target control

Control: specific voting thresholds will depend on the state of incorporation of the target. In many cases, absolute control can be obtained at the simple majority level.

Certain entities may have "golden shares" or similar arrangements that give a shareholder control at much lower levels.

Tax grouping: affiliated US corporations may elect to file consolidated federal income tax returns as members of a consolidated group. An affiliated group generally consists of chains of 80% owned (by vote and value) corporate subsidiaries having a common parent that owns such chains directly or indirectly.

Squeeze-out of minority shareholders

Procedure: squeeze-out of minority shareholders following an offer is typically possible if the bidder has acquired at least a majority of the target's shares, but the threshold will vary according to the state of incorporation of the target.

Price: shareholders must be offered the same consideration as set out under the terms of the offer. However, dissenting shareholders may exercise appraisal rights whereby a court would determine the consideration to be paid in connection with a merger or squeeze-out following a tender offer.

Mandatory offer threshold and price

No mandatory offer threshold in the US.

Certain funds for cash consideration

There is no cash confirmation or similar requirement in the US, but a bidder could be liable for misrepresentation of its funding arrangements.

Bidders increasingly seek "SunGard" provisions in debt documentation to provide greater certainty that lenders will fund the acquisition consideration when needed.

Typical "SunGard" language limits:

- > the types of collateral that must be delivered on closing to delivery of stock certificates and certain collateral that can be provided by making a public filing; and
- > representations and warranties required to be accurate as conditions to funding to those (i) contained in the acquisition agreement which are material to lenders and which, if untrue or incorrect, would give the borrower a right to terminate its obligations and (ii) relating to other matters within the borrower's control.

Restrictions on target support

Financial assistance: no statutory prohibitions on financial assistance.

Upstream guarantees: are usually available, but will commonly be limited to the extent necessary to avoid breaching fraudulent conveyance laws.

Financing disclosure requirements

Details required to be publicly disclosed include:

- > the sources and total amount of funds to be used to finance the transaction;
- > any material conditions to the financing and a description of alternative financing plans, if any;
- > a statement of expenses, including confirmation of whether the target has paid or will pay expenses; and
- > a summary of each loan agreement containing: the identity of parties, term, collateral, interest rates, other material terms or conditions and a brief description of plans to finance or repay the loan. Financing fees and flex terms are typically not disclosed.

Where all or any part of the loan is, or is expected to be, utilised, directly or indirectly, for a public acquisition of a US target, the loan documentation will be publicly available through the SEC website.

Syndication

Premature public disclosures of a tender offer may constitute the announcement (and corresponding procedural requirements) of a tender offer. Premature public disclosure of a merger could also have adverse implications. Thus, any negotiations and agreements with lenders should be kept confidential and governed by a non-disclosure agreement prior to launching any takeover.

Syndication during the bid period should generally not cause any specific legal concerns.

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

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