Ashurst

Global Guide to Public M&A

Outpacing change

contents

Foreword

We are pleased to present the fourth edition of the Ashurst Global Guide to Public M&A, which has been produced by highly experienced public M&A lawyers active across Ashurst's offices in a range of jurisdictions, including the UK, Australia, Belgium, China*, France, Germany, Hong Kong, Indonesia, Ireland†, Italy, Japan, Luxembourg, Singapore‡, Spain and the United States.

The Guide provides a summary of the rules in these jurisdictions in relation to public M&A transactions, highlights the relevant offer structure and the indicative transactional timeline, and answers the most commonly asked key commercial questions.

Our corporate team comprises more than 100 partners across Europe, the Middle East, Australia and Asia. If you would like further information on any of the issues covered in the Guide, please speak to your usual Ashurst contact or any of the partners listed in the Key contacts.

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United Kingdom

1.1 Regulation

The UK Takeover Code (the **Code**) is the principal source of regulation for public M&A transactions in the UK. The Code is issued and enforced by the Panel on Takeovers and Mergers (the **Panel**) and regulates offers for companies which have their registered offices in the UK, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a UK regulated market, a UK multilateral trading facility (such as AIM) or a stock exchange in the Channel Islands or the Isle of Man. The Code also applies to certain other public and private companies but only where their registered offices and place of central management are in the UK, the Channel Islands or the Isle of Man.[1 & 2]

The Code is based on six general principles, which are essentially standards of good commercial behaviour to ensure fair and equal treatment of shareholders, and is formed of detailed rules and notes on the rules which develop the principles further.

1.2 Structure

Offers for companies regulated by the Code can be implemented using a number of structures, although the most commonly used are a contractual takeover offer (an **Offer**) pursuant to Part 28 of the Companies Act 2006 (the **Act**) or a members' scheme of arrangement pursuant to Part 26 of the Act (a **Scheme**).

(a) Offer

A contractual offer is made by the bidder to the target's shareholders to acquire their shares, subject to a number of terms and conditions. The most important condition to an Offer is the acceptance condition, which requires that the Offer is conditional on the bidder receiving not less than a certain level of acceptances.

Pursuant to the Code, the bidder must receive, at a minimum, sufficient acceptances to take its overall shareholding in the target (when aggregated with any other shares it holds in the target) to over 50 per cent. Typically, a bidder will set its acceptance condition at 90 per cent reflecting the "squeeze-out" threshold in the UK—once a bidder has acquired not less than 90 per cent of shares to which the Offer relates, it can compulsorily acquire the remaining shares in the target under the statutory squeeze-out procedure set out in Part 28 of the Act (see section 1.2(c) below). Although reaching the 90 per cent threshold is an important milestone for most Offers, it is nonetheless common for this condition to be expressed as being capable of waiver at the election of the bidder, although a bidder will usually be unwilling to waive the condition unless a shareholding of at least 75 per cent in the target has been achieved, which generally allows the bidder to delist the target. A 75 per cent shareholding will also enable the bidder to pass special resolutions of the target, for example, to re-register the target as a private company.

An indicative timeline for the implementation of an Offer is included at the end of this section.

(b) Scheme

A Scheme is a statutory procedure under the Act whereby a target agrees an arrangement with its shareholders and is therefore used when a bid is recommended by the board of the target.

In order to maintain flexibility, if a competitive situation arises, it is current market practice for a bidder implementing a takeover using a Scheme to reserve the right to change the structure to an Offer, with the consent of the Panel.

In order to become effective, a Scheme must be approved by 75 per cent in value, representing a majority in number, of target shareholders present and voting, either in person or by proxy at a Court-convened meeting and sanctioned by the Court. Once sanctioned, the Scheme is binding on 100 per cent of the target's shareholders irrespective of the way in which they voted.

A Scheme may not be appropriate if the target has an active minority which is opposed to the bid. A large number of small shareholders can block a Scheme if they comprise a simple majority in number of those attending and voting at the meeting. Shareholders need to muster less support to prevent control passing than they would on an Offer.

An indicative timeline for the implementation of a Scheme is included at the end of this section.

1 Offers for other public companies (which do not have their securities admitted to trading) and, in certain circumstances, private companies, which are considered by the Panel to have their central place of management and control in the UK, Channel Islands or the Isle of Man (the Residency Test), are also governed bythe Code. Offers for companies that do not have their securities admitted to trading but are governed by the Code due to the application of the Residency Test are not considered any further in this section.

2 The Panel is currently consulting on a new jurisdictional framework which would narrow the scope of the companies to which the Code applies. It would re-focus the application of the Code on companies which are registered and listed (or were recently listed) in the UK. Any changes, if made, would not come into effect until Autumn 2024.

(c) Squeeze-out of minority shareholders

If a takeover is implemented as an Offer, it is likely that the bidder will want to acquire compulsorily the shareholdings of any minority shareholders who have not accepted the Offer. This process is known as "squeeze-out" and becomes available where the bidder has, by virtue of acceptances of an Offer, acquired or unconditionally contracted to acquire not less than 90 per cent of the shares to which the Offer relates. On reaching this threshold, the bidder is entitled to give a squeeze-out notice to non-assenting shareholders.

Squeeze-out is not necessary on a Scheme as, once effective, a Scheme is binding on all target shareholders.

1.3 Secrecy and announcements

There must be absolute secrecy before the announcement of a bid.

All persons privy to confidential information, and particularly price-sensitive information, concerning a bid must treat that information as secret and must conduct themselves so as to minimise the chances of an accidental leak of information. Such information should only be communicated on a "need-to-know" basis and only if the recipient is aware of the need for secrecy. Code names should always be used.

When conducting preliminary offer-related discussions, the parties involved should be aware that extending discussions beyond "a very restricted number" of persons (generally no more than six) outside those who need to know in the companies concerned and their respective immediate advisers, can give rise to an obligation to make an announcement due to the increased risk of information leaking. This obligation may arise even where there has not been an untoward movement in the parties' share prices. As a consequence, the Panel should always be consulted prior to more than six external parties being approached.

The Code has strict rules about when an announcement is required and divides the responsibility for making an announcement between bidder and target according to the circumstances.

Outlined below is a summary of when an announcement is required:

(a) If there is a leak

Before an approach

Before a bidder has made an approach to the target's board (but after it starts actively considering a bid), the bidder will be responsible for consulting the Panel and, if necessary, making a leak announcement if:

- the target is the subject of rumour and speculation; or
- there is an untoward movement in the target's share price; and
- the Panel rules that there are reasonable grounds for concluding that it is the bidder's actions which have led to the situation.

Following an approach

Following an approach, a target will be obliged to consult the Panel and, if necessary, make a leak announcement if it is the subject of rumour and speculation, or there is an untoward movement in its share price. The only exception to this is where the approach is unequivocally rejected, in which case the position described above (Before an approach) will apply.

Even if there is no leak, a target can choose to make an announcement to commence an offer period or publicly identify a potential bidder at any time it considers appropriate.

An announcement by a target (whether voluntary or obligatory) which commences the offer period will:

- need to identify all potential bidders with whom it is in talks, or from whom it has received an approach (unless such approach has been rejected by the target unequivocally); and
- trigger an automatic 28-day "put up or shut up" (**PUSU**) deadline[2] such that each of the bidders identified in the announcement must: proceed to announce a firm intention to make an offer for the target; announce that it does not intend to make an offer; or request that the target seek an extension of the deadline from the Panel.

Any subsequent announcement which first identifies another potential bidder will also trigger a PUSU deadline in relation to that potential bidder.

2 This PUSU deadline is also triggered if an announcement is made by a potential bidder stating that it is considering making a firm offer for the target.

A PUSU deadline can only be extended by the Panel at the request of the target, and no obligation can be imposed on a target (even in a recommended situation) to seek an extension.

PUSU deadlines fall away on the announcement of a firm offer for the target and competing bidders must clarify their intentions by 5.00 pm on "Day 53", typically the 53rd day after posting of the firm bidder's offer document.

(b) Acquisition of 30 per cent or more

If a shareholder or a bidder (together with its concert parties) acquires 30 per cent or more of shares carrying voting rights in a company, the Code obliges that shareholder or bidder to make a mandatory offer for the company. Mandatory offers broadly can have no conditions other than a minimum acceptance condition of 50 per cent plus one share, and they must be made in cash or include a full cash alternative.

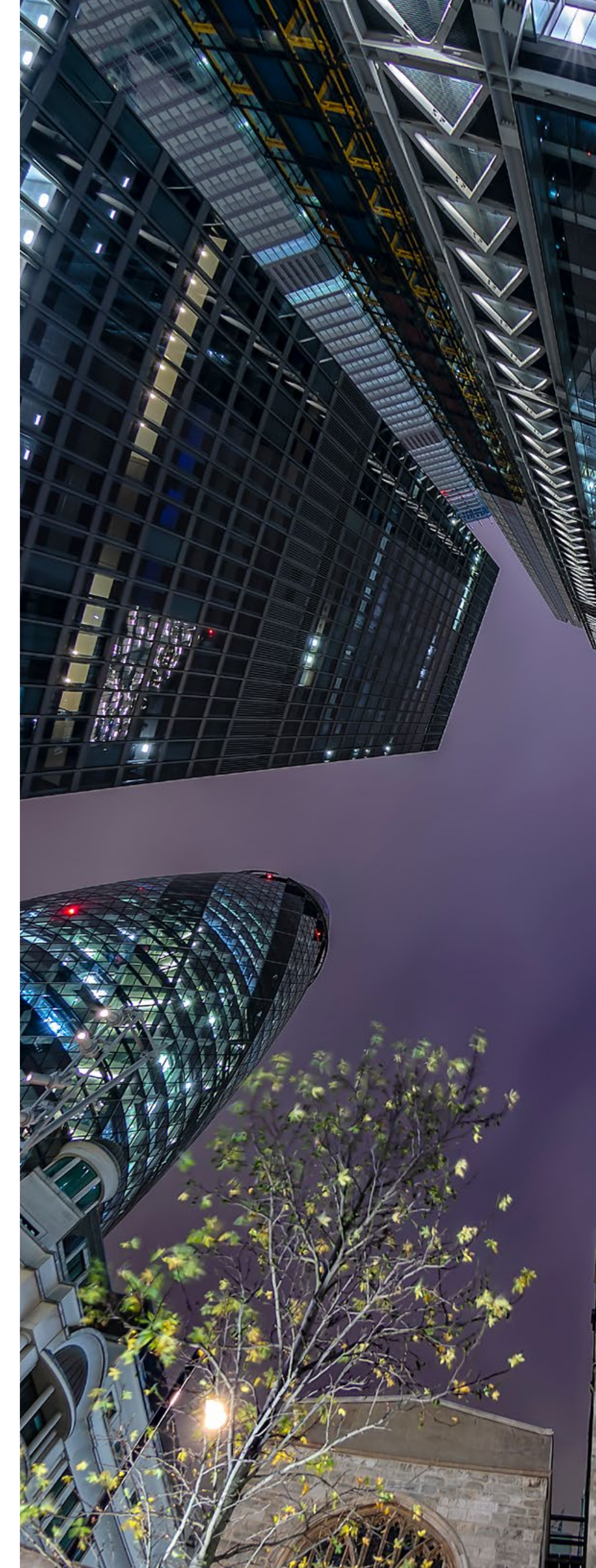
The shareholder/bidder will need to make an announcement immediately following the acquisition which triggers a mandatory offer.

The announcement obligations under the Code are not the only disclosure requirements that apply to the acquisition of shares. For more information on the thresholds which trigger announcement obligations, see section 1.4(c) below.

(c) Firm intention to make an offer

A firm intention to make an offer should only be announced when the bidder has every reason to believe that it can and will be able to implement the offer and, where a bid includes an element of cash, the bidder's financial adviser has confirmed that it has sufficient resources to satisfy full acceptance of the offer (following completion of a cash confirmation process). Bidders also need to be aware that the inclusion of pre-conditions to posting of the offer/scheme document require the consent of the Panel and any such pre-conditions can generally be invoked only in very narrow circumstances and with the consent of the Panel.

In addition to the mandatory announcement obligations outlined above, a potential bidder may also choose to make a possible offer announcement detailing the terms on which a bid might be made for the target. This type of announcement (often referred to as a bear hug announcement) is used to start a virtual bid to put pressure on the target board to engage with the potential bidder, but as it has the effect of triggering the automatic 28-day PUSU deadline referred to above, this strategy should be used with care.



1.4 Disclosure of interests and stakebuilding

Depending on the liquidity of the relevant stock and the number of willing sellers in the market, a potential bidder may consider purchasing target shares in the market either before or after approaching the target's board.

Such acquisitions may have serious consequences for a bid and some of the following issues will be relevant to any stakebuilding strategy:

(a) Insider dealing/market abuse

So as to avoid any insider dealing/market abuse concerns, no acquisitions should be made if a bidder or anyone acting in concert with it has any inside information relating to the target. Knowledge that a bidder is itself considering a bid, if that is the only inside information a potential bidder has, is not a concern and acquisitions by that potential bidder of the target company's shares will in these circumstances not amount to insider dealing or market abuse.

(b) Offer structure

Deciding if and/or when to stakebuild may also be affected by the offer structure. If the bid is to be implemented as an Offer, any shares acquired by the bidder prior to the posting of the offer document are not shares to which the Offer relates, and therefore cannot count towards the 90 per cent squeeze-out threshold. They can count towards the acceptance threshold, however, and will count towards the 90 per cent squeeze-out threshold if acquired after the posting of the offer document.

If implemented as a Scheme, any shares held by the bidder and its concert parties cannot be voted in favour of the Scheme, so while they could be voted against an interloper's scheme (or used to oppose a competing offer), such shares will be of no assistance in achieving the voting thresholds required to implement the Scheme itself.

(c) Disclosure

Disclosure Guidance and Transparency Rules

Despite the existence of a bid for a company, if a shareholder's aggregate interest in a company exceeds 3 per cent, and if their holding changes to reach, exceed or fall below every 1 per cent thereafter, it must notify the company of this within two trading days pursuant to the UK Disclosure Guidance and Transparency Rules. The company will then be obliged to announce the notification to the market by the close of the next trading day identifying the name of the purchaser of the shares.

Any such announcement may cause market speculation regarding the shareholder's intentions and require a clarificatory announcement to be made under the Code (unless a bid has already been announced). These disclosure requirements mean that there is a real risk that any pre-announcement stakebuilding will result in a bidder's name being made public in connection with the possible bid.

The Code

During an offer period, the Code's disclosure regime applies to: the target; any named bidder; and any person who, together with its concert parties, is or becomes interested in 1 per cent or more of any class of relevant securities of the target or named paper bidder.

Any party to the offer must make a dealing disclosure if it, or a concert party, deals in the relevant securities of a target or named paper bidder by no later than 12 noon on the business day following the date of the relevant dealing. Persons unconnected to the offer with interests in securities representing 1 per cent or more of any class of relevant securities have until 3.30 pm on the business day following the date of the relevant dealing.

In addition, each person to whom the disclosure regime applies must make a public opening position disclosure within ten business days of the commencement of the offer period or the date on which a bidder is first identified as such. The opening position disclosure announcement must contain details of the person's long interests and short positions in, and rights to subscribe for, any relevant securities of each of the target and any paper bidder.

(d) Price floor

An acquisition of interests in target securities will set a floor price for a bid announced within three months of the relevant acquisition, or if the acquisition is made after commencement of the offer period. The same applies for any acquisitions made in the previous 12 months if, during that time, a stake of over 10 per cent in the target is acquired.

(e) Cash consideration

If a bidder (together with its concert parties) acquires for cash consideration: shares in the target during the offer period; or 10 per cent or more of shares in the target during the offer period and/or in the 12 months prior to the commencement of the offer period, the offer must be for cash consideration or be accompanied by a cash alternative at not less than the highest price paid.

(f) Mandatory offer required

As set out in section 1.3(b) above, if a bidder and/or any concert party acquires 30 per cent or more of a company's shares then a mandatory takeover offer for that company is required, which, broadly, can have no conditions other than a minimum acceptance condition of 50 per cent plus one share.

1.5 Cash confirmation

When a bidder announces a firm intention to make an offer for the target and such offer is for cash or contains an element of cash, the Code requires the announcement to contain a confirmation by an appropriate third party (typically the bidder's financial adviser) that sufficient resources are available to the bidder to satisfy full acceptance of the offer. The "cash confirmation" must be repeated in the formal offer/scheme document which must be posted to shareholders of the target within 28 days of the offer announcement.

In most cases, significant due diligence is required before a financial adviser (or other suitable third party) will permit the cash confirmation to be given, as the party giving the confirmation could be made to produce the cash itself if, when giving the cash confirmation, it failed to act responsibly and did not take all reasonable steps to assure itself that the cash was available.

1.6 US securities

If any shares in a target company are held (directly or beneficially) by US shareholders, the implications of including US shareholders in the offer will need to be assessed. An analysis of the issues will need to be undertaken at the outset of each transaction.

Such an analysis will also be needed for each of the other jurisdictions covered in this guide where shares in the relevant target company are held by US shareholders. Please refer to Chapter 15 (USA) of this guide for more information.

1.7 Key commercial questions

Are advisers required?
The Code requires the board of the target to obtain competent independent advice on a bid and the substance of that advice must be made known to shareholders. Although not strictly required (other than on a reverse takeover), it is standard practice for bidders to appoint advisers. In addition, typically, the financial adviser will appoint legal advisers to assist with the cash confirmation process set out in section 1.5 above.

Is the target obliged to make information available to a bidder?
Not specifically, but if a target has made information available to one potential bidder it must be provided to other potential bidders (even if they are less welcome), provided that the requesting potential bidder is aware of the other's intentions.

Can the target take action to frustrate a bid?
Not without the approval of shareholders at a general meeting.

Can a bidder prevent the target from disclosing its identity to the market?
No. A potential bidder must not attempt to prevent the board of a target from making an announcement relating to a possible offer at any time that the target considers appropriate.

Can the target grant exclusivity or pay a break fee to a bidder?
A general prohibition applies to offer-related agreements (e.g. break fees, matching rights, exclusivity) although there are two exceptions (with the consent of the Panel) for break fees: (i) where a break fee is agreed in favour of a bidder that has participated in a formal sale process launched by the target and (ii) where a target seeks a "white knight" after a bidder has made a hostile firm offer for the target.

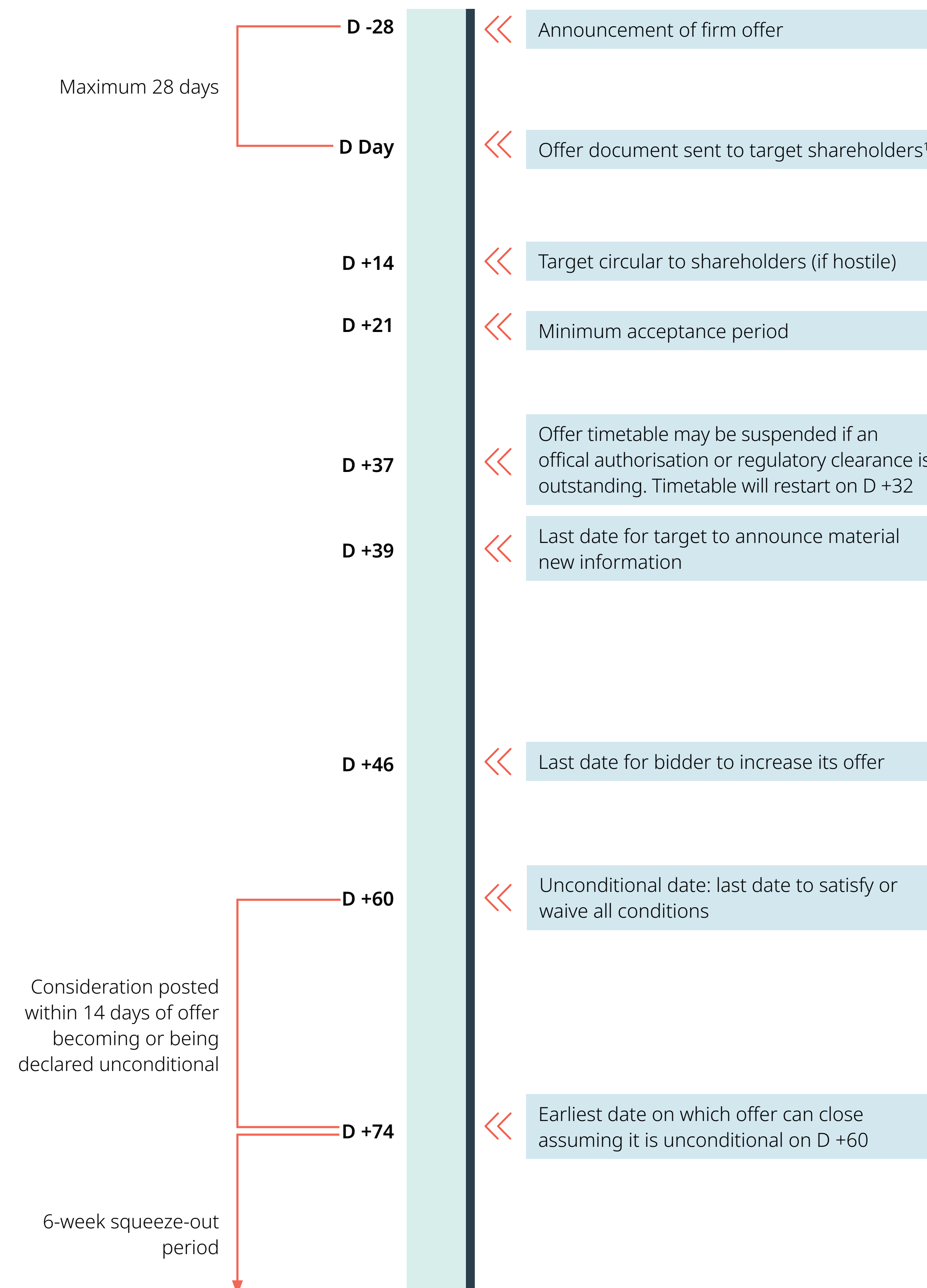
Can a bidder enter into special deals with the target's management or other key shareholders?
Not without the consent of the Panel. If Panel consent is given, full disclosure and, in certain circumstances, the consent of the target's independent shareholders will be required.

Can information be given to key shareholders in advance?
Yes, provided such information is then shared with all other target shareholders. Information must be made equally available to all target shareholders (and persons with information rights) as nearly as possible at the same time and in the same manner. Meetings and calls with shareholders and other stakeholders should be chaperoned by the financial adviser to ensure compliance with the Code.

Can a bidder obtain irrevocable commitments?
Yes. Bidders will often seek irrevocable commitments (or non-binding letters of intent) from key shareholders, including the target's director shareholders.

Can the target provide financial assistance for a bid, such as security or loans?
No. A target is prohibited from providing any gifts, loans or security and from giving any other financial assistance which may reduce its net assets materially while it remains a public company. Once it is re-registered as a private company, the target may provide financial assistance.

Indicative timeline for a UK takeover by way of an offer

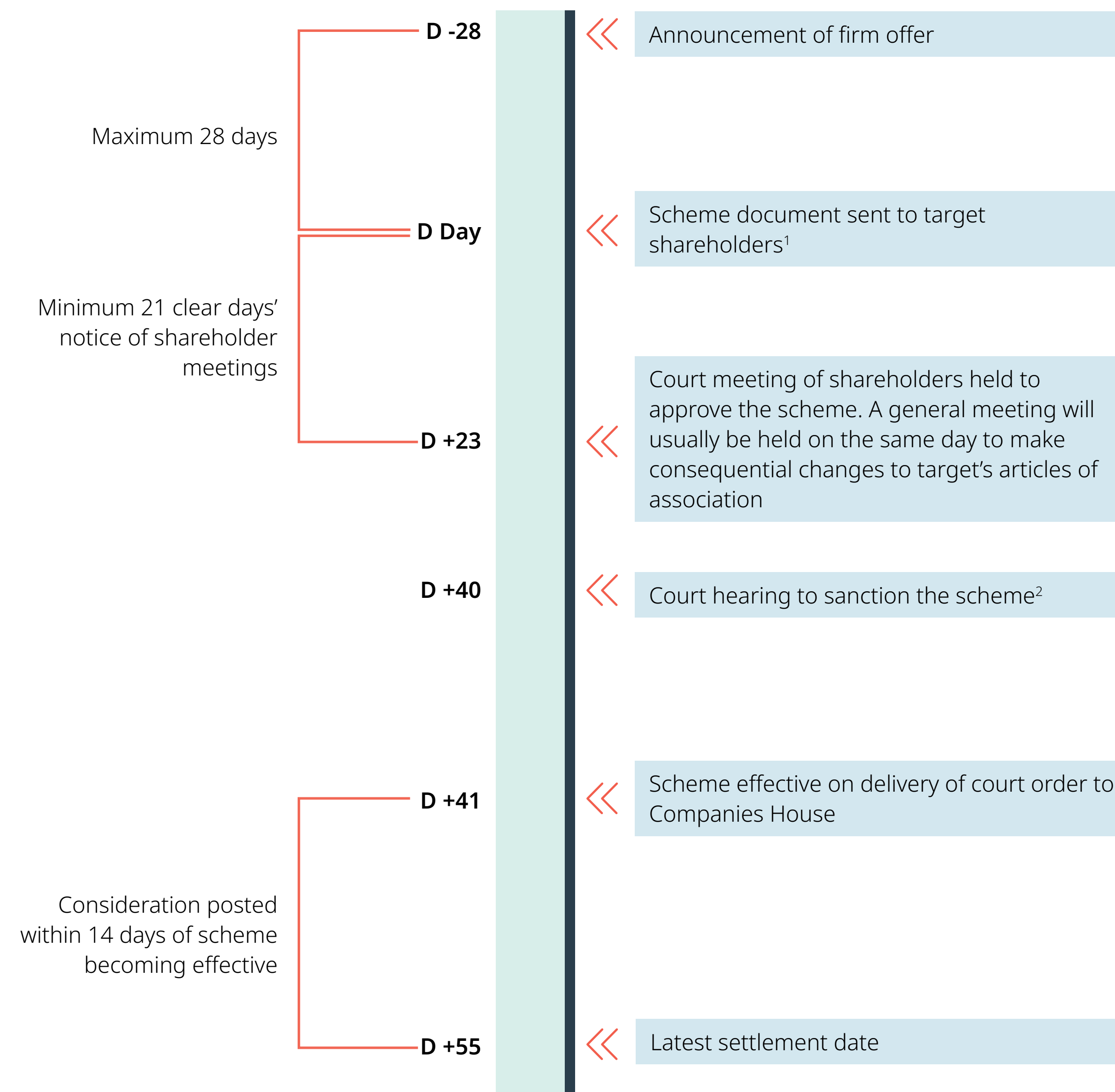


Assumptions: No competition or other regulatory clearances and no competitive bid situation.

Note: The timetable can be accelerated by bidder making an acceleration statement. This brings forward the unconditional date. The squeeze-out procedure can commence as soon as the 90 per cent threshold is met.

1. Not earlier than 14 days after the date of the offer announcement (unless the target board consents).

Indicative timeline for a takeover by way of a scheme in England and Wales



Assumptions: Recommended bid with no competition or other regulatory clearances and no competitive bid situation.

Note: Timetable not as strictly governed as a contractual offer and can be extended if Panel and target agree.

1. Not earlier than 14 days after the date of the offer announcement (unless the target board consents).
2. This is an indicative timeline and the court sanction hearing could happen sooner than D +40. All conditions (other than those relating to court sanction of the scheme, delivery of the court order to Companies House and any admission of consideration securities to trading) must be satisfied by the date of the court hearing to sanction the scheme.

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2 Australia

2.1 Regulation

Public M&A transactions in Australia are regulated by the Corporations Act 2001 (Cth) (the **Act**) and, in particular, Chapter 6 of the Act (**Chapter 6**). Enforcement is divided between the Australian Securities and Investments Commission (**ASIC**) and the Takeovers Panel (the **Panel**), which is a statutory "peer review" tribunal with part-time members drawn from the business community. Chapter 6 regulates offers for:

- Australian companies that are listed or that have more than 50 members; and
- listed managed investment schemes (i.e. trusts),

(together, **Chapter 6 entities**).

Chapter 6 contains detailed rules (broadly similar in policy to the UK City Code) requiring that the target company shareholders be treated equally and given reasonable time and enough information to enable them to assess a control proposal.

2.2 Structure

A takeover of a Chapter 6 entity is usually implemented either by way of a conventional contractual offer pursuant to Chapter 6 (a **takeover bid**) or a statutory scheme of arrangement pursuant to Part 5.1 of the Act (a **Scheme**).

(a) 20 per cent takeovers threshold

Chapter 6 prohibits the acquisition of an interest resulting in any person's voting power in a Chapter 6 entity increasing to more than 20 per cent (or any person's voting power increasing between 20 per cent and 90 per cent) (**20 per cent threshold prohibition**). The definition of voting power is broad, and includes control by persons or their associates over voting or disposal of securities.

There are a number of exceptions to this rule, the most important of which permit the following transactions:

(i) acquisitions under a takeover bid (see section 2.2(b) below);

(ii) acquisitions resulting from Schemes (see section 2.2(c) below);

(iii) acquisitions with the approval of a majority of the shareholders who are not parties to the transaction;

(iv) acquisitions of no more than 3 per cent of voting power every six months (also known as the **creep rule**); and

(v) downstream acquisitions in Chapter 6 entities that result from upstream acquisitions in bodies listed in Australia or on foreign stock markets approved by ASIC.

The 20 per cent threshold prohibition is broad and catches, for example, the acquisition of more than 20 per cent of voting power in a corporation formed in another jurisdiction (subject to the downstream exception noted above) if that corporation, in turn, has an interest of more than 20 per cent in a Chapter 6 entity.

(b) Takeover bid

A takeover bid is a contractual offer made by the bidder to the target's shareholders to acquire their shares. The offer must be made to all holders of the class of shares which is the subject of the bid. Market bids must be unconditional, but the more common off-market bid may be subject to conditions (only off-market bids are discussed in the remainder of this section). One of the most important common conditions of a takeover bid is the acceptance condition, which requires that the takeover bid is conditional on the bidder receiving acceptances in relation to more than a specified percentage of shares (usually either 50 per cent or 90 per cent). This condition is often waived before it is reached (and there is no mandatory minimum acceptance required).

Other common conditions include:

(i) regulatory approvals (including, where required for foreign bidders, the approval of the Australian Treasurer under the Foreign Acquisitions and Takeovers Act 1975 (Cth));

(ii) no material adverse change;

(iii) no material acquisitions or disposals; and

(iv) none of the events specified in section 652C of the Act occur – these are serious events such as the issue of new shares or the appointment of a liquidator or administrator (known as prescribed occurrences).

An indicative timetable for the implementation of a Scheme is included at the end of this section.

(c) Scheme

A Scheme is a statutory procedure whereby a target agrees to an arrangement with its shareholders. As a Scheme is implemented by the target, the structure is only viable when a takeover is recommended rather than hostile.

In order to become effective, a Scheme must be approved at a court – convened meeting of the target company by at least 75 per cent of the votes cast on the resolution, and also (unless the court orders otherwise,for example, to counter share splitting) by a majority in number of shareholders who vote. If approved by the court, the Scheme is binding on all shareholders: no squeeze-out of the minority is required.

In addition to the certainty of acquiring 100 per cent control on a specified date, a Scheme offers much greater flexibility in terms of structuring. However, a Scheme gives the target control of the process and the timing. Also, unlike a takeover bid, a Scheme does not allow the bidder to adjust the terms of the offer quickly (for example, by increasing the bid price or extending the offer period). Flexibility is important if there are competing bids.

A Scheme cannot be used to avoid the application of Chapter 6. However, ASIC usually allows a takeover to be made by a Scheme as long as the treatment and protection of shareholders is equivalent (although not necessarily identical) to that required by Chapter 6.

An indicative timetable for the implementation of a Scheme is included at the end of this section.

(d) Squeeze-out of minority shareholders

After a takeover bid, the bidder can compulsorily acquire (or **squeeze-out**) the outstanding shares (on the terms that applied under the bid) if the bidder and its associates:

(i) have relevant interests in at least 90 per cent of the bid class securities; and

(ii) have acquired at least 75 per cent of the securities that the bidder offered to acquire under the bid.

Any remaining shareholders can object by applying to the court. The court must be satisfied that the consideration is not fair value before it can order that the objectors' securities not be acquired.

Compulsory acquisition is also available (whether or not there is a takeover bid) in the following cases:

(i) A person who (together with related bodies corporate) has full beneficial interests in at least 90 per cent (by number) of a particular class of securities, can compulsorily acquire the remaining securities in that class for cash consideration within six months of acquiring the 90 per cent holding.

(ii) All outstanding securities in the target (that are shares, or securities convertible into shares) can be compulsorily acquired by a person who holds:

- 90 per cent (by value) of all securities (shares, or securities convertible into shares) in the target (i.e. owns 90 per cent of the fully diluted equity); and
- at least 90 per cent of the voting rights.

In both these cases, whether the cash sum offered is fair must be assessed by an independent expert. Court approval is needed for the compulsory acquisition if the holders of at least 10 per cent of the outstanding securities object.

Compulsory acquisition is generally not necessary if a takeover is implemented as a Scheme because, once effective, a Scheme is binding on all target shareholders However, it may still be used to acquire other classes of securities (e.g. options) that are not subject to the Scheme.

2.3 Secrecy and announcements

Insider trading laws may prevent a potential bidder from communicating its intentions to persons likely to purchase shares, unless there is an applicable exception.

The Australian Securities Exchange (**ASX**) Listing Rule 3.1 imposes a general obligation on listed companies to keep the market properly informed. A listed target (or bidder) will usually be required to immediately disclose information it is aware of regarding a proposed takeover if:

(i) it ceases to be an incomplete proposal or negotiation;

(ii) it ceases to be confidential (or ASX considers there is likely to be a false market and issues a query); or

(iii) a reasonable person would expect disclosure.

"Immediately" means "promptly and without delay". Disclosure of an incomplete proposal which remains confidential is not normally required.

Media comment or speculation combined with material share price movement is likely to prompt an ASX query. Also, ASIC can issue infringement notices (imposing a fine of A$100,000 for larger companies) if it believes an entity has not complied with its continuous disclosure obligations.

Takeover bids must be posted within two months after a person publicly proposes to make a takeover bid (and must be on terms not substantially less favourable than those proposed). No time limit applies where a Scheme is proposed.

There is no general requirement to announce a takeover bid before it is actually made. Where bidders voluntarily make public statements, such statements cannot be false or misleading. Under the "truth in takeovers" policy of ASIC and the Panel, bidders may be held to certain statements regarding a proposed transaction (including statements suggesting the offer price is final) unless those statements are clearly qualified.

2.4 Disclosure of interests and stakebuilding

A potential bidder may consider purchasing target shares in the market (if available) or off-market, either before or after approaching the target's board.

Such acquisitions may have serious consequences for a takeover bid and the following issues may be relevant:

(a) Insider trading
Insider trading prohibitions prevent a bidder from making acquisitions if it has any price-sensitive information relating to the target. There is an exception covering the bidder's knowledge that it proposes to enter into, or has entered into, transactions in relation to the target's securities. There is also a defence where the other party to the transaction knew, or ought reasonably to have known, the information.

(b) Foreign acquirers
A foreign acquirer will usually need to obtain prior Foreign Investment Review Board approval (or make any acquisition conditional on obtaining approval) in order to acquire 20 per cent or more of the target's shares, but different thresholds can apply to different sectors and acquirers.

(c) 20 per cent threshold prohibition
A bidder cannot acquire more than 20 per cent of the target's shares without making a bid. It is not permissible for a bidder to cross the 20 per cent threshold (through either acquisitions or pre-bid commitments) and then subsequently make a bid. Rather, the 20 per cent threshold can only be crossed through actual acceptances under a bid or another exception (see section 2.2(a) above).

(d) Takeover structure
In the case of a Scheme, the acquisition of shares by an acquirer in effect takes shares out of the hands of target shareholders who would otherwise be likely to vote in favour of the Scheme. In addition, any shares held by the bidder and its associates cannot be voted in favour of the Scheme, so although they could be voted against an interloper's Scheme (or be used to oppose a competing takeover bid) such shares will be of no assistance in achieving the voting thresholds required to implement the Scheme itself.

(e) Disclosure
Acquisition of an interest of 5 per cent or more of the target shares (including interests of associates) must be notified to the target and the ASX within two business days (or by 9.30 am on the next trading day if the target is the subject of a takeover bid). Except in the case of open market purchases, agreements contributing to the need to give the notice must be attached. Subsequent changes of 1 per cent or more must also be notified.

Where there is a control transaction or a substantial interest is acquired, the Panel requires disclosure of long derivative positions that give a combined holding (taken with any shares held) of 5 per cent or more, or movements in such a holding of 1 per cent or more. Short positions are not netted out, and should also be disclosed where a person's long position exceeds 5 per cent.

(f) Price floor
Pre-bid stakebuilding fixes a minimum price for a takeover bid. The consideration offered under a bid (whether cash or scrip) must be equal to, or greater than, the highest value paid for securities in the bid class by the bidder or its associates during the four months preceding the bid. ASIC will apply similar principles in the case of a Scheme.

(g) Cash consideration
In the case of a takeover bid, the bidder can generally buy shares during the offer period only if the acquisitions are made on the open market and the offer is free from all conditions apart from the condition relating to prescribed occurrences (see section 2.2(b) above) or the bidder has less than zo per cent or has "creep" capacity (see section 2.2(a)(iv) above).

After the bidder has served its bid documents on the target, any cash acquisition of bid class securities it makes outside a formal off-market bid can have an impact on the formal bid consideration, as follows:

(i) The level of consideration for any cash offers or contracts is automatically raised to the highest price paid by the bidder outside the bid.

(ii) If the formal bid does not already include a cash alternative, one will be added automatically. Any of the target's shareholders who have already accepted the non-cash offer are entitled to claim cash in place of the consideration they initially accepted.

2.5 Key commercial questions

Are advisers required?
Not expressly. However, in larger transactions the target and potential bidders will inevitably appoint legal and financial advisers.

Is the target obliged to make information available to a bidder?
No. Unlike in the UK, there is no requirement (aside from ordinary directors' duties) that information made available to one potential bidder must be furnished to other potential bidders. However, where a takeover bid is made, the target will be required to provide all material information to shareholders in its target's statement.

Can the target take action to frustrate a takeover bid?
Not without the approval of shareholders if the frustrating action gives rise to "unacceptable circumstances" (which depends on its effect on shareholders and the market).

Can a bidder prevent the target from disclosing its identity to the market?
Not if disclosure is required under ASX Listing Rule 3.1 (see section 2.3 above).

Can the target grant exclusivity or pay an inducement fee to a bidder?
Yes, provided that such provisions do not have a substantial:

- anti-competitive effect on current or potential bidders; or
- coercive effect on the target's shareholders.

A break fee of 1 per cent or less of equity value is generally acceptable in the absence of other factors (such as coercive triggers).

The target board can agree to a "no shop", but the Panel requires that "no-talk" and "no due diligence" agreements must contain a fiduciary out to allow the target's directors to discharge their fiduciary and other duties. Even with a fiduciary out, the period of restraint under a no-talk agreement must still be limited and reasonable.

Obligations to notify an acquirer of details of competing offers (rather than the mere fact of an offer) may also need to be subject to a fiduciary out.

The Panel has been consulting the market on proposed revisions to its guidance note on deal protection. The proposed revisions, if adopted, will recognise certain limited circumstances where it is not unacceptable for the target to grant a short period of "no-talk" and "no due diligence" to a bidder without a fiduciary out during the non-binding bid stage.

Can a bidder enter into special arrangements with the target's management or other key shareholders?
Generally not without full disclosure and the approval of the target's independent shareholders.

Can information be given to key shareholders in advance?
Generally, no. ASIC is opposed to selective disclosure.

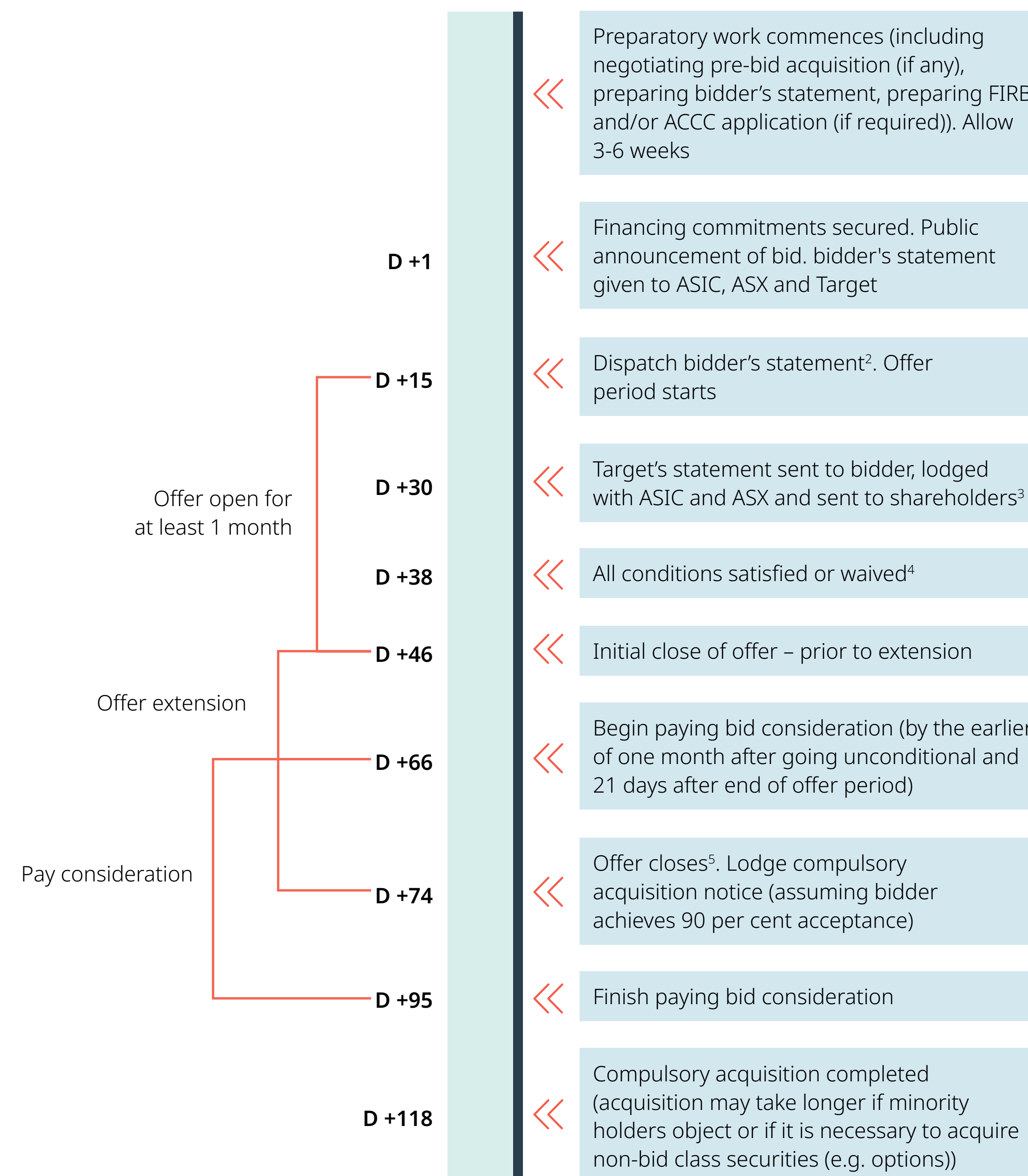
Can a bidder obtain irrevocable commitments?
Yes, up to the 20 per cent threshold (see section 2.2(a) above). Bidders will often seek irrevocable commitments (or statements of intention to accept) from key shareholders, including any directors of the target who hold shares.

Can the target provide financial assistance for a bid, such as security or loans?
Generally not without shareholder approval, unless the financial assistance does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its creditors.

Can a bidder force the target to de-list?
The target may request that ASX de-list it from the ASX. ASX will generally approve the de-listing if the request is made within one month after the closing of the takeover bid, the bidder foreshadows the de-listing in the bidder's statement, the bidder controls at least 75 per cent of the target's shares and the number of target shareholders with holdings worth at least A$500 is fewer than 150.

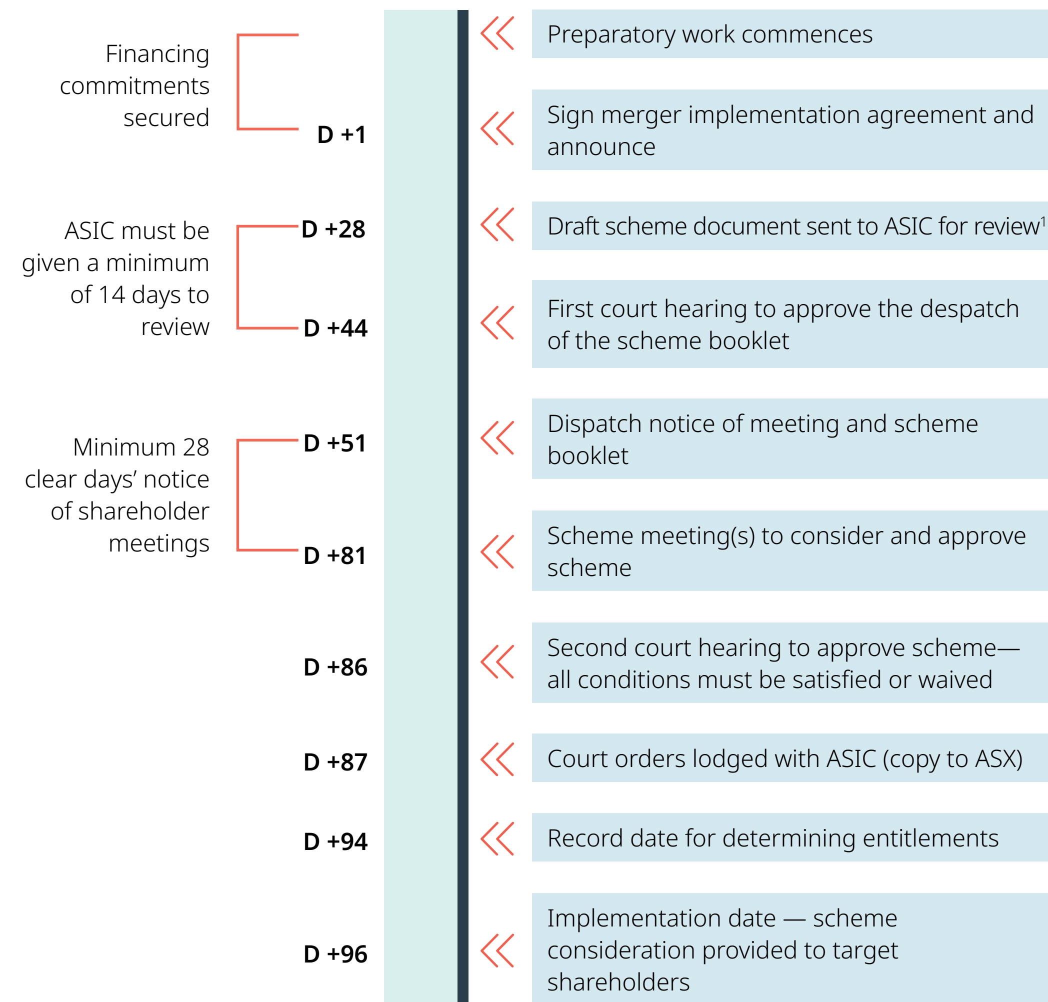
If the bidder fails to satisfy the above requirements, ASX will usually require a special resolution of target shareholders (at least 75 per cent of the votes cast) approving the de-listing. The bidder and its associates will not be permitted to vote on such special resolution within 12 months after the close of the takeover bid.

Indicative timeline for an off-market takeover in Australia[1]



1. Assumes no delays in obtaining regulatory approvals, no Takeovers Panel proceedings, litigation or other challenges to the bid.
2. Bidder's statement must be dispatched to target shareholders within 14 and 28 days after it is given to the target and within two months after announcement (D +1).
3. The target's statement must be sent no later than 15 days after the bidder gives notice that all offers have been sent (D +15).
4. Most conditions can only be waived not less than seven days before the end of the offer period.
5. Assumes minimum initial one-month offer period extended by four weeks (e.g. two x two week extensions). The offer period can be extended repeatedly up to a maximum of 12 months.

Indicative timeline for a takeover by way of a scheme in Australia



1. Time can be saved if the scheme booklet is prepared in advance of announcement.

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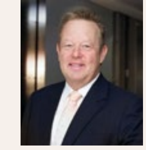

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3 Belgium

3.1 Regulation

The Law of 1 April 2007 on public takeovers (the **Takeover Law**) is the principal source of regulation for public M&A transactions in Belgium. The Takeover Law has been supplemented by the Royal Decree of 27 April 2007 on public takeovers (the **Takeover Decree**) and a second Royal Decree of the same date on squeeze-out bids (the **Squeeze-Out Decree**). The Financial Services and Markets Authority (**FSMA**) is the regulatory authority in charge of supervising takeover bids in Belgium.

In principle, any voluntary offer, including self-tenders, is subject to the Belgian takeover rules as soon as it is "public" in Belgium (i.e. if it is publicly announced in Belgium, or is otherwise directed at no fewer than 150 investors (other than qualified investors) in Belgium).

Belgian law will no longer apply to voluntary offers for companies registered in another EU Member State whose primary listing in another Member State (except as regards publicity for the offer in Belgium). Neither will Belgian law apply to voluntary offers for companies registered in Belgium whose primary listing in another Member State (except for matters of company law, employee information and publicity). Belgian law will apply, but to a limited extent (on matters of price and offer procedure), to voluntary offers for companies incorporated in another Member State but without a listing in such country and with their principal market in Belgium.

As regards mandatory offers (see section 3.2(b) below), the Belgian rules will apply to offers for companies that are both registered and listed in Belgium. As in the case of voluntary offers, Belgian law will apply to offers (i) for companies registered in another Member State whose primary market is in Belgium (but only to matters related to price and offer procedure) and (ii) for companies registered in Belgium whose primary market is in another Member State (but only in relation to the determination and calculation of the control threshold, and matters of company law, employee information and publicity).

Note that any "promotional materials" (such as advertisements) published or disseminated in Belgium are subject to prior FSMA clearance, even if such materials relate to an offer that, as per the principles above, is not (in whole or part) subject to Belgian law.

3.2 Structure

(a) Voluntary bids

In principle, any voluntary bid (including self-tenders) is subject to the Belgian takeover rules as soon as it is "public" in Belgium. A bid will be deemed to be "public" in Belgium if it meets either of the following conditions:

(i) a public announcement or communication is made in Belgium by the bidder (or by a person acting on behalf of or in concert with the bidder (other than a qualified intermediary based in Belgium)) whereby sufficient information is given about the terms of the bid allowing the holders of securities to decide whether or not to transfer their securities; or

(ii) the bidder (or a person acting on behalf of or in concert with the bidder (other than a qualified intermediary based in Belgium)) uses any advertising means (including circulars and standard documents) in Belgium to announce or recommend the bid.

An offer will not be deemed to be public if it falls within the following safe harbour rules:

(i) offers for securities solely to "qualified investors";

(ii) offers to fewer than 150 persons, other than "qualified investors"; and

(iii) offers for securities whose denomination per unit amounts to at least €100,000.

The usual form of a voluntary bid involves the bidder making an irrevocable bid that would extend to all of the target company's securities granting voting rights (or access to voting rights) not already held by the bidder or a party affiliated to the bidder. It is, however, also possible for the bidder to make its offer subject to certain conditions, such as the acquisition of a certain threshold of participation (in the case of a voluntary takeover bid) or the approval of regulatory authorities, such as antitrust authorities.

The bidder may not make its offer subject to the obtaining of financing if the offer takes the form of a cash bid. One of the conditions of admissibility of the offer is that the bidder provides, at the outset, evidence to the FSMA that it has at its disposal sufficient funds to finance the entirety of the offer. Likewise, in the event of an exchange offer, the bidder must prove that it holds a sufficient number of securities to carry out the bid or at least that it has the power to issue or the right to acquire them.

The bidder may modify or withdraw its bid during the offer period in certain circumstances (i.e. the issuing of certain new securities or the target entering into a transaction that significantly impacts upon the target's assets) within five days of notification by the target of such circumstances and subject to prior approval by the FSMA.

The bidder may also withdraw its offer during the offer period if:

(i) a counter bid or a higher bid is made;

(ii) certain administrative or judicial approvals (other than antitrust clearances) are not obtained;

(iii) one of the bid's conditions is not fulfilled (for reasons beyond the bidder's control); and

(iv) exceptional circumstances beyond the bidder's control prevent completion of the bid, provided that the FSMA's motivated consent is obtained.

(b) Mandatory bids

Any person acquiring, either alone or in concert with third parties, directly or indirectly, an interest of more than 30 per cent of voting securities (regardless of whether a premium has been paid or multiple voting rights per share) in a Belgian company admitted to trading on a regulated market (i.e. Euronext Brussels) or an interest of more than 50 per cent of voting securities (regardless of whether a premium has been paid or multiple voting rights per share) in a Belgian company admitted to trading on a multilateral trading facility designated by Royal Decree (Euronext Growth and Euronext Access) must inform the FSMA within two business days after the acquisition and launch a public takeover bid within a maximum period of 40 business days.

There are several exceptions to the principle that a mandatory bid must be made when the 30 per cent threshold is reached, such as in the case of certain capital increases, transfers between affiliates or in the event control is held by another shareholder having a higher interest. Grandfathering clauses were provided for existing shareholders who reached 30 per cent before the 2007 regulations were enacted and these have generally been used.

(c) Minority squeeze-out

Article 7.82, section 1 of the Belgian Code of Companies and Associations, as well as the Takeover Law and the Squeeze-Out Decree regulate the squeeze-out of minority shareholdings in Belgian public companies.

In order to launch a squeeze-out, the bidder must hold, directly or indirectly, at least 95 per cent of the securities with voting rights (not taking into account multiple voting rights) of the target company. The securities held by the target itself are taken into account, together with the securities held directly or indirectly by the bidder, for the calculation of the 95 per cent threshold. The squeeze-out must be made in cash and the entirety of the necessary funds must be at the disposal of the bidder at the start of the procedure. The procedure is similar to the procedure that applies to takeover bids, save that a special report with respect to the price offered must always be drawn up by an independent expert, and that the minority shareholders have the right to address comments on and objections to the conditions of the squeeze-out to the FSMA. Upon expiry of the offer, all shares not presented to the offer will be deemed to be transferred to the bidder and the target company will no longer be considered a publicly listed company.

The Takeover Decree also provides for a simplified squeeze-out procedure. It allows a bidder to re-open (within a maximum period of three months) the offer at the sale conditions, if it has directly or indirectly reached a threshold of 95 per cent of the shares with voting rights and 95 per cent of the other securities with voting rights at the end of the offer, provided it has obtained 90 per cent of the voting rights of the shares in the course of the takeover bid. It is not mandatory that the simplified squeeze-out is made in cash.

The Takeover Decree has also introduced a sell-out right for shareholders in the event that the bidder holds at least 95 per cent of the shares with voting rights and 95 per cent of other voting securities after its takeover bid and provided that the bidder has obtained 90 per cent of the voting rights of the shares in the course of the takeover bid. The sell-out is made on the same conditions as the takeover bid.

Finally, the Takeover Decree contains a provision which, for a period of 12 months after the end of the takeover bid, prohibits a bidder (and any persons acting in concert with it) from purchasing securities off-market at a price above the offer price paid during the offer, unless the price difference is also paid to all holders of securities who tendered their shares during the offer. This provision guarantees the equal treatment of shareholders. The provision is also likely to deter merger arbitrageurs taking positions in the course of a takeover bid on the expectation that the bidder will be prepared to buy out the shares held by them at a higher price in order to reach the 95 per cent squeeze-out threshold.

3.3 Procedural steps

(a) Preliminary steps

Initial contacts. Before a (formal) notification is made to the FSMA, the bidder may contact (i) the target's board to verify whether it would consider recommending the bid or (ii) certain shareholders to negotiate in cases where the bidder is considering first acquiring control and then making a mandatory bid.

Due diligence. Although not required by law, it is possible to conduct a due diligence review of the business of the target. In deciding the scope of the due diligence review, insider trading rules should be taken into account, as well as the possibility that disclosure of the due diligence report may be required by the FSMA.

(b) Announcement

Bidder's initial notification to FSMA. The initial notification contains the terms and conditions of the bid, a draft prospectus, a cash confirmation letter whereby the bank confirms that the full amount of the bid price is available to the bidder (or, in the event of a securities exchange, evidence that the securities to be offered in exchange are available to the bidder) and evidence that the other requirements of the takeover regime are complied with. It must also contain a commitment from the bidder that it will pursue the bid. Furthermore, in the event that the takeover bid is being launched by a person who already exercises "control" over the target company, the notification must include a fairness opinion on the valuation of the securities that are the subject of the bid.

"Put up or shut up". The FSMA has the right, in the event of persistent rumours and speculation, to ask a possible bidder to publicly state whether or not it has the intention to launch an offer in order to maintain the integrity of the market and the equal treatment of shareholders. If the bidder does not then publicly confirm its intention to launch a bid, it will be barred (absent material changes in circumstances) from launching an offer for a period of six months.

(c) Timing

Timeline. The Takeover Decree sets out a timeline from the announcement to the closure of the bid. This timeline is set out at the end of this section.

The FSMA will make a public announcement not later than one business day after receipt of the initial notification. On the same day, the FSMA will notify the listing committee of the stock exchange on which the securities of the target company are listed, as well as notifying the target company and the bidder that a public announcement has been made with respect to the notification.

At the same time as making the public announcement, the FSMA will provide the board of the target company with a copy of the bidder's draft prospectus. The board of the target must within five business days inform the FSMA and the bidder if it believes the draft prospectus is incomplete or misleading. The FSMA must approve the prospectus within ten business days of receipt of the initial notification.

The target board must, within five business days of the notification by the FSMA of the approved prospectus, prepare and submit a response memorandum to the FSMA. The FSMA must then also approve the response memorandum within five business days of receipt.

The bid must start no earlier than five business days after the approval of the prospectus or the response memorandum by the FSMA, depending on which event occurs first. The bid must remain open for acceptance for a minimum of two weeks and a maximum of ten weeks. However, if the target company convenes a shareholders' meeting to approve a capital increase, an issue of securities or any other action that could significantly affect the target's assets and liabilities, the bid is extended for two more weeks after this meeting.

(d) Response memorandum

Response memorandum. Once the prospectus is approved by the FSMA, it is communicated by the FSMA to the target company. The target board must thereupon, within five business days of such communication, provide the FSMA with a response memorandum giving its views on:

(i) the offer document;

(ii) the effect of the bid on the company's interests, its shareholders, creditors and employees, including employment;

(iii) the bidder's strategic plans for the target company and their possible effect on the target's financial results, workforce and its operational sites referred to in the offer document;

(iv) the number of securities granting voting rights (or access to voting rights) held by the target company's directors;

(v) whether the target company's directors who hold securities intend to accept the offer; and

(vi) whether the target board will approve the transfer of securities to the bidder and request the application of any pre-emption (in both instances, where provided for in the target articles of association).

The target board must also indicate whether the views expressed in the response memorandum are unanimous and, if they are not, specify any dissenting/diverging opinions.

The FSMA must then also approve the response memorandum within five business days of receipt.

The bidder must publish the results of the bid within five business days of closure of the bid.

(e) Employee and works council consultation

Employees' rights. After announcement of the bid by the FSMA (one business day after the initial notification), the target company's board and the bidder must inform their respective employees' representatives (or, in the absence of employees' representatives, the employees directly) of the main terms and conditions of the bid. As soon as the prospectus is made public, it must be communicated by the target company's board and the bidder to their respective employees' representatives. At the same time, the target company's board must communicate its opinion on the bid to its employees' representatives. If the target company's board receives in due time the opinion of its works council regarding the bid, such opinion must be attached to the opinion prepared by the board of the target company.

Finally, unless it is unanimously decided otherwise by its members, the target company's works council must convene a hearing to interview representatives of the bidder on its commercial and financial policy, its strategic plans for the target and their possible consequences for the workforce and the target's operational sites. This hearing must be held no more than ten business days after the opening of the bid. If the bidder's representatives do not attend the hearing, when invited to do so, the bidder is prohibited from exercising the voting rights attached to the securities it has acquired in the context of the bid.

Employees of the target do not have any right or powers to prevent the bid from happening, but do have a right to express their opinion and a right to receive information.

(f) Squeeze-out

Re-opening the offer and/or squeeze-out. The Takeover Decree provides a procedure for re-opening the offer and for the acquisition of shares of minority shareholders immediately after a bid.

In the event that the bidder holds at least 90 per cent of the voting securities as a result of the offer, it must do the following:

- (i) re-open the offer to allow all shareholders to sell their remaining shares on the same terms as the initial offer;
- (ii) re-open the offer if the bidder requests the de-listing of the target shares within three months of the end of the acceptance period;
- (iii) re-open the offer if, before the end of the acceptance period, the bidder has agreed to acquire securities of the target at a price above the bid price.

The offer must, in each case, be re-opened within ten business days of the public announcement of the results or the circumstance giving rise to the obligation to re-open it. The acceptance period of the re-opening must be at least 5 business days and no more than 15 business days.

In addition, if the bidder holds at least 95 per cent of the target's voting securities as a result of the bid (or its re-opening), the bidder can re-open the bid again for at least 15 days with a view to squeezing out the remaining shareholders on the same terms as the initial offer, provided that it reserved this right in the offer document. Any securities not tendered to the re-opened bid are deemed to be transferred to the bidder by operation of law, and the consideration due from the bidder for these securities is deposited in an escrow account.

The Belgian Code of Companies and Associations and the Squeeze-Out Decree also allow a person who holds at least 95 per cent of a company's voting securities other than as a result of a bid to squeeze-out minority shareholders. The procedure is similar to the squeeze-out subsequent to a bid, but is adapted to take account of its specific nature. For instance, the offer can be made only for cash, and the offer document must include a fairness opinion (with respect to the price) from an independent expert.

(g) Sell-out right

Sell-out right for minority shareholders. The Takeover Decree provides a sell-out procedure entitling minority shareholders to require, within three months of closure of a bid, the bidder to acquire their securities at the bid price if at closure of the bid (or its re-opening) the bidder holds 95 per cent of the voting securities and has acquired 90 per cent of the voting securities subject to the bid as a result of the bid.

3.4 Key commercial questions

Are advisers required?

In the context of a takeover bid by a bidder who, acting alone or in concert with third parties, already has control over the target (including a bidder who has at least so per cent of the voting rights plus one voting right or has the power to appoint the majority of the directors of the target), the independent directors (or, if none, the board of directors) of the target are required to appoint, at the bidder's cost, an independent expert. This expert will draft a report providing a valuation of the securities to which the takeover relates and an analysis of the valuation of those securities proposed by the bidder. Such report will be attached to the takeover prospectus.

In the context of a squeeze-out procedure (other than immediately following a takeover bid), an independent expert will be required to draft, at the bidder's cost, a fairness opinion in which such expert provides:

(i) information on the target;

(ii) information on the securities to which the squeeze-out relates;

(iii) an opinion on the valuation of those securities made by the bidder; and

(iv) an opinion on whether the price proposed by the bidder is sufficient to meet the interests of the shareholders.

Such fairness opinion will be made public by the FSMA. If the proper protection of the rights of the shareholders in the target justifies this, the FSMA can, in both of the above procedures, request the bidder to appoint an additional expert at its cost.

Is the target obliged to make information available to a bidder?

No, not before the offer has been made public.

During the offer period of a takeover bid, the target, among others, will be required to:

(i) publish important provisions of agreements which may have a material impact on the offer, its procedure or its result;

(ii) provide the FSMA with daily details of transactions (including loans) in relation to its securities (these details will be published on the FSMA's website); and

(iii) notify the FSMA and the bidder of each decision to issue securities granting voting rights and any other decision which may result in the offer failing (save for the decision of the target to solicit alternative offers).

Can the target take action to frustrate an offer?

In a takeover bid, the target has various options to frustrate the offer, provided that its articles of association so allow, such as: (i) the creation of non-transferable securities; (ii) the creation of rights of approval and pre-emption rights in respect of share transfers; (iii) the completion of a capital increase by the board of directors; (iv) the repurchasing of its own shares; (v) the issuing of convertible securities or warrants; and (vi) providing for a 'poison pill'. However, these protective measures are mostly subject to certain statutory conditions.

In addition, the articles of association of a target whose securities are listed on a regulated market can provide that, subject to certain conditions, certain of the above protective measures will not apply vis-a-vis the bidder.

In the case of a squeeze-out procedure (other than immediately following a takeover bid), shareholders can, within 15 days of the squeeze-out offer being made, notify the FSMA of their objections to such offer (e.g. objections in relation to the valuation of the target or its securities or the offered price). The FSMA can then, within 15 days, issue comments on the offer based on these objections. Those comments will be notified to the bidder, the target and the shareholders and can be made public as well. The bidder can then, within 15 days, decide to amend the offer. In the absence of such voluntary amendment, the FSMA can oblige the bidder to amend its offer in accordance with the comments of the shareholders. If the bidder does not comply with such request, the FSMA will not approve the prospectus. Shareholders only have these powers in the case of a squeeze-out procedure.

Shareholders who have accepted an offer in respect of a takeover or a squeeze-out can always withdraw such acceptance during the offer period.

Can a bidder prevent the target from disclosing its identity to the market?

The target or its shareholders do not decide on whether or not the identity of the bidder is made public.

Belgian law requires a bidder (who wishes to launch a takeover bid or is obliged to do so) to notify the FSMA of its intention to issue a public offer and provide to the FSMA a prospectus in which its identity will need to be disclosed. The FSMA will subsequently make such notification public.

Can the target grant exclusivity or pay an inducement fee to a bidder?

It is not prohibited for shareholders to grant exclusivity to a certain bidder.

The payment of inducement fees is uncommon in Belgium and its validity would be questionable if the inducement fee was not in the company's interest.

Can a bidder enter into special arrangements with the target's management or other key shareholders?

Yes, this is possible but note that:

(i) with regard to a takeover procedure, any arrangements (including arrangements with the target's management or with key shareholders) that (i) may have a material impact on the valuation of the offer, its procedure or its result or (ii) grant benefits only to certain shareholders need to be disclosed to the FSMA and may result in the FSMA requesting amendment of the bidding price; and

(ii) during the offer period and a period of 12 months following the end of the offer period, a bidder cannot acquire securities at a price higher than the offer price unless such higher price is extended to all beneficiaries of the offer (including shareholders who have already accepted the offer).

Can information be given to key shareholders in advance?

Information must be made equally available to all shareholders in the context of a takeover procedure.

The target is not allowed to announce a public offer before the FSMA has publicised the notification by the bidder of its intention to issue a public offer.

Insiders who are or ought to be aware that they possess inside information and who are using, or attempting to use, this information to sell or acquire securities to which that information relates can face administrative and criminal sanctions. Similarly, insiders recommending a third party, on the basis of such information, to sell or acquire securities to which that information relates, can face administrative and criminal sanctions.

Can a bidder obtain irrevocable commitments?

Shareholders who have accepted the offer are allowed, during the offer period, to withdraw such acceptance. Contractual arrangements limiting this right of withdrawal are possible but, to the extent they may have a material impact on the valuation of the offer, its procedure or its result, will need to be properly disclosed in the prospectus.

Can the target provide financial assistance for a bid, such as security or loans?

No, a company may not, save in the case of certain statutory exceptions, advance funds, make loans or provide security in order to finance the acquisition of its shares by a third party. Violation of this rule will result in the nullity of the transaction, and the civil and criminal liability of the company's directors.

Can a bidder force the target to de-list?

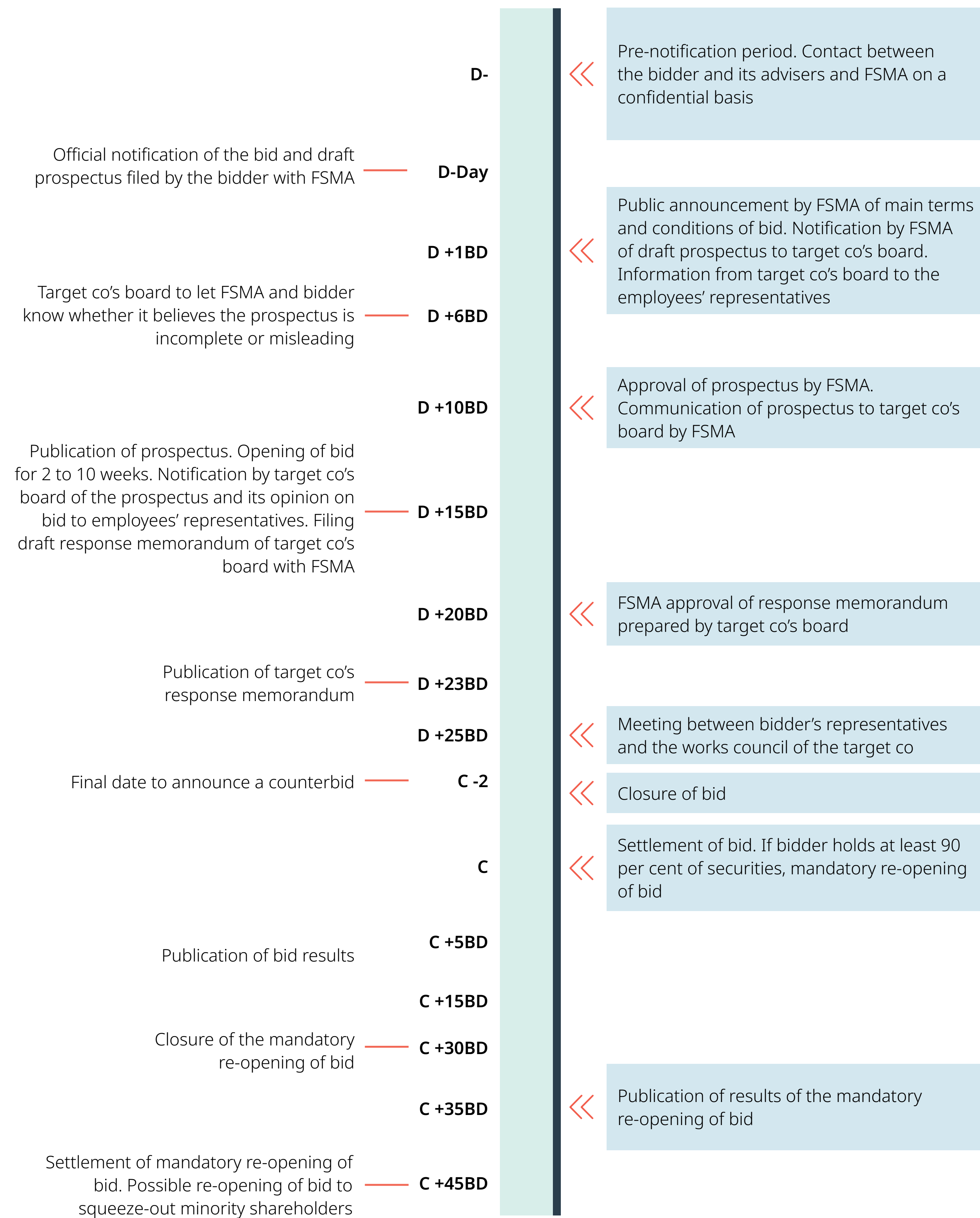
De-listing is always possible once the bidder has acquired 100 per cent of the issued securities (or 95 per cent, allowing the bidder to squeeze-out the remaining shareholders).The FSMA will need to approve the de-listing.

Under Belgian law there is no legal basis for a forced de-listing.

Do Belgian foreign direct investment rules apply in case of a takeover of a listed company?

On 1 July 2023, Belgium gave effect to Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments by establishing a screening mechanism for foreign investments representing 10 per cent or 25 per cent (depending on the activities) of shares of companies active in strategic sectors (e.g. critical infrastructure related to energy, water supply or healthcare). This screening mechanism also applies to takeovers of listed companies.

Indicative timeline for a public takeover bid in Belgium



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4 People's Republic of China

4.1 Regulations

In China,[1] the takeover of a Chinese listed company is mainly governed by the Securities Law of the People's Republic of China (the **Securities Law**) and the Measures for the Administration of the Takeover of Listed Companies (the **Takeover Measures**).

If the acquirer is a foreign investor, the transaction must also comply with the Regulations on Acquisition of Domestic Enterprises by Foreign Investors, the Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors (the **Strategic Investment Measures**) and the Special Administrative Measures (Negative List) for the Access of Foreign Investment (the **Negative List**), which may be updated by the authorities from time to time.

The China Securities Regulatory Commission (**CSRC**) is responsible for regulating and administrating the takeover of a listed company; the market administration authority and other competent authorities are responsible for foreign investment market access review; and the Ministry of Commerce (**MOFCOM**) is responsible for reviewing the eligibility of a foreign investor's strategic investment in a PRC listed company.

According to the Administrative Measures for Securities and Futures Investment Made in China by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors and the Provisions on the Administration of Domestic Securities and Futures Investment Funds of Foreign Institutional Investors, a foreign investor qualified as a Qualified Foreign Institutional Investor (**QFII**) or a RMB Qualified Foreign Institutional Investor (**RQFII**) being approved by CSRC is allowed to acquire shares of a listed company within the investment quota granted by State Administration of Foreign Exchange (**SAFE**), but the shareholding ratio for a QFII or a RQFII to acquire a listed company is limited.

4.2 Structure

The Securities Law and the Takeover Measures provide for two main methods to acquire a listed company: takeover by offer and takeover by agreement.

(a) Takeover by offer

Takeover by offer means that the investor makes a declaration to all shareholders of the target company extending the binding offer to purchase all or part of the target company's shares.

(i) Voluntary offer

When an investor intends to acquire no less than 5 per cent but no more than 30 per cent of the total outstanding voting shares of a listed company, it can choose to take over by way of voluntary offer by sending an offer to all shareholders.

(ii) Mandatory offer

When an investor already holds 30 per cent of the total outstanding voting shares of the target company and intends to increase its shareholding, then any further acquisition of shares must be made through a mandatory offer.

(iii) Exemption of an offer

When the investor has satisfied certain conditions, even if the takeover has triggered a mandatory offer, the investor may apply to the CSRC to exempt itself from making offers to all of the shareholders of the target company. Once an exemption is granted, the investor may acquire the shares through non-offer methods. Please refer to section 4.2(d) below for further details.

(iv) Procedures for takeover by offer

When an investor intends to acquire the target company's shares by offer, the investor must make an offer report, engage a financial adviser, notify the target company, and make an announcement of the offer report summary to the general public. If the acquisition is subject to approval(s) by relevant authorities, the investor is obligated to make a special representation in the report summary and to announce the offer report to the general public after the obtainment of the approval(s).

(b) Takeover by agreement

Unless otherwise required by the Takeover Measures, investors and shareholders of the target company may negotiate the transaction in private, and acquire the shares by agreement.

If an investor intends to acquire no more than 30 per cent of the total outstanding voting shares of the target company, it can acquire the shares through a share transfer agreement.

If the investor intends to acquire more than 30 per cent of the total outstanding voting shares through a private agreement, the part exceeding such 30 per

1 For the purposes of this section, excluding Hong Kong, Macau and Taiwan.

cent of the total outstanding voting shares shall be acquired by offer, unless an exemption is granted by the CSRC. If the investor intends to perform the share transfer agreement prior to obtaining the exemption or the CSRC refuses to grant such exemption, such investor shall make the general offer to acquire all outstanding shares before it performs the share purchase agreement.

If the acquirer is a foreign investor, an opinion of the financial adviser to be issued according to the Strategic Investment Measures shall be submitted as well.

(c) Indirect takeover

An investor may also acquire the shares of a listed company through indirect ways, such as acquiring shares of a listed company by investment relationship, agreement or other arrangement (i.e. an indirect takeover). In an indirect takeover, if the investor ultimately holds shares equivalent to more than 30 per cent of the outstanding shares of the target company, the investor must make a general offer for all outstanding shares of the target company. The investor may also apply for an exemption from the CSRC if certain conditions are met. Where no exemption is granted, and the investor cannot make a general offer for all shares of the target company, it must reduce its shareholding to no more than 30 per cent of the shares in the target company.

(d) Conditions for the exemption of offer

As mentioned above, an obligation to make a mandatory offer can be triggered when an investor takes over more than 30 per cent of the total outstanding voting shares of a listed company; however, the investor is entitled to apply to the CSRC for an exemption from making a mandatory offer when:

(i) such acquisition is between entities controlled by the same person and will not result in any change of the actual controlling person of a listed company; or

(ii) the target company is facing financial insolvency and the investor has proposed a restructuring plan which has been approved by a general meeting of the target company, and the investor has promised not to transfer its shares in the company within the next three years.

Meanwhile, the mandatory offer is not applicable when:

(i) the gratuitous transfer, modification or combining of state-owned assets with the approval of the government or the state-owned assets administrative department result in the investor's owning more than 30 per cent of the total outstanding shares of the company;

(ii) the capital stock reduction due to the redemption of shares by a listed company from specific shareholder(s) at a determined price approved by the general shareholders' meeting, resulting in the investor's ownership of equity shares of the company accounting for over 30 per cent of the total outstanding shares of the company;

(iii) the independent shareholders of the general shareholders' meeting of a listed company have granted approval to an investor obtaining newly outstanding shares of the company, resulting in the investor's ownership of equity shares of the company accounting for over 30 per cent of the total outstanding shares of the company, the investor has committed that it will not transfer the new shares in the next three years, and a waiver of offer has been given with an approval by the company's general shareholder's meeting;

(iv) to increase not more than 2 per cent of the outstanding shares of the listed company in every successive 12 months after holding 30 per cent or more outstanding shares of the listed company;

(v) to increase its shares after holding 50 per cent or more outstanding shares of the listed company but without prejudice of the company's listed status;

(vi) securities company, bank or other financial institution holds more than 30 per cent of outstanding shares of a listed company due to its conducting underwriting or providing of loans, but without intention to control the company, and a scheme has been proposed on the transfer of shares to unrelated parties within a reasonable period;

(vii) the holding is increased to more than 30 per cent of outstanding shares of a listed company due to inheritance;

(viii) the holding is increased to more than 30 per cent of outstanding shares of a listed company due to the performance of a redemption agreement, and the voting rights are not changed in the terms of the agreement; and

(ix) the holding is increased to more than 30 per cent of outstanding shares of a listed company due to the reclassification of preferred voting rights.

The CSRC also has discretion to grant an exemption when it deems appropriate based on the necessary development of a securities market and protection of investors' legal rights.

4.3 Disclosure

Under a public M&A, the investor shall make disclosure when the shares it holds (including the shares registered under its own name and that of controlled affiliates) in the listed company have reached a certain level or changed by a certain proportion, the investor and its concert party must disclose their shareholdings. The shares owned by the investor and any concert parties must be aggregated when calculating the total shares owned by the investor in one listed company.

An investor and any concert party must disclose their shareholdings in the following situations:

(a) General requirements

In the case of a takeover by offer, agreement or by other arrangements, where an investor holds shares in a target company amounting to 5 per cent of all outstanding voting shares, the investor must, within three days of the acquisition, make a ownership changing report, submit a written takeover report to the CSRC and the Stock Exchange, notify the target company, and make an announcement to the general public.

After an investor holds shares in a target company amounting to more than 5 per cent of all outstanding voting shares, each time the share percentage of the outstanding voting shares it holds changes by up to 5 per cent of the total outstanding voting shares, the investor must, within three days of the occurrence of the change, make an ownership changing report, submit a written takeover report to the CSRC and the Stock Exchange, notify the target company, and make an announcement to the general public. In addition, each time the share percentage of the outstanding voting shares it holds changes up to 1 per cent of the total outstanding voting shares, the investor must notify the target company and make an announcement to the general public by the next day of the occurrence of such change.

In the case of a takeover by offer, the investor is obliged to disclose any shareholding change to the market.

(b) Investor's duties of clarification

An investor must make a prompt clarification if a listed company makes an enquiry in relation to that investor, particularly if there is a leak and the investor's name is in the public domain, or if the leak causes an untoward movement in the listed target company's share price.

(c) Duty of disclosure when acquiring a controlling shareholder's shares

When an investor intends to acquire the shares from a target company's controlling shareholder, the controlling shareholder shall query the capacity, credit status and purpose of the acquisition. The results must be disclosed in the equity change report.

4.4 Special requirements for a foreign investor acquiring a listed company

In addition to the general requirements set out in section 4.3 above, when a foreign investor intends to take over a listed company, it must also comply with the requirements for a foreign investor to acquire a PRC listed company.

Since the enactment of the new Foreign Investment Law in 2020, updates have been made to most of the regulations regarding foreign investor acquiring a listed company to be consistent with the Foreign Investment Law, while there are still certain regulations to be further amended, such as the Strategic Investment Measures[2].

Currently, a foreign investor can acquire the shares of a PRC listed company by:

(a) directly acquiring B shares of the target company from the market;

(b) acquiring B shares[3] of the target company through a private placement;

(c) acquiring A shares of the target company through a QFII or RQFII;

(d) acquiring A shares of the target company through Shanghai-Hong Kong Stock Connect, Shenzhen-Hong Kong Stock Connect or Shanghai-London Stock Connect[4]; or

(e) conducting the acquisition in the form of a medium- or long-term strategic investment of a certain scale (the **Strategic Investment**). A foreign investor must satisfy the following requirements when acquiring a listed company through a Strategic Investment:

(i) Investment methods

A foreign investor must perform the Strategic Investment in a listed company by way of a share transfer agreement or private placement.

(ii) Investor's qualification

Where a foreign investor intends to make a Strategic Investment in a listed company, it must adhere to any limitations on a foreign investor's shareholding in the target company's industries under PRC laws (including the Negative List). If the listed company belongs to an industry that forbids or restricts foreign investment, foreign investors cannot invest in such company, or must ensure their shareholding ratio does not exceed the restriction of foreign investment.

The foreign investor or its parent company must have actual assets outside the PRC of at least US$100 million, or must manage actual assets outside the PRC of at least US$500 million. The foreign investor and its parent company must not have been subject to any significant penalties imposed by competent authorities inside or outside the PRC in the past three years.

(iii) Requirements for Strategic Investment

A foreign investor's Strategic Investment can be made in instalments, but, after the initial investment, its shareholding ratio shall be at least 10 per cent of the target company's outstanding shares, unless otherwise provided by applicable regulations for particular industries or approved by competent authorities. A foreign investor cannot transfer A shares of a listed company acquired through Strategic Investment within three years of the acquisition.

(iv) Procedures for Strategic Investment

Regardless of whether the Strategic Investment is conducted by way of share transfer agreement or private placement, generally it should be subject to the following procedures:

- the acquisition must be approved by the target company's board and shareholders;
- once the resolutions regarding the acquisition have been passed, the target company and the foreign investor may enter into the transfer agreement or private placement contract;
- if the business of the target company falls under the Negative List, or such acquisition is a related-party acquisition, on completion, the foreign investor must first obtain approval from the competent authority, then complete the registration process with the competent registration authorities; and
- if the business of the target company does not fall under the Negative List or is not a related-party acquisition, the target company may directly complete the registration process first, then make the reporting process within 30 days of completion of the registration process.

2 The current Strategic Investment Measures were promulgated on 28 October 2015. On 18 June 2020, MOFCOM promulgated the Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors (the Version of the Revised Draft for Public Comment), which provides a significant reduction of the investment threshold, expands the way of investment (including the way of takeover by offer) and implies other positive impacts for a foreign investor acquiring a listed company.

3 The Chinese stock exchanges list two different types of shares. A shares refer to the common shares issued by companies incorporated in China, which are mainly traded by domestic entities or retail investors in Chinese currency. B shares are also issued by companies listed on Chinese stock exchanges; however, B shares are denominated in Chinese Yuan, but are issued and traded in United States or Hong Kong dollars. Usually, foreign investors are permitted to directly acquire B shares, but can acquire A shares only under certain circumstances.

4 The three stock connects are corporation schemes between stock exchanges in China, Hong Kong and England. Under Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect, a foreign investor is allowed to transact the shares of an A-share listed company on the Hong Kong Stock Exchange, while a domestic investor is allowed to transact the shares of a H-share listed company on the Shanghai/Shenzhen Stock Exchange, subject to certain requirements provided under these schemes. On 11 February 2022, the CSRC issued the Provisions on the Regulation of the Depositary Receipt Business under the Stock Connect Scheme between Domestic and Overseas Stock Exchanges to replace the previous Regulatory Provisions on the Interconnection Depositary Receipt Business of the Shanghai Stock Exchange and the London Stock Exchange (for Trial), which has expanded the scope of the connect between China's domestic and overseas Stock Exchanges bilaterally in Shenzhen, Germany and Switzerland and other European Stock Exchanges. However, compared with the Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect, the Shanghai-London Stock Connect scheme does not allow investors to directly transact the shares, but allows listed companies to issue depository receipts for foreign investors to trade on an offshore stock exchange. The investors may face more difficult requirements and processes to convert their depository receipts into shares.

4.5 Key commercial questions

Can an investor transfer its shares after the takeover of the target company?

The Securities Law provides that an investor must not transfer the acquired shares within 18 months after the completion of a takeover. However, such time limit is not applicable to share transfers between investors controlled by the same controller.

A foreign investor must not transfer A shares of a listed company acquired through Strategic Investment within three years of the acquisition.

Can an investor compulsorily acquire the remaining shares of the target company when it has held a certain proportion of the target company's shares?

No. Under current PRC laws, an investor has no right to compulsorily acquire the remaining shares of the target company when it has acquired a certain proportion of shares.

Can a takeover cause a listed company to de-list?

Yes, a takeover may cause a listed company to de-list under certain conditions, including but not limited to:

(a) when an investor makes a general offer for all of the shares of the target company, and acquires all of the shares for the purpose of de-listing the target company; or

(b) when an investor's takeover causes the target company to be disqualified from listing, i.e. the general public shareholders hold less than 25 per cent of the target company's total shares for 20 successive trading days, or hold less than 10 per cent of the target company's total shares where the total shares equity exceeds RMB 400 million.

Is there a limit on the shareholding ratio for a QFII to acquire a listed company?

Yes. A single QFII may not hold more than 10 per cent of the shares of any listed company, and a listed company should not have more than 30 per cent of its A shares held by QFIIs.

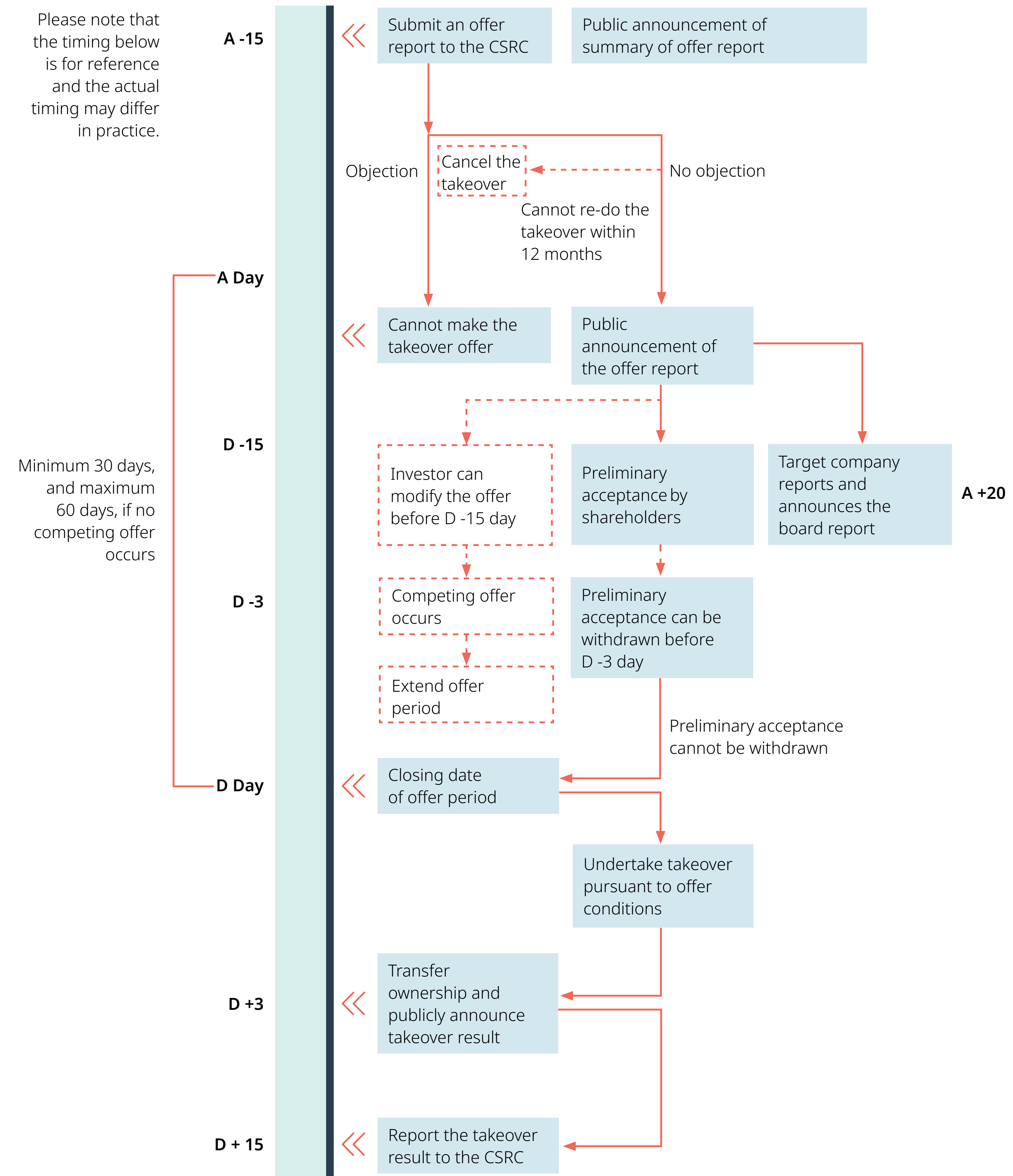
Does an investor need to make an antitrust filing when acquiring shares in a listed company?

Where an investor is intending to obtain "control" or is able to have a decisive impact through an acquisition, which acquisition reaches a certain declaration threshold, the investor must file an antitrust declaration with the Antitrust Bureau of the State Administration for Market Regulation for clearance. No acquisition can be implemented without clearance of the antitrust filing.

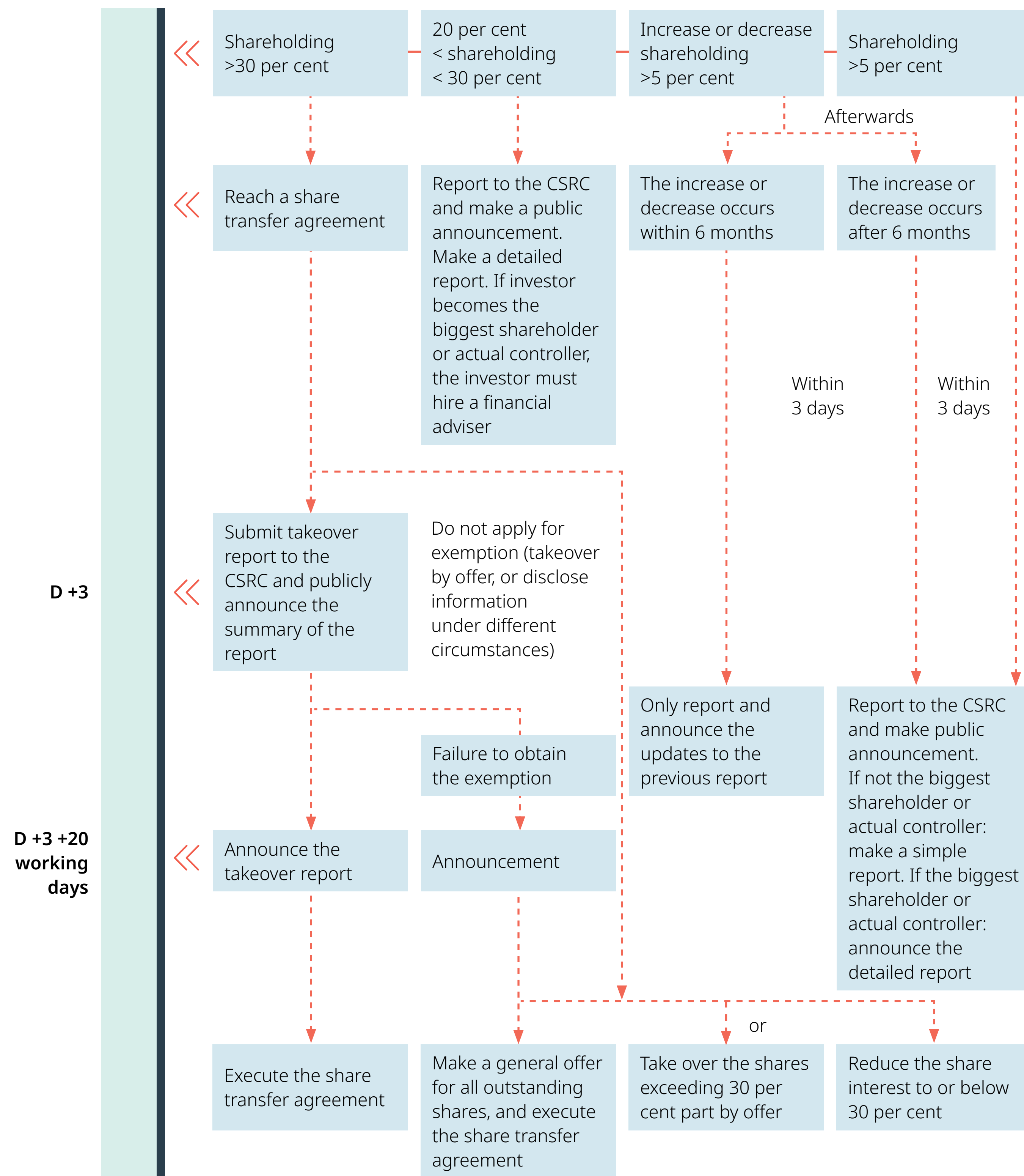
Does a foreign investor need to go through a security review during a takeover of a listed company?

Pursuant to the Measures for the Security Review of Foreign Investments, effective from 18 January 2021, foreign investors or the relevant parties in China must take the initiative in declaring to the competent authority before implementation: (i) investments in military industry, military industrial supporting and other fields related to security of national defence, and investments in areas that surround military facilities and military industry facilities; and (ii) their investments in important agricultural products, important energy and resources, important equipment manufacturing, important infrastructure, important transport services, important cultural products and services, important information technology and internet products and services, important financial services, key technologies and other important fields relating to national security, and their obtaining an actual controlling stake in the investee enterprise.

Indicative timeline for a takeover by way of an offer in China



Indicative timeline for a takeover by agreement in China



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5 France

5.1 Regulation

Under French law, public takeovers are regulated primarily by the General Regulation of the Financial Market Authority (*Autorite des marches financiers*, or the **AMF**), the EU Takeover Directive (Directive 2004/25/EC, the **Directive**), the French Monetary and Financial Code (which sets out the principles of securities and exchange law), the French Commercial Code (governing essentially the corporate aspects of French public companies), and more recently by the law on growth and business transformation, known as the PACTE Act of 22 May 2019, which, among other things, reduced the squeeze-out threshold from 95 per cent to 90 per cent of the share capital and voting rights.

The AMF is the regulatory authority in charge of supervising the information provided to shareholders in public offers. The AMF ensures that the rights of minority shareholders are respected, reviews offers and is responsible for declaring whether an offer conforms with applicable legal and regulatory provisions.

The main rules and principles governing public takeovers are set out in the AMF's General Regulation. The purpose of this regulation is to ensure that all parties to a public bid comply with the general principles of: (i) fairness in transactions, and in competition among bidders; (ii) equal treatment and access to information by holders of securities involved in the bid; and (iii) transparency and integrity of the market.

The regulations apply only to offers for financial securities covered by Article L 211-1, II of the French Monetary and Financial Code, i.e. shares or other securities granting or that may grant access, directly or indirectly, to capital or voting rights, debt securities and equivalent instruments issued under foreign laws.

On regulated markets, French regulations on public bids apply if:

(i) the company has its registered office in France and its securities are listed on a regulated market in France;

(ii) the company has its registered office abroad (outside EU Member States or is party to the EEA agreement) and its securities are listed on a regulated market in France; or

(iii) the company has its registered office in another EU Member State or is party to the EEA agreement and its securities:

- o are not listed on a regulated market in the State of the registered office; and
- o were admitted on a regulated market of a EU Member State or another State that is party to the EEA agreement for the first time in France.

5.2 Structure

Under French law, the main types of public offers are:

(i) cash tender offer (*offre publique d'achat*): the acquisition of securities by the bidder is offered for a cash consideration;

(ii) exchange offer (*offre publique d'echange*): the acquisition of securities is offered in exchange for other listed securities, whether issued or to be issued;

(iii) mixed offer: combination of (i) and (ii) above in which payment is made partly in securities and partly in cash; and

(iv) alternative offer: the bidder offers the shareholder of the target company the option to receive, in exchange for its securities, a payment in cash, in securities or both.

In addition, a distinction is made between:

(i) recommended bid: a tender offer that has received the approval of the target's board; and

(ii) hostile bid: the bidder seeks to take control of the company despite the opposition of the board and shareholder(s) who control(s) the target company.

Finally, under French law, a distinction is drawn between a voluntary bid and a mandatory bid.

(a) Voluntary bids

The usual form of a voluntary bid involves the bidder, acting alone or in concert with others (it being specified that all natural or legal persons acting in concert with the bidder are bound by the same obligations as the bidder itself), making an irrevocable bid that would extend to all of the target company's securities granting voting rights (or access to voting rights) not already held by the bidder.

The voluntary bid must be fully financed but may be subject to the satisfaction of other conditions, such as the acquisition of a predefined threshold (generally more than 50 per cent – higher thresholds are rare and limited to specific cases, such as distress companies) or the approval of regulatory authorities (e.g. antitrust clearance).

While irrevocable in principle, the bidder may modify or withdraw its bid during the offer period in certain circumstances, including for example the issuing by the target of certain new securities, the target entering into a transaction that significantly impacts target's situation, a counter bid or a higher bid is made, or the tender offer's conditions precedent are not fulfilled.

(b) Mandatory bids

Public offers are normally optional. However, there are a few cases in which bids are mandatory:

(i) when an individual or legal entity, acting alone or in concert within the meaning of Article L. 233-10 of the French Commercial Code, comes to hold, directly or indirectly, more than 30 per cent of the equity securities conferring voting rights or more than 30 per cent of the voting rights of a company governed by French law whose shares are admitted to trading on a regulated market of a EU Member State or another State that is party to the EEA agreement;

(ii) when individuals or legal entities acting alone or in concert come to hold, as a result of a merger or contribution, more than 30 per cent of the capital securities or voting rights of such a company (such threshold is set at 50 per cent of the share capital or voting rights for companies listed on an organised multilateral trading facility (e.g. Euronext Growth);

(iii) mandatory tender offers also apply to persons (acting alone or in concert) who hold, directly or indirectly, between 30 per cent and 50 per cent of a listed company's share capital or voting rights and increase that holding by 1 per cent or more within less than 12 consecutive months.

Once these thresholds are crossed, the bidder must, at its own initiative, immediately inform the AMF and file a public offer proposal, generally under a simplified process (see below), for all the equity securities and securities giving access to the capital or voting rights of the issuer.

By way of exception, mandatory public bids are not always necessary. They are subject to a number of adjustments, for example, the deposit requirement is waived in the event of a transfer free of charge between individuals and in the event of a distribution of assets by a legal entity in proportion to the rights of the shareholders.

(c) Squeeze-out of minority shareholders

Under French law, there is a possibility to acquire all target shares that have not been tendered to the offer. Following successful closing of a tender offer or within three months thereof, a controlling shareholder can automatically acquire the remaining target securities if (i) the securities not tendered by minority shareholders do not represent more than-10 per cent of the capital or voting rights (art. L433-4, 1° of the French Monetary and Financial Code); and (ii) if the bidder has informed the AMF, when filing the offer, that it reserves the right to implement the squeeze-out procedure following completion of the offer depending on its results, or has informed the AMF that the offer will automatically be followed by a squeeze-out procedure. The price applicable to the squeeze-out is subject to the issuance of a fairness opinion.

(d) Sell-out right

Symmetrically, in the event that the bidder holds at least 90 per cent of the capital or voting rights, French legislation provides for a sell-out procedure entitling minority shareholders to require a buyback.

5.3 Procedural steps

There are two main procedures for public offers: a standard procedure and a simplified procedure.

(a) Standard procedure

The standard procedure (*procedure normale*) applies where the bidder, acting alone or in concert with others, holds less than 50 per cent of the share capital or voting rights of the target.

Acceptances of persons wishing to tender their securities to the bid under the standard procedure may be revoked at any time up to the end of the last day of the offer. The offer is open for 25 trading days and may be reopened, outbid or counter-bid by a third party.

(b) Simplified procedure

This procedure may be used where the bidder already, or following an acquisition, holds directly or indirectly, alone or in concert, 50 per cent or more of the target's share capital and voting rights, or where it wishes to acquire up to 10 per cent of the target's share capital and voting rights.

Under the simplified procedure, a shorter timetable applies. The duration of the simplified offer may be as short as ten trading days or 15 for an exchange offer.

5.4 Disclosure of interests and stakebuilding

(a) Insider trading / market abuse

Before launching a public tender offer, bidders should be cautious when trading a potential target's shares on the market. Certain documents (due diligence reviews) may be deemed privileged information for the purposes of insider trading rules and expose the bidder, the target, their respective directors and officers, and certain other persons to criminal liability. Insider dealing and unlawful disclosure of inside information may be punishable by imprisonment for up to five years and a fine of up to €100 million, which can be increased to ten times the profit realised by the insider and must not be less than the amount of that profit.

(b) Price floor

(i) In voluntary tender offers, the price is set freely by the bidder. However, the bidder's discretion is governed by the law and AMF regulations.

(ii) In a simplified tender offer or a public buyout offer, the price offered by a bidder who already holds 50 per cent or more of the target's share capital and voting rights cannot be, except with the AMF's approval, lower than the average trading price weighted by trading volume for the 60 trading days preceding the filing of the offer.

(iii) An alternative or improved all cash offer must be at a price at least 2 per cent higher than the preceding bid. An offer at the same price may however be considered to constitute an alternative or improved bid if the voluntary minimum tender condition applicable to the existing offer is waived or lowered. Where part or all of the consideration offered consists of shares, the AMF ensures that the alternative or improved bid represents a significant improvement in the conditions offered to the target's shareholders. Each new bid requires a prospectus, which must be approved by the AMF.

(iv) In a mandatory offer, the proposed price must be at least equivalent to the highest price paid by the bidder for securities of the target during the 12-month period preceding the crossing of the 30 per cent threshold. The AMF can, however, impose or authorise a different offer price in the case of a material change in the characteristics of the target or the market for its securities (in particular, in the case of an ailing target or a transaction supported by ancillary agreements between the bidder and the seller of the target's shares).

(c) Secrecy and announcements

A bidder must publicly and promptly announce that it is considering a potential offer, unless it is able to keep its intentions confidential. Similarly, discussions between a potential bidder and the target or its shareholders may remain confidential only where measures are taken to ensure (and do in fact preserve) such confidentiality. This is most often done through non-disclosure agreements covering the existence and content of ongoing negotiations, information exchanged between the parties or undertakings to tender shares.

Also, according to the "Put up or shut up" rule, the AMF may, in particular when the market for the issuer's financial instruments is subject to significant price variations or unusual volumes, ask persons who it has reasonable grounds to believe are preparing, alone or in concert, a public offer on securities admitted to trading on a French regulated market to inform the public of their intentions within a set period. This applies in particular in the event of discussions between the issuers involved, or the appointment of advisers, with a view to preparing a public offer. This information is brought to the attention of the public through the publication of a press release, which is submitted to the AMF for prior review and whose author must ensure that it is disseminated effectively and in full (AMF General Regulation art. L 433-1,V-al. 2 and AMF General Regulation art. 223-32, para. 2).

(d) Disclosure

Under French law, the crossing of certain thresholds in the capital or voting rights of a listed company (C. com., art. L. 233-6 to L.233-15) generates a reporting obligation.

Thresholds have two sources: the law and the articles of association. The first imposes a reporting obligation when thresholds of 5,10,15, 20, 25, 30, one-third, 50, two-thirds, 90 and 95 per cent are crossed, for whatever reason;

A person crossing any of these thresholds must inform the company within four trading days of doing so, giving the total number of securities and voting rights it holds. If the company is listed on a regulated stock market, the person crossing these thresholds must also inform the AMF within four trading days. The AMF then discloses this information to the public.

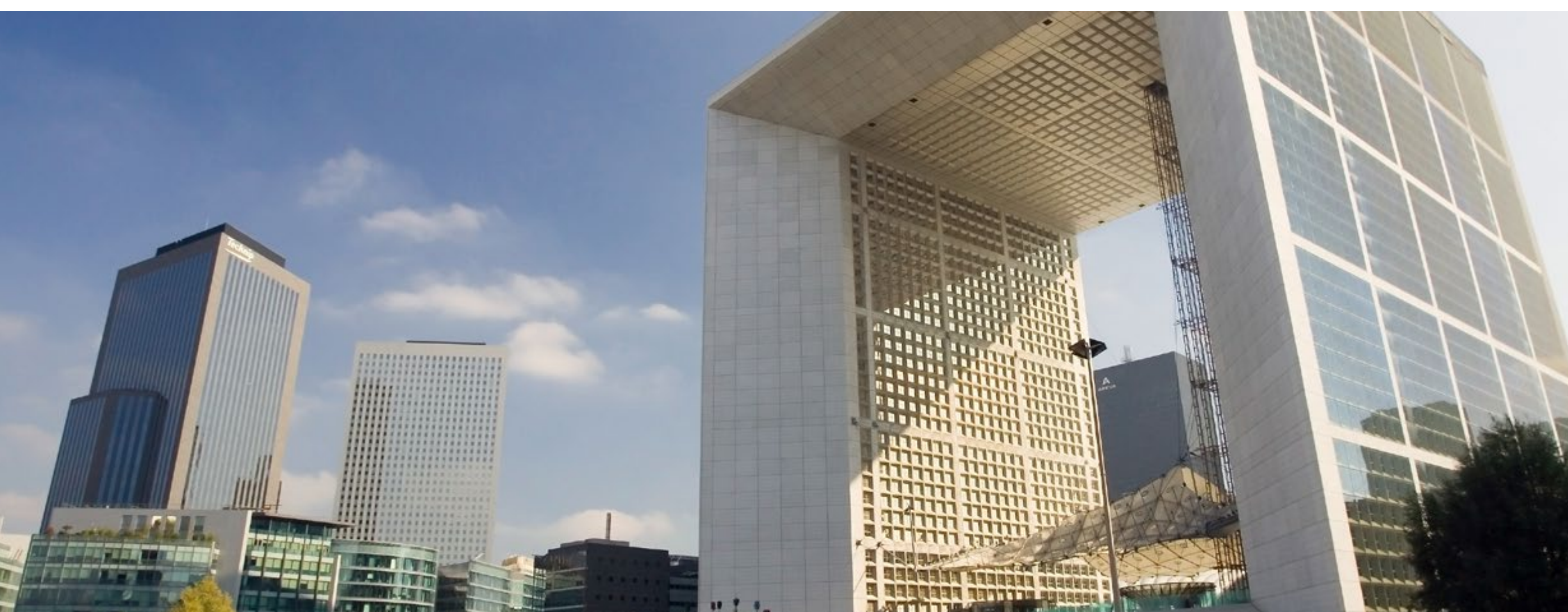
The target's articles of association may provide additional disclosure requirements, which can be as low as 0.5 per cent of the share capital or voting rights.

Also, if a person crosses the 10,15, 20 or 25 per cent thresholds in any French company listed on a regulated stock market, it must inform the company and the AMF of its objectives for the following six-month period within five trading days, by stating the means of financing the share purchases, whether it is acting alone or in concert, whether it intends to continue to purchase shares or not, etc.

Violation of this reporting system is punishable by criminal and disciplinary action. It is also punishable under civil law by the judicial suspension of all or part of the voting rights for five years and by the automatic deprivation of voting rights attached to shares exceeding the undeclared fraction, for a maximum of two years.

(e) Lapse threshold

Under French law (article 231-9 of the General regulation of the *Autorité des Marchés Financier*), any cash tender offer, at the close of which the offeror, acting alone or in concert within the meaning of Article L. 233-10 of the Commercial Code, does not hold shares representing more than 50 per cent of the share capital or voting rights, shall be null and void.



5.5 Key commercial questions

Are advisers required?

French law does not provide for such an obligation but, in practice, both the bidder and the target appoint legal and financial advisers. In addition, under French law, an independent expert is appointed by the target company of a takeover bid in cases of potential conflict of interest or risk of breach of the requirement for equal treatment of the target's shareholders, the target's board of directors or its supervisory board (e.g. the target company is already controlled by the bidder before the launch of the transaction; the directors of the target company or persons controlling the offeree company have entered into an agreement with the bidder which may affect their independence).

Is the target obliged to make information available to a bidder?

Under certain circumstances, the bidder may have access to non-public information provided by the target in a data room. The AMF guidelines provide that data rooms should be set up for significant transactions only and recommend that access to the data room be limited to bidders showing a serious interest as stated in a Letter of Intent and having previously entered into a confidentiality agreement.

However, in order to comply with the principle of a level playing field for alternative bids, the target is expected to allow under similar conditions any competing bidder to review material non-public information disclosed in a data room.

Can the target take action to frustrate a bid?

The basic principle under French law is that the company's management may take action to frustrate a bid, without any prior authorisation from the shareholders. By way of exception, the company's articles of association may provide that such measures that could frustrate the bid may not be taken without the prior authorisation of the shareholders.

Common anti-takeover measures include the insertion in the articles of association of a clause limiting the voting rights of each shareholder at shareholder meetings.

Can a bidder prevent the target from disclosing its identity to the market?

No. From the beginning of the offer period, the draft offer document, which indentifies the bidder, must be made available to the public free of charge at the registered offices of the offeror and the institution(s) making the offer.

Can the target grant exclusivity or pay a break fee to a bidder?

Break fees are not prohibited per se. However, they must comply with the principle of free interplay of offers and counter-offers and can be challenged if the amount is excessive. In addition, break fees payable by the target can raise issues in relation to compliance with the target's corporate interest and, where applicable, works council consultation procedures. Break fees must be disclosed to the AMF at the date of filing of the offer and in the offer document.

Can a bidder enter into special deals with the target's management or other key shareholders?

Bidders can approach the target's main shareholders to enter into agreements, pursuant to which they undertake to tender their shares (*engagements d'apport*). Such undertakings may be incompatible with the principle of free interplay of offers and counteroffers. In this respect, bidders seeking such undertakings usually allow the concerned shareholders to tender their target securities to a competing bid in exchange for a reasonable break fee. These agreements must be publicly disclosed.

Can information be given to key shareholders in advance?

Pre-IPO disclosure is limited and material information about the company may only be disclosed to persons subject to confidentiality obligations prior to publication of the registration document. Information about the transaction itself must not be made public before the AMF's approval of the prospectus.

Can a bidder obtain irrevocable commitments?

Shareholders who have accepted the offer are allowed to withdraw their acceptance during the offer period. Contractual agreements limiting this right of withdrawal are possible, but will need to be properly disclosed in the prospectus.

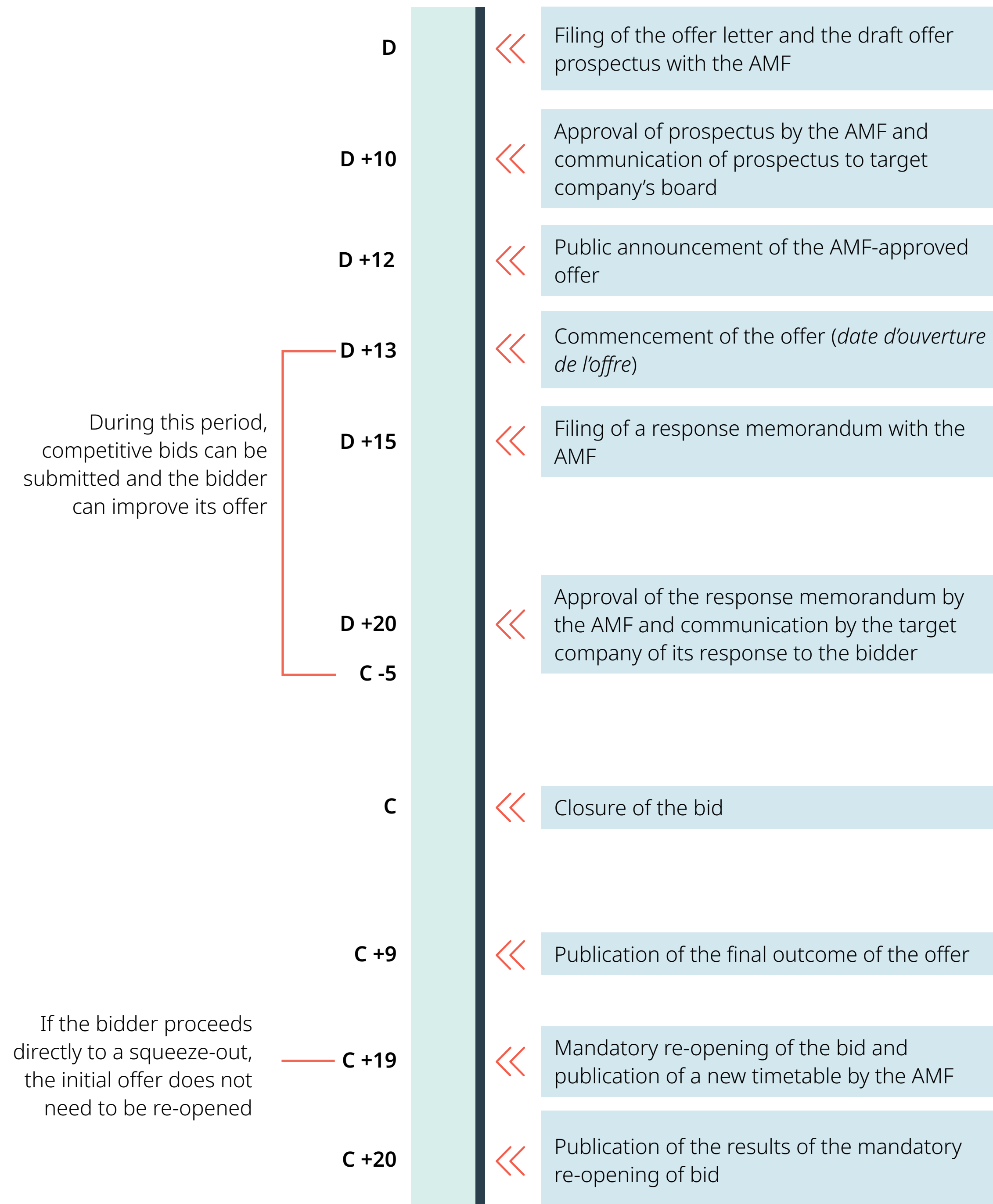
Can the target provide financial assistance for a bid, such as security or loans?

No. Financial assistance is strictly prohibited under French law.

Can a bidder force the target to de-list?

A de-listing of a company can only be implemented if a majority shareholder, or a shareholder group acting in concert, holds at least 90 per cent of the share capital and voting rights of the company.

Indicative timeline for a takeover offer in France



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6 Germany

6.1 Regulation

The German Securities Acquisition and Takeover Act (*Wertpapiererwerbs* and *Übernahmegesetz*, the **Act** or **WpÜG**) is the principal source of legislation for public M&A transactions in Germany. The Act is supplemented by a number of ordinances. In addition to the Act, the parties involved in a takeover offer will also be subject to other statutory and regulatory provisions. These include:

(a) the WpÜG Offer Ordinance. This ordinance contains rules on the provision of supplementary information in the offer document, pricing rules for takeover offers and mandatory offers, and details of the circumstances in which exemptions from the mandatory offer obligation may be granted;

(b) certain provisions of the German Stock Corporation Act (Aktiengesetz, the **AktG**); the insider dealing prohibitions of the regulation (EU) No 59 6/2014 of the European Parliament and of the Council of 6 April 2014 on market abuse, which entered into force on 3 July 2016; and the disclosure requirements of the German Securities Trading Act (*Wertpapierhandelsgesetz*, the **WpHG**); and

(c) German stock exchange legislation, which is relevant only if the bidder's shares are listed on a regulated German stock exchange or if the bidder is offering securities that are or will be listed on a regulated German stock exchange pursuant to an exchange offer.

Since 2002, the German Financial Supervisory Authority (*Bundesanstalt fur Finanzdienstleistungsaufsicht*, **BaFin**) or has been responsible for monitoring public takeovers. BaFin supervises offers in accordance with the provisions of the Act and has certain statutory enforcement powers. Within the scope of its assigned functions, BaFin remedies any adverse circumstances that may impair the orderly conduct of the procedures under the Act or cause substantial disadvantages to the securities market.

The WpÜG regulates all offers for public companies and partnerships limited by shares which have their registered offices in Germany, if any of their securities are admitted to trading on a regulated market in Germany or any regulated market in another country of the European Economic Area (EEA). In certain circumstances, certain provisions of the Act also apply to offers for non-German companies incorporated within the EEA that are listed on a regulated market of a stock exchange in Germany but not in their home jurisdictions. The Act is designed to ensure the fair and equal treatment of shareholders and to provide an orderly framework within which takeovers are conducted.

The Act contains five general principles and more detailed provisions on the conduct of public offers. The first and most important principle is the bidder's obligation to treat all target shareholders of the same share class equally.

6.2 Structure

Under the German regime a distinction is drawn between a voluntary takeover offer and a mandatory offer. If the potential bidder has already acquired control over the target company, the bidder has to announce a mandatory offer. Control under the Act means holding or attribution to the bidder of more than 30 per cent of the voting rights. Although a statutory scheme of arrangement (similar to Part 26 of the UK Companies Act 2006) does not exist in Germany, it is, however, possible to merge companies in Germany or even in different Member States of the EEA by way of a universal succession (i.e. a collective transfer of assets, liabilities and contracts).

(a) Takeover offers

Under the Act, a takeover offer means an offer for the acquisition of control of the company. "Control" means the holding of at least 30 per cent of the voting rights in the target company. Takeover offers are voluntary.

A takeover offer which covers only a certain percentage of the shares in the target company (a **partial offer**) is not permitted. If a bidder does not intend to acquire control, a partial offer is possible.

A bidder is free to set an acceptance condition for a takeover offer at any level above 30 per cent. Relevant thresholds would be:

(i) 50 per cent of the voting rights allowing the bidder to pass resolutions at an annual general meeting (AGM), such as the distribution of dividends and the election of supervisory board members;

(ii) 75 per cent of the voting rights allowing the bidder to pass resolutions at an AGM, such as the implementation of a profit and loss transfer agreement, and special corporate measures; and

(iii) 95 per cent of the voting rights allowing the bidder to pass a resolution at an AGM to implement a squeeze-out of the minority shareholders.

An indicative timetable for the implementation of an offer is included at the end of this section.

(b) Mandatory offer

If a shareholder (together with its concert parties) acquires 30 per cent or more of the voting rights in a target company, or 30 per cent or more of the voting rights are attributed to a shareholder, the Act obliges this shareholder to make a mandatory offer for all shares of the target company. A mandatory offer can have no conditions, with the exception of merger control or other mandatory clearances (e.g. foreign investment control).

The shareholder/bidder must make an announcement immediately, or at the latest within seven calendar days following the acquisition which triggers a mandatory offer.

In certain circumstances, BaFin must, upon written application, permit voting rights attached to shares in the target company to be disregarded when calculating whether the control threshold of 30 per cent has been reached or exceeded. This applies, for example, to shares acquired in the course of group restructurings. In addition, BaFin may exempt a controlling shareholder from the mandatory offer obligation if, for example, the controlling position was acquired in connection with a turnaround of the target company, as a result of a reduction of the target's share capital or where the controlling shareholder unintentionally acquired 30 per cent of the voting rights. An exemption may also be granted by BaFin if a third party has a higher percentage of voting rights in the target company.

(c) Statutory merger alternative

In the case of a statutory merger, the shareholders of the entity that is merged (the **merged company**) receive shares in the surviving company (the **acquirer**).

A merger agreement must provide for an appropriate exchange ratio, which must be confirmed by a court-appointed auditor. However, after the merger has taken effect, each shareholder of the merged company may challenge the exchange ratio in a special court procedure with the aim of achieving a top-up payment made to all shareholders of the merged company. A merger requires shareholders' consent (at least 75 per cent of the votes cast) from the shareholders of both companies.

Where the acquirer is incorporated outside Germany, dissenting shareholders of the merged company must be granted the right to be cashed out for adequate compensation. There is no prescribed timetable for a statutory merger by law.

If control over the surviving entity is acquired by a shareholder of the merged entity as a result of the merger, an obligation on such shareholder to launch a mandatory offer for the shares of the shareholders of the surviving entity may be triggered.

(d) Compulsory acquisition of minority shareholders

In Germany, there are three ways to compulsorily acquire all target shares that have not been tendered in the offer, known as the "takeover squeeze-out", the "general squeeze-out" and the "merger squeeze-out".

The takeover squeeze-out and the general squeeze-out both require that the bidder holds directly or indirectly at least 95 per cent of the target's share capital and pays adequate cash compensation to the minority shareholders concerned. The general squeeze-out is not tied to a preceding takeover, but requires a more time-consuming implementation procedure. A general squeeze-out can be initiated at any time. The compensation has to reflect the full value of the company. The minimum price per share is usually the three-month average quotation.

In a takeover squeeze-out, the transfer of the shares is effected by a court decision if the bidder so requests within three months of the expiry of the acceptance period. Minority shareholders are entitled to the same compensation as paid under the offer. The compensation will be deemed to be adequate if at least 90 per cent of the shares were tendered thereunder. Otherwise, the court reviews the adequacy of the compensation before deciding on the bidder's request.

The merger squeeze-out is available to a majority shareholder of a public limited company who owns at least 90 per cent of the share capital of a target company which is also a public limited company. The merger squeeze-out requires a shareholder resolution to be adopted by the shareholders of the public limited company within three months after the date on which both public limited companies have entered into a merger agreement, pursuant to which the target company is merged into the majority shareholder public limited company. The squeeze-out becomes effective concurrently with the merger, i.e. at the time when the merger of both public limited companies is registered in the commercial register of the majority shareholder.

As far as the other procedural requirements, the adequate compensation of the minority shareholders and the judicial challenge of the squeeze-out are concerned, the same rules as for the general corporate law squeeze-out apply.

(e) Sell-out

If the conditions of a takeover squeeze-out are established, the Act provides for a voluntary sell-out right for the minority shareholders. The sell-out right mirrors the squeeze-out right of the bidder. It enables the minority shareholders to give up their shareholding positions by tendering their shares. In return, they receive an adequate compensation which is equal to the compensation under the squeeze-out regime. The minority shareholders have to exercise their sell-out right within three months from the end of the acceptance period.

6.3 Publication of the decision to make an offer

The bidder must publish its decision to make a voluntary takeover offer in accordance with section 10 of the Act without delay. If a bidder's shareholder resolution is required to make an offer and such bidder's shareholder resolution has not been passed, there is still a duty to publish. BaFin may permit the bidder to publish the decision only after the resolution of the shareholders' meeting if the bidder ensures, through taking appropriate precautions, that market distortions are not a concern.

The bidder shall, prior to publication, give notice of the decision to make an offer:

(a) to the management of the stock exchanges where the securities of the bidder, the target company and other companies directly affected by the offer are admitted for trading;

(b) to the management of the stock exchanges where derivatives are traded, to the extent that the securities of the target company are the subject of the derivatives; and

(c) to BaFin.

The publication of the decision triggers a four-week period during which the bidder must submit the offer document to BaFin for review and approval.

6.4 Disclosure of interests and stakebuilding

Depending on the liquidity of the stock and the number of willing sellers in the market, a potential bidder may consider purchasing target shares in the market either before or after approaching the target's board.

Such acquisitions may have serious consequences for an offer and the following are some of the issues that are likely to be relevant to any share-buying strategy

(a) Insider dealing/market abuse

So as to avoid any insider dealing/market abuse concerns, no acquisitions should be made, if a bidder or anyone acting in concert with it has any precise information, relating directly or indirectly to the target, which has not been made public, but which would have the potential to substantially influence the price of the target's shares if it were made public. Knowledge that a bidder is itself considering an offer is a defence to market abuse and insider dealing.

(b) Offer structure

Deciding when and/or if to stakebuild may also be affected by the offer structure.

Based on the consideration payable under an offer, there are three types of offers in place:

(i) cash offer (all shares of the target company will be acquired at a specific offer price payable in cash). This is the most common form;

(ii) exchange offer (all shares of the target company will be acquired in exchange for shares in the bidder or a group company); or

(iii) combination of cash and exchange offer (shareholders of the target may be offered the choice between cash or shares or a combination of cash and shares).

If the bid is to be implemented as an offer, any shares acquired by the bidder prior to the launching of the offer document are not shares to which the offer relates and therefore cannot count towards the 90 per cent threshold of the takeover squeeze-out.

(c) Disclosure

Irrespective of the existence of an offer for a company, if a shareholder's aggregate voting rights in a company listed on a regulated market on a German stock exchange exceed 3 per cent, and if the voting rights change to reach, exceed or fall below 5, 10, 15, 20, 25, 30, 50, and 75 per cent thereafter, it must notify the company and BaFin in no later than four trading days. The company will then be obliged to announce the notification to the market.

The notification duty applies to voting rights not only from own shareholdings, but also from shareholdings of subsidiaries, trustees and parties acting in concert. Furthermore, the notification duty also applies to voting rights originating from instruments vesting a right to purchase shares (such as physically settled options and derivatives contracts) as well as cash-settled derivatives (such as swaps) if they allow the holder or a third person to acquire voting rights attached to shares. The first notification threshold is 5 per cent of the voting rights followed by the thresholds as stated above.

Voting rights attached to shares and to instruments are aggregated and only trigger a notification duty if the result of such aggregation exceeds 5 per cent. As long as an investor/bidder holds voting rights pertaining to shares held or attributed to them less than 3 per cent or instruments less than 5 per cent, no disclosure obligation exists. Consequently, investors/bidders are only able to purchase up to 2.99 per cent of shares plus 2 per cent of instruments without having to disclose.

(d) Price floor

An acquisition of interests in target securities will set a floor price for an offer announced within six months of the relevant acquisition, or if the acquisition is made after commencement of the offer period. Additionally, if the shares are admitted to trading on a German stock exchange, the offer price must correspond at least to the weighted average stock exchange price during the three months before the publication of the decision to launch an offer or, in the case of a mandatory offer, the disclosure of the acquisition of control.

If the bidder or persons acting in concert acquire target shares within one year after the offer and if the consideration paid for such shares is higher than the offer price, the bidder must pay the difference in price in cash to all shareholders who accepted the offer.

(e) Cash consideration

The bidder is generally free to decide on the cash consideration provided that all target shareholders in the same share class are treated equally.

However, if a bidder (together with its concert parties) acquires more than 5 per cent of the shares or voting rights in the target company for cash during the six months prior to the publication of the offer until the end of the acceptance period, the offer must be for cash consideration or accompanied by a cash alternative at not less than the highest price paid.

(f) Duties of the bidder to publish in the context of a public offer

The bidder has the duty to publish the following key documents in the context of an offer:

(i) public announcement of the decision to make an offer;

(ii) offer document approved by BaFin including funding confirmation in the case of a cash offer;

(iii) weekly public announcement regarding current status of the acceptance of the offer (water level announcements) during the acceptance period, with the water level announcement to be published daily in the last week; and

(iv) public announcement of the final acceptance level after the expiration of the acceptance period.

6.5 Key commercial questions

Are advisers required?

There is no legal requirement to appoint advisers under the Act. However, in practice the bidder and the target company regularly engage a legal and a financial adviser.

Is the target obliged to make information available to a bidder?

There is no statutory obligation. The members of the management board and the supervisory board of the target company must act in the best interests of the company. Therefore, a target company can make information available to one potential bidder, but not to other potential bidders if they are less welcome.

Can the target company take action to frustrate an offer?

Not without the approval of its shareholders. An authorisation specifying any frustrating actions may be granted for a maximum of 18 months. The resolution of the AGM requires a majority vote of at least 75 per cent of the votes cast. Actions of the management board under such authorisation require the consent of the supervisory board.

The management board and the supervisory board have to publish a reasoned statement in which they explain their position towards the offer, in particular whether the proposed consideration is appropriate or not.

Can a bidder step back from the offer?

Yes. If the bidder steps back from the offer after having made the public announcement under section 10 of the Act and does not publish an offer document, BaFin will prohibit the offer. As a consequence, the bidder and any person acting in concert with the bidder are prohibited from making a new offer for one year. The same applies if an offer contained an acceptance condition and such condition has not been met.

What security does a bidder need to provide for the compensation offered?

In the event of a cash offer, the bidder must obtain a financing confirmation from an independent European credit institution confirming that sufficient funds to acquire all outstanding shares are available. In the event of an exchange offer, such financing confirmation is not required. The bidder, however, must provide evidence that sufficient shares are available to satisfy the offer.

Can a bidder enter into special arrangements with the target's management or supervisory board?

The bidder and persons acting jointly are prohibited from granting or holding out the prospect of unjustified cash payments or unjustified monetary benefits to members of the management and supervisory boards of the target company.

Can information be given to key shareholders in advance?

Information must be made equally available to all target shareholders (and persons with information rights) as nearly as possible at the same time and in the same manner.

Can a bidder obtain irrevocable commitments?

Yes. Bidders will often seek irrevocable commitments (or non-binding letters of intent) from key shareholders, including the members of the management and supervisory boards.

Can the target provide financial assistance for a bid, such as security or loans?

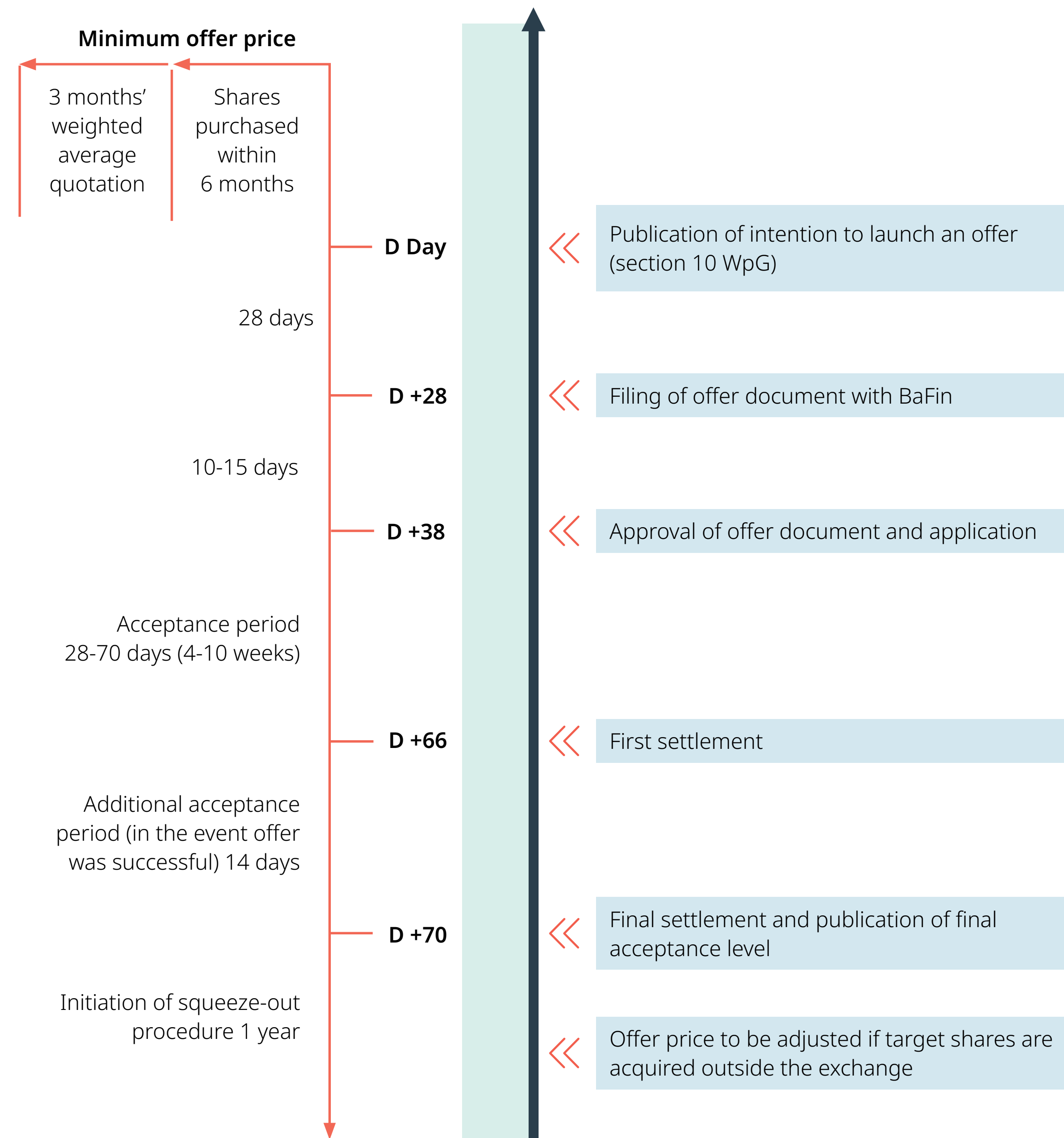
No. A target is prohibited from providing any loans or security and from giving any other financial assistance for the acquisition of its shares under section 71a of the AktG. An agreement violating section 71a of the AktG is null and void. If the target, after a successful offer, is re-registered as a private company, it may provide financial assistance under a different legal regime.

Can a bidder force the target to de-list?

In principle, yes, but only if the management board is willing to de-list the company, as the decision of the management board cannot be overruled by a shareholder resolution. According to the new de-listing legislation, de-listing from the regulated market requires a public tender offer for cash that is open to acceptance by all outstanding shareholders. The offer is then governed by the Act. The de-listing offer must provide for a cash consideration not below the volume-weighted average stock exchange price of the target share within the six-month period prior to publication of the bidder's intent to launch the offer. If trading in the shares is illiquid, an expert valuation is required.

Once the offer document has been published, the management board may lodge the de-listing application with the relevant stock exchange. The decision about the de-listing is within the discretion of the relevant stock exchange.

Indicative timeline for a public takeover bid in Germany



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7 Hong Kong

7.1 Regulation

The Code on Takeovers and Mergers (the **Code**) is the principal source of regulation for public M&A transactions in Hong Kong. The Code is issued by the Securities and Futures Commission (the **SFC**) in consultation with the Takeovers and Mergers Panel and administered by the Executive Director of the Corporate Finance Division of the SFC (or any of its delegates) (the **Executive**). It regulates takeovers, mergers and share buy-backs affecting public companies in Hong Kong, companies with a primary listing of their equity securities in Hong Kong and Real Estate Investment Trusts (**REITs**) with a primary listing of their units in Hong Kong.

The Code is based on ten general principles, which set standards of good commercial behaviour to ensure fair and equal treatment of shareholders, and is formed of detailed rules and notes on the rules which develop these principles further.

7.2 Structure

Offers for companies regulated by the Code can be implemented in one of two ways: either by way of a conventional contractual offer (an **Offer**); or a statutory scheme of arrangement pursuant to the relevant companies laws applicable in the place of incorporation of the target company (a **Scheme**).

(a) Offer

An Offer is a contractual offer made by the bidder to the target's shareholders to acquire their shares, subject to a number of terms and conditions. The most important condition to an Offer is the acceptance condition, which makes the offer conditional on the bidder receiving not less than a certain number of acceptances.

The Code generally requires that a bidder must make an offer (referred to as a mandatory offer) to acquire all of the shares of the target not already owned by it if the bidder (either alone or together with those acting in concert with it) comes to hold 30 per cent or more of the voting rights of the target, or where the bidder (either alone or together with those acting in concert with it) holds not less than 30 per cent (but not more than 50 per cent) of the voting rights of the target and subsequently increases the percentage of voting rights that it holds by 2 per cent from the lowest percentage holding in the previous 12 months. A voluntary offer is an offer which is not a mandatory offer. A voluntary offer may be for all of the shares in the target not owned by the bidder or it may be a partial offer[1] which is for a specified number of shares in the target, provided that it complies with the requirements for partial offers under the Code.

The Code requires that the bidder receives, at a minimum, sufficient acceptances to take its overall shareholding in the target (when aggregated with any other shares it holds in the target) to over 50 per cent, unless the Executive consents otherwise. Typically a bidder making a voluntary offer will set its acceptance condition at 90 per cent as, once a bidder has acquired not less than 90 per cent of the shares to which the offer relates, it may be able to compulsorily acquire the remaining shares in the target under the statutory squeeze-out procedure set out in the relevant companies laws applicable in the place of incorporation of the target company.[2]

An indicative timetable for the implementation of an Offer is included at the end of this section.

(b) Scheme

A Scheme is a statutory procedure whereby a target agrees to an arrangement with its shareholders. As a Scheme is implemented by the target, the structure is only viable when an offer is recommended rather than hostile.

In order to become effective, in addition to satisfying the requirements for the Scheme under the law of the place of incorporation of the target, a Scheme must be approved by at least 75 per cent of the votes attaching to the disinterested shares (i.e. those not held by the bidder or persons acting in concert with it) that are cast either in person or by proxy at a duly convened meeting of the holders of the disinterested shares and the number of votes cast against the resolution to approve the scheme must not be more than 10 per cent of the votes attaching to all disinterested shares. Once approved, the Scheme is binding on all of the shareholders holding the class of shares to which the Scheme relates; no squeeze-out of the minority is required.

In addition to the certainty of acquiring loo per cent control if the Scheme is approved, another advantage of a Scheme is that, unlike an Offer, where stamp duty is payable at 0.2 per cent of the value of the consideration paid for the target securities, no stamp duty is payable on securities acquired under a Scheme, provided that it is combined with a reduction of capital of the target.

An indicative timetable for the implementation of a Scheme is included at the end of this section.

1 A partial offer must be made for a precise number of shares and must be conditional upon the bidder receiving acceptances for not less than that number.

2 Most companies listed on the Stock Exchange of Hong Kong Limited are incorporated in offshore jurisdictions such as Bermuda, the British Virgin Islands or the Cayman Islands.

(c) Squeeze-out of minority shareholders

If a takeover is implemented as an Offer, it is likely that the bidder will want to compulsorily acquire the shareholdings of any minority shareholders who have not accepted the Offer. This process is known as "squeeze-out" and under the Code becomes available where the bidder has, by virtue of acceptances of an Offer, acquired or unconditionally contracted to acquire not less than 90 per cent of the disinterested shares within four months of posting the offer document.

On reaching this threshold, the bidder is entitled to give a compulsory acquisition notice to the holder of any shares to which the offer relates and which the bidder has not acquired or unconditionally contracted to acquire. Where an Offer is made for more than one class of share capital, the 90 per cent test is applied, and the right is exercisable, separately in respect of each class.

A squeeze-out will not be necessary if a takeover is implemented as a Scheme as, once effective, a Scheme is binding on shareholders holding the class of shares to which the Scheme relates.

7.3 Secrecy and announcements

There must be absolute secrecy before the announcement of an offer.

All persons privy to confidential information, and particularly price-sensitive information, concerning an offer must treat that information as secret and must conduct themselves so as to minimise the chances of an accidental leak of information. Such information should only be communicated on a "need-to-know" basis and only if the recipient is aware of the need for secrecy. Code names should always be used.

When conducting preliminary offer-related discussions, the parties involved should be aware that extending discussions beyond "a very restricted number" of persons outside those who need to know in the companies concerned, and their respective immediate advisers, can give rise to an obligation to make an announcement due to the increased risk of information leaking. A bidder wishing to approach a wider group, for example, in order to arrange financing for the offer, to seek irrevocable commitments or to organise a consortium to make the offer should consult the Executive. This obligation may arise even where there has not been an undue movement in the parties' share prices. The Executive should be consulted in all cases of doubt.

The Code has strict rules about when an announcement is required and divides the responsibility for making an announcement between the bidder, a potential vendor (i.e. holder(s) of shares carrying 30 per cent or more of the voting rights of the target) and/or the target, according to the circumstances.

Outlined below is a summary of when an announcement is required:

(a) If there is a leak

(i) Before an approach

Before an approach to the target's board, the bidder and/ or a potential vendor will be responsible for making a leak announcement if:

a. the target is the subject of rumour and speculation about a possible offer; or

b. there is an undue movement in the target's share price or in the volume of share turnover and there are reasonable grounds for concluding that the actions of the potential vendor and/or potential bidder have led to the situation.

(ii) Following an approach

Following an approach, a target will be obliged to make a leak announcement if it is the subject of rumour or speculation about a possible offer, or there is an undue movement in its share price or in the volume of share turnover.

Even if there is not a leak, a target can choose to make an announcement to commence an offer period or publicly identify a potential bidder when negotiations or discussions between the bidder and the target company are about to be extended to include more than a very restricted number of people, or at any other time it considers appropriate.

An announcement by a bidder or target (whether voluntary or obligatory) that talks are taking place or that a potential bidder is considering making an offer:

a. may, at the request of the Executive, need to identify the potential bidder with whom the target is in talks, or from whom the target has received an approach; and

b. triggers an obligation for the target to make an announcement setting out the progress of the talks or the consideration of a possible offer at the end of every one-month period until the bidder identified in the announcement announces a firm intention to make an offer for the target, or announces that it does not intend to make an offer.

Any subsequent announcement which first identifies another potential bidder will also be subject to the one-month announcement obligation set out above.

The offer period commences from the time an announcement is made of a proposed or possible offer (with or without terms).

(b) Acquisition of 30 per cent or more

If a bidder (either alone or together with its concert parties) comes to hold 30 per cent or more of the voting rights of the target or crosses certain thresholds above 30 per cent (as set out in section 7.2 (a) above), the Code obliges that shareholder to make a mandatory offer for each class of share capital in the company which, broadly, can have no conditions other than a minimum acceptance condition of 50 per cent plus one share. Due to the large number of listed companies in Hong Kong where a close-knit group of shareholders hold a controlling stake between them, a large majority of offers made by number are mandatory offers required to be made by a bidder under the Code immediately after it has acquired the controlling stake.

A bidder who has acquired 30 per cent or more of the voting rights in the target will need to make an announcement immediately following the acquisition which triggers a mandatory offer.

The announcement obligations under the Code are not the only disclosure requirements which apply to the acquisition of shares. For more information on the thresholds which trigger announcement obligations, see section 7.4(c) below.

(c) Firm intention to make an offer

An announcement is also required when a bidder notifies the board of the target of its firm intention to make an offer.

A firm intention to make an offer should only be announced when the bidder has every reason to believe that it can and will be able to implement the offer and, where an offer includes an element of cash, the bidder's financial adviser has confirmed that it has sufficient resources to satisfy full acceptance of the offer (following completion of the "cash confirmation" process).

In addition to the mandatory announcement obligations outlined above, a potential bidder may also choose to make a possible offer announcement detailing the terms on which an offer might be made for the target. This type of announcement is often used in Hong Kong where regulatory clearances required to complete the offer are unlikely to be obtained within the normal Code timetable.

7.4 Disclosure of interests and stakebuilding

Depending on the liquidity of the stock and the number of willing sellers in the market, a potential bidder may consider purchasing target shares in the market either before or after approaching the target's board.

Such acquisitions may have material implications for an offer. The following are some of the issues that will be likely to be relevant to any share-buying strategy:

(a) Insider dealing/market manipulation

So as to avoid any insider dealing/market manipulation concerns, no acquisitions should be made if a bidder or anyone acting in concert with it has any price-sensitive information relating to the target which is not generally known.

(b) Offer structure

Deciding when and/or if to stakebuild may also be affected by the offer structure. If the bid is to be implemented as an Offer, any shares acquired by the bidder prior to the date of the announcement of a firm intention to make an offer are not shares to which the offer relates, and therefore cannot count towards the 90 per cent squeeze-out threshold.

If implemented as a Scheme, the acquisition of shares by a bidder would effectively take shares out of the hands of target shareholders who may otherwise vote in favour of the Scheme. In addition, shares held by the bidder and its concert parties may be voted in favour of the Scheme, however, these votes will not be counted: hence such shares will be of no assistance in achieving the voting thresholds required to implement the bidder's proposed Scheme.

(c) Disclosure

(i) Disclosure of interests under the Securities and Futures Ordinance

Irrespective of the existence of an offer for a company, if a shareholder's aggregate interest in a company reaches or exceeds 5 per cent or if its holding subsequently changes to exceed or fall below a whole number percentage above 5 per cent or fall below 5 per cent, it must notify the company and The Stock Exchange of Hong Kong Limited within three business days pursuant to the Securities and Futures Ordinance.

These disclosure requirements mean that it is highly likely that any pre-announcement stakebuilding reaching or exceeding 5 per cent will result in a bidder's name being made public in connection with the possible bid.

(ii) The Code

The Code's disclosure regime applies to the target company, the bidder and each of their associates.

Any person to whom the disclosure regime applies must make a dealing disclosure if it deals in the relevant securities of the target or the bidder (where shares in the bidder are being issued as consideration for the offer) by no later than 12:00 noon on the business day following the date of the relevant dealing (unless the dealing took place in a United States time zone).

(d) Price floor

(i) Non-mandatory offers

If a bidder or any person acting in concert with it purchases shares in the target within the three-month period prior to commencement of the offer period (or prior to such period if the Executive is of the view that the circumstances so require, to give effect to the equality of treatment principle) or during the period (if any) between the commencement of the offer period and the announcement of a firm intention to make an offer, the offer to the target shareholders must not be on less favourable terms.

During the offer period after a firm intention to make an offer has been announced, if a bidder or any person acting in concert with it purchases shares in the target at above the offer price, then the bidder must increase the offer to not less than the highest price paid for such target shares.

(ii) Mandatory offers

The highest price paid by the bidder or any person acting in concert with it for any target shares during the offer period and within six months prior to its commencement will set the floor price for any mandatory offer for target shares of that class referred to in section 7.4(f) below.

(e) Cash consideration

If a bidder (together with its concert parties) acquires for cash consideration:

(i) shares in the target during the offer period; or

(ii) 10 per cent or more of the shares carrying voting rights in the target during the offer period and/or in the six months prior to the commencement of the offer period,

the offer must be for cash consideration or accompanied by a cash alternative at not less than the highest price paid.

(f) Mandatory offer required

As set out in sections 7.2(a) and 7.3(b) above, if a bidder either alone or together with its concert parties acquires voting rights of the target crossing certain thresholds, then a mandatory takeover offer (in cash) for the target's shares is required which, broadly, can have no conditions other than the minimum acceptance condition of 50 per cent plus one share.

7.5 Key commercial questions

Are advisers required?
The Code requires the board of the target to obtain the advice of a competent and independent financial adviser to advise it on whether an offer is fair and reasonable and as to acceptance and voting, and the substance of that advice must be made known to the shareholders of the target. The Code also requires the bidder to appoint a financial adviser who must, among other things, make a confirmation to the Executive that the bidder has sufficient resources to satisfy full acceptance of the offer.

Is the target obliged to make information available to a bidder?
Not specifically, but if a target has made information available to one potential bidder it must be furnished to other potential bidders (even if they are less welcome).

Can the target take action to frustrate an offer?
Not without the approval of the target shareholders at a general meeting.

Can a bidder prevent the target from disclosing its identity to the market?
A potential bidder must not attempt to prevent the board of the target from making an announcement relating to a possible offer at any time that it considers appropriate. It may be possible to agree with the target not to name the possible bidder while also making the market aware of an approach which may lead to an offer.

The identity of the bidder and its ultimate controlling shareholder and parent company must be disclosed in an announcement of a firm intention to make an offer.

Can the target grant exclusivity or pay an inducement fee to a bidder?
Yes, but subject to certain safeguards which must be observed. An inducement fee or break fee must be de minimis (normally no more than 1 per cent of the offer value) and the target company board and its financial adviser must confirm to the Executive in writing that each of them believes that the fee is in the best interests of the shareholders of the target. Full disclosure on any inducement or break fee arrangement is required in the announcement of a firm intention to make an offer and in the offer document, and the relevant documents must be put on display. The Executive should be consulted at the earliest opportunity in all cases where such arrangement is proposed.

Can a bidder enter into special arrangements with the target's management or other key shareholders?
Not without the consent of the Executive. If Executive consent is given, full disclosure, an opinion from the target's independent financial adviser as to whether the special arrangement is fair and reasonable and the approval of the target's independent shareholders will normally be required.

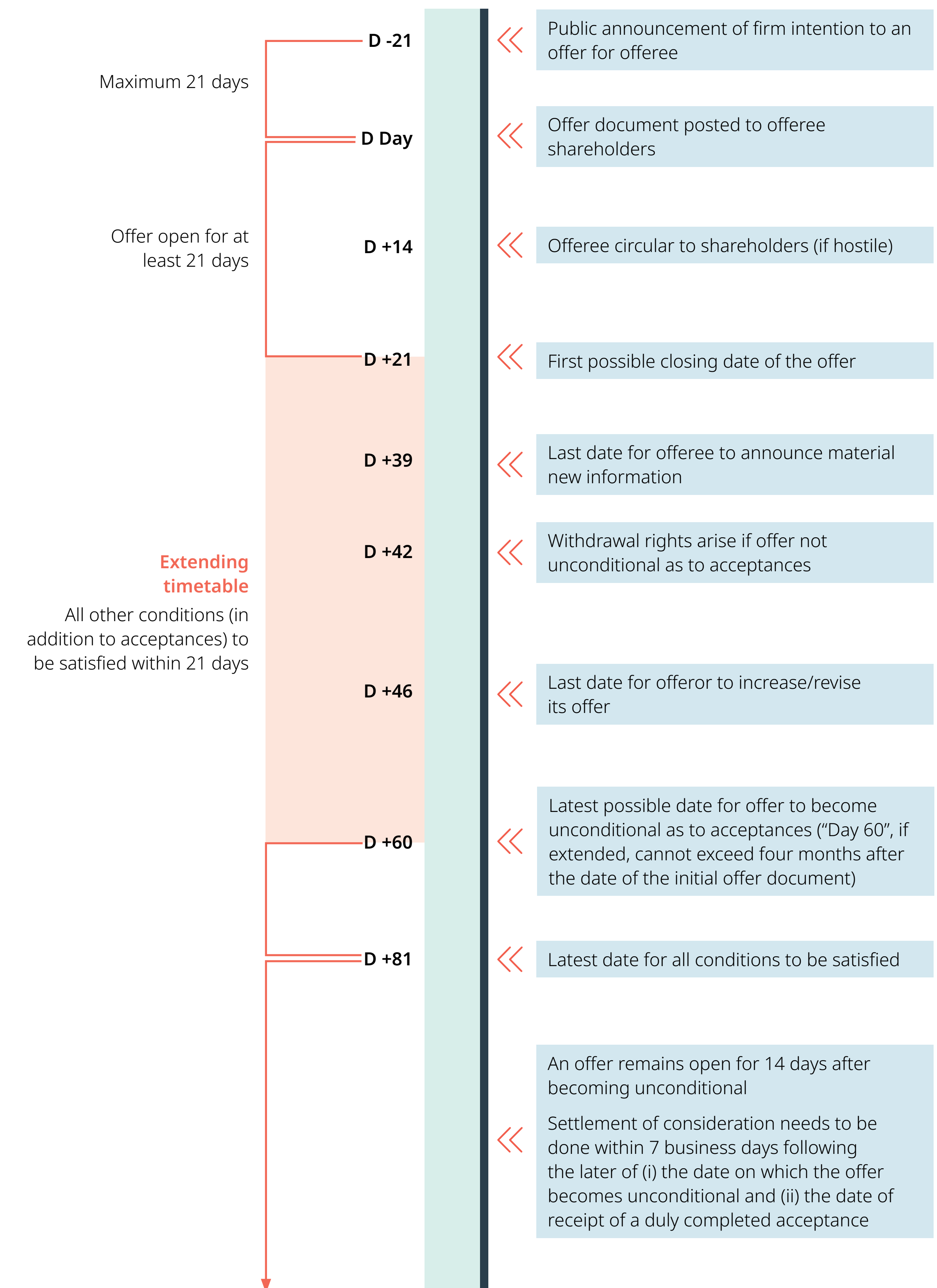
Can information be given to key shareholders in advance?
Information must generally be made equally available to all target shareholders (and persons with information rights) as nearly as possible at the same time and in the same manner. Upon execution of a confidentiality undertaking, some advance disclosure may be permissible (e.g. to obtain irrevocable commitments), provided that all information is subsequently shared equally. Meetings with shareholders should be chaperoned by the financial adviser to ensure information is given equally.

Can a bidder obtain irrevocable commitments?
Bidders may seek irrevocable commitments from a very restricted number of shareholders. In general, a bidder may approach a shareholder with a material interest in the target (i.e. 5 per cent or more voting rights) at any time prior to the publication of a possible offer announcement or a firm intention announcement, and prior consultation with the Executive is not necessary. The Executive's consent is required before approaching other shareholders.

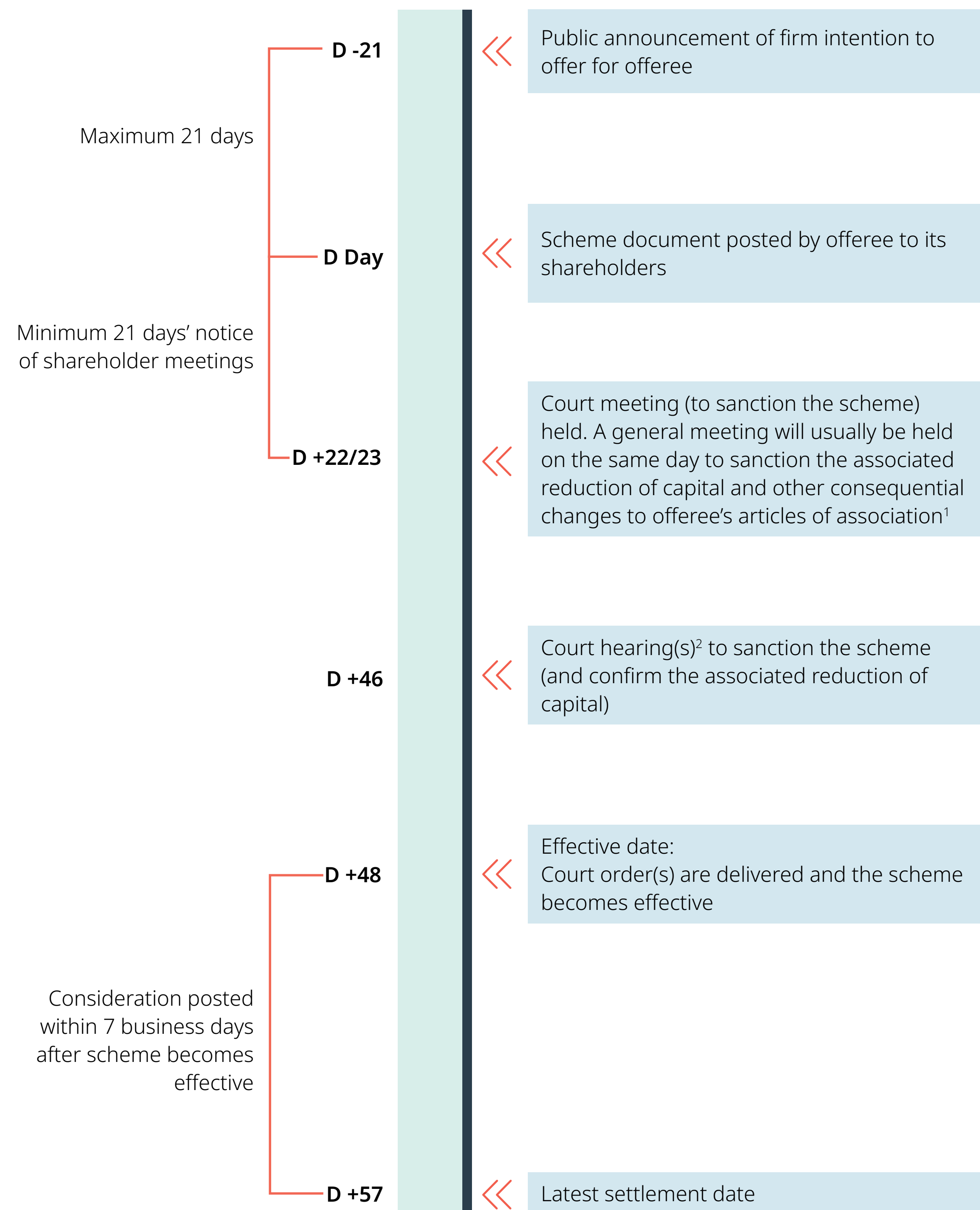
Can the target provide financial assistance for a bid, such as security or loans?
The laws of the place of incorporation of the target may prohibit the granting of financial assistance by the target to another person in respect of the acquisition of its shares. The granting of such financial assistance may also have implications for the target under the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (the **Listing Rules**). If another bona fide offer has been communicated to the board of the target or may be imminent, such financial assistance to the target may amount to frustrating action which, is prohibited under the Code.

Can a bidder force the target to de-list?
In an Offer, the bidder can procure the de-listing of the target after compulsory acquisition (i.e. after the squeeze-out of minority shareholders – see section 7.2(c) above). In a Scheme, de-listing can occur once the Scheme is effective. Generally, under the Listing Rules, a company's free float must be at least 25 per cent of the total number of issued shares. Accordingly, if following an Offer the bidder holds more than 75 per cent of the total number of issued shares in the target, it may be required to sell down its interest to independent third parties to restore the public float to the minimum required level, unless a waiver from the Stock Exchange of Hong Kong Limited is obtained.

Indicative timeline for a takeover by way of an offer in Hong Kong



Indicative timeline for a takeover by way of a scheme in Hong Kong*



*This indicative timeline may vary depending on the court's availability

1. All conditions (other than those relating to court sanction of the scheme and delivery of the court orders) must be satisfied by the date of the court hearing to sanction the scheme.
2. Sometimes the court hearing to sanction the scheme and the court hearing to confirm the associated reduction of capital will occur on different dates. This is because, often, employees' share options may only become exercisable upon court sanction of the scheme. A period of two or so days between the hearings therefore allows these options to be exercised and for the shares to be issued to optionholders. These shares can then participate in the Scheme by being cancelled on the scheme effective date

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8 Indonesia

8.1 Regulation

The Indonesian authority responsible for supervising mergers and acquisitions of Indonesian public companies since January 2013 is the Financial Services Authority (*Otoritas Jasa Keuangan*, or **OJK**). Prior to 1 January 2013, public companies' mergers and acquisitions were supervised by the Capital Markets & Financial Institutions Supervisory Agency (*Badan Pengawas Pasar Modal & Lembaga Keuangan*, or **Bapepam & LK**). As stipulated by Law No. 21 of 2011 of OJK (**OJK Law**), OJK is replacing Bapepam & LK and the Indonesian Central Bank as the investigative and supervisory body across the entire financial services sector of Indonesia (including the banking, capital markets and non-bank financial institution sectors). The OJK Law does not replace previous legislation in the banking and/or financial sectors provided that the legislation does not conflict with the OJK Law or has not been replaced by the OJK. Therefore all regulations issued by Bapepam & LK in relation to public companies' mergers and acquisitions are still valid and binding unless they are substituted or revoked by new regulations issued by OJK.

Law No.40 of 2007 on Limited Liability Companies as last amended by Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation (**Company Law**) does not apply to acquisitions of Indonesian public companies, except for mergers where the Company Law applies alongside the applicable Bapepam & LK/OJK regulations.

The Indonesian regime for acquisitions of public companies only applies to public companies incorporated in Indonesia.

8.2 Structure

An acquisition of a public company in Indonesia can be conducted by way of an acquisition (**Acquisition**) followed by a mandatory tender offer (**MTO**) for the remaining shares of the company, a voluntary tender offer (**VTO**) or a merger (**Merger**).

(a) Acquisition (followed by an MTO)

Under OJK Regulation No. 9/POJK.04/2018 of 2018 on Takeover of Public Companies, issued on 27 July 2018 (OJK Regulation 9/2018), an Acquisition is defined as an action that directly or indirectly causes a change in the controller(s) of a public company. The controller of a public company is defined as a party(ies), which directly or indirectly:

(i) owns more than 50 per cent of the total issued and paid-up shares; or

(ii) has the ability to control, directly or indirectly, in any manner whatsoever, the management and/or policies of a public company.

Pursuant to Article 2 of OJK Regulation 9/2018, control over a public company, which is based on the ability to decide, whether directly or indirectly, in any manner whatsoever, the management and/or policies of a public company, can be evidenced by documents and/or information that reflect the type of control the party has over the public company.

Such documents and/or information include:

- agreements with other shareholders, resulting in a voting rights exceeding 50 per cent;
- authority to manage the financial and operational policies of the public company under its articles of association/agreement;
- authority to appoint or replace most members of the board of directors and board of commissioners, and accordingly control the public company through such members of the board of directors and the board of commissioners;
- ability to control a majority vote at a board of directors and a board of commissioners meeting in order to control the public company; and/or
- any other ability which may indicate control over the public company.

Under OJK Regulation 9/2018, "controller" also covers the parties acting in concert.

Where a party takes control of the target company, it must:

(i) make an announcement of the completion of the acquisition in at least one nationally circulating Indonesian language daily newspaper or on the Indonesian Stock Exchange (IOX) website (**Acquisition Announcement**) and notify OJK on the occurrence of the acquisition within one business day following the completion of the acquisition; and

(ii) conduct an MTO.

An indicative acquisition timeline is included at the end of this section.

The OJK is not required to approve and/or give clearance for an acquisition. It is also unnecessary for the shareholders of the target company and/or other government authorities to approve the acquisition unless required by the laws and regulations governing the industry of the target company (e.g. an acquisition of an Indonesian bank must be approved by the OJK).

Mandatory Tender Offer

An Acquisition must be followed by an MTO for all of the remaining issued shares of the target company, except for:

(i) shares owned by the selling shareholder(s) in the Acquisition transaction;

(ii) shares owned by another party(ies) to whom the acquirer has made an offer to purchase its shares under the same terms and conditions;

(iii) shares owned by other parties who are also subject to mandatory tender offer requirements or who undertake a voluntary tender offer over their shares in the target company (a competing tender offer);

(iv) shares owned by the substantial shareholder(s) of the target company; and

(v) shares owned by another controller of the target company.

The execution of the MTO and the disclosure of documents pertaining to the MTO to the public require prior clearance from the OJK.

Since an MTO is conducted after an Acquisition, the price of the target shares in respect of the MTO must be calculated in accordance with the method stipulated in OJK Regulation 9/2018. An indicative timeline of an MTO following an Acquisition is included at the end of this section.

The new controller may appoint another party or parties to conduct the MTO on behalf of the new controller, provided that the new controller must own more than 50 per cent of all issued and paid-up shares with voting rights of the appointed party, directly or indirectly. The appointed party must also comply with all requirements and procedures of MTO as set forth in OJK Regulation 9/2018.

Exemption from making an MTO

In certain circumstances, the obligation to make an Acquisition Announcement and an MTO is not required:

(i) the acquisition occurs due to marriage or inheritance of assets;

(ii) the acquisition occurs due to the purchase of shares by a party, who previously is not a shareholder of the target company, and such party purchases the shares of the target company at the maximum amount of 10 per cent of the total issued shares with valid voting rights, which purchase is undertaken in every 12 month period;

(iii) the acquisition occurs due to the implementation of duties and authorities of a government institution or the state based on the prevailing laws;

(iv) the acquisition occurs due to a direct purchase over the shares owned/possessed by a government institution or the state for the implementation of the duties and authorities mentioned in paragraph (iii) above;

(v) the acquisition occurs based on a final and binding court order or judgment;

(vi) the acquisition occurs due to merger, spin-off consolidation or liquidation of a shareholder of the public company;

(vii) the acquisition occurs because there is a grant, i.e. transfer/delivery of shares without any consideration from the receiving party.

Pursuant to OJK Regulation 9/2018, a prospective acquirer involved in negotiations which may result in an acquisition may, but is not obliged to, announce the negotiations in at least one nationally circulating Indonesian language newspaper or on IDX's website (**Acquisition Negotiation Disclosure**) and provide such announcement to:

- the target company;
- the OJK; and
- the IDX.

Where an Acquisition Negotiation Disclosure has been made, the prospective acquirer must, as a continuing obligation, disclose any material developments in relation to the negotiations to the target company, the OJK and the IDX no later than two working days after such developments occur. The information must also be announced in at least one nationally circulating Indonesian language newspaper or on IDX's website.

The acquirer should carefully determine the exact date for the announcement of the Acquisition Negotiation Disclosure because the date of the announcement may be linked directly with the tender offer price. A premature announcement may negatively affect the proposed transaction. Therefore, before making the Acquisition Negotiation Disclosure, all parties related to the transaction should have in-depth discussions and mutually approve whether an announcement of Acquisition Negotiation Disclosure will be made and, if made, ensure that the disclosure can be conducted properly and avoid any negative sentiment from the market.

(viii) the acquisition occurs because there is a particular debt collateral that is governed by a loan agreement, within the core work of public company restructuring based on a decision of a government body or institution or the state pursuant to the prevailing laws;

(ix) there is a subscription for shares by shareholders who exercise their rights in proportion to their shareholding as regulated under the OJK Regulation regarding increases of capital of public companies by way of a rights issue;

(x) there is a subscription for shares for the implementation of an increase of capital without conducting a rights issue, conducted in order to repair the financial position of the public company;

(xi) the acquisition occurs due to the enforcement of a government or state entity's policies;

(xii) if such MTO is implemented, it will be in contravention of the prevailing laws;

(xiii) if the acquisition happens due to the execution of a Voluntary Tender Offer based on OJK Regulation No. 54/ POJK.04/2015 on Voluntary Tender Offers (**OJK Regulation No. 54**); or

(xiv) such acquisition has been announced in the public offering prospectus, and is conducted within one year after the registration statement becomes effective.

If the change of control occurs due to any of the above exemptions, the new controller must nevertheless make a public announcement in relation to the acquisition in at least one nationally circulating daily newspaper or on IDX's website and disclose the acquisition to the target company, OJK and the Indonesia Stock Exchange (IDX), within two working days of the acquisition occurring.

The obligation to make an Acquisition Announcement and to undertake an MTO does not apply in an indirect acquisition of a public company (**Target Co**) through another public company (**Hold Co**), provided that the revenue contribution from the Target Co to the Hold Co at the time of the acquisition is less than 50 per cent based on the consolidated financial statements of the Hold Co.

Divestment (refloat) requirement

If the MTO results in the new controller owning more than 80 per cent of the issued shares of the target company, then the new controller must, within two years after the completion of the MTO, transfer shares back to the public (refloat) so that at least 20 per cent of the total paid-up shares of the target company are owned by the public.

If the acquisition causes the new controller to own more than 80 per cent of the issued shares of the public company, then the controller must transfer at least the same amount of shares as it purchased during the MTO back to the public within two years.

Price of Shares of MTO

Pursuant to OJK Regulation 9/2018, the prices of shares of an MTO (**MTO Price**) must be determined based on the following rules:

(i) for a direct acquisition of shares listed and traded at the stock exchange, the MTO Price is at least:

a. the average price of the highest daily trading price at the stock exchange within the last 90 days prior to the Acquisition Announcement (or Acquisition Negotiation Disclosure, if the new controller announces negotiation) (Announcement); or

b. the price at which the shares were acquired in the acquisition (Acquisition price), whichever is higher;

(ii) for a direct acquisition of shares listed and traded at the stock exchange, but where there is no trading at the stock exchange or the trading has temporarily been halted by the stock exchange within 90 days or more prior to the Announcement, the MTO Price is at least:

a. the average price of the highest daily trading price at the stock exchange within the last 12 months prior to the last trading day or the day on which the trading is being halted; or

b. the Acquisition price, whichever is higher;

(iii) for a direct acquisition of shares which are not listed and not traded at the stock exchange, the MTO Price is at least:

a. the Acquisition price; or

b. a fair price as determined by an appraiser who is registered at the OJK, whichever is higher;

(iv) for an indirect acquisition of shares of a public company listed and traded at the stock exchange, the MTO Price is at least the average price of the highest daily trading price at the stock exchange within the last 90 days prior to the Announcement;

(v) for an indirect acquisition of shares of a public company listed and traded at the stock exchange, when during 90 or more days prior to the Announcement there has been no trading at the stock exchange or the trading has been temporarily halted by the stock exchange, the MTO Price is at least the average price of the highest daily trading price at the stock exchange within the last 12 months prior to the last trading day or the day when the trading was temporarily halted; or

(vi) for an indirect acquisition of shares of a public company which are not listed and not traded at the stock exchange, the MTO Price is at least the same as the fair price as determined by an independent appraiser who is registered at OJK.

(b) Voluntary Tender Offer (VTO)

A VTO is defined as a voluntary takeover offer made through the "mass media"' by a party to acquire issued shares of a public company by way of purchasing the issued shares of the target company, or by exchanging them with other securities.

The execution of a VTO and the documentation that must be disclosed to the public was previously governed by Bapepam Regulation No. I.X.F.1. on 23 December 2015, OJK issued a new regulation on VTO i.e. OJK Regulation No. 54 which replaces the BAPEPAM Regulation No. I.X.F.1. AVTO requires prior clearance from the OJK.

A party intending to conduct a VTO must announce its plan by submitting the VTO Statement (in the form set out under OJK Regulation No. 54) to the OJK, the stock exchange, the target company and any other parties that have made a tender offer for the shares which the tender offer period has not yet expired.

Simultaneously, such party shall make a public announcement in a minimum of two Indonesian language daily newspapers, one of which is nationally circulated (**VTO Announcement**). The VTO may not be revoked or cancelled after the VTO Announcement has been made, without prior approval from the OJK.

Pursuant to OJK Regulation No. 54, the price of a VTO, except if agreed otherwise by the OJK, must be the highest of:

(i) the highest VTO price that was offered by the same offer or in the previous VTO conducted within 180 calendar days prior to the date of the VTO Announcement;

(ii) the average of the highest daily trading price of the target's shares on the IDX within the 90 calendar days prior to the date of the VTO Announcement (if the VTO is for shares or warrants that are listed and traded on IDX);

(iii) the average of the highest daily trading price of the target's shares on IDX within the past 12 months calculated since the last trading date of the target's shares and/or warrants if the target's shares have not been traded within 90 calendar days from the date of the VTO Announcement; or

(iv) the reasonable price that is determined by an appraiser, in the event the VTO is conducted over unlisted shares and/or warrants.

An indicative timeline of a VTO is included at the end of this section.

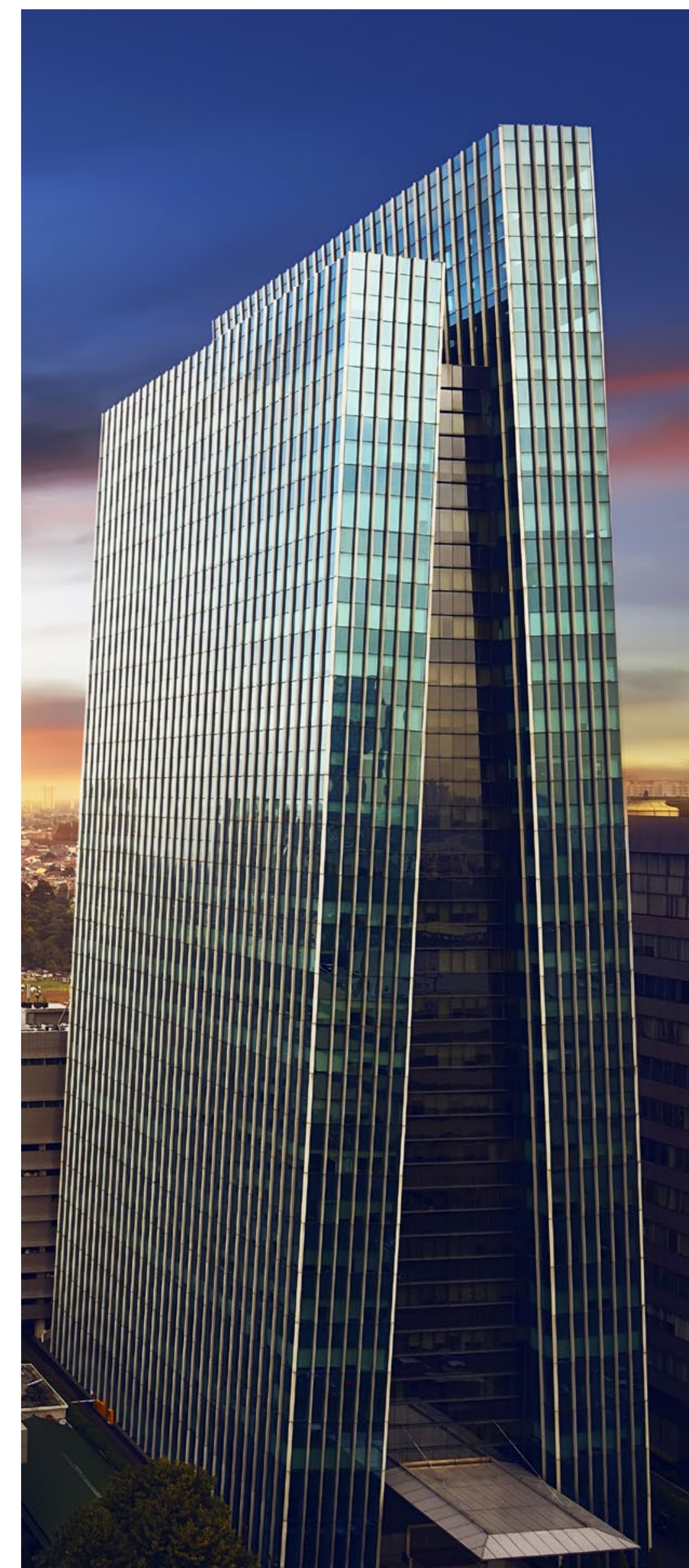
(c) Merger

A merger of a public company with a private company or another public company is subject to the provisions of Company Law and OJK Regulation No. 74/ POJK 09/2016 on Merger and Consolidation of Public Companies as partially amended by OJK Regulation No. 58/POJK.04/2017 on Electronic Submission of Registration Statements or Applications for Corporate Actions (**OJK Regulation 74/2016**) and OJK Regulation No.15/POJK.04/2020 on Plans and Procedures of General Meetings of Shareholders of Public Company (**OJK Regulation 15/2020**).

The general principles of mergers under the Company Law and OJK Regulation 74/2016 are as follows below.

- The assets and liabilities of the dissolving entity, by operation of law, are transferred to the surviving entity.
- All assets, liabilities, agreements or contracts with any third parties which have been signed by the dissolving entity are transferred, by operation of law, to the surviving entity on the effective date of the proposed merger. As a result, due diligence to identify the assets and liabilities of each company participating in the merger is performed.
- The merging companies appoint an independent appraiser to provide a fairness opinion on the surviving company's asset value.
- The shareholders of the dissolving entity, by operation of law, become shareholders of the surviving entity.
- The appointed independent appraiser also provides a fairness opinion on the share conversion value.
- The dissolving entity is dissolved/liquidated by operation of law, without a prior liquidation process, as of the effective date of the merger.

An indicative timeline of a merger is included at the end of this section.



8.3 Affiliated transactions

Pursuant to OJK Regulation No. 42/POJK.04/2020 on Affiliated Transactions and Conflict-Of-Interest Transactions (**OJK Regulation No. 42**), an affiliated transaction is defined as any activity and/or transaction carried out by and between a public company or a "controlled entity" and any affiliate of such public company, its Board of Directors (**BOD**), Board of Commissioners (**BOC**), majority shareholders, or controllers, including any activity and/ or transaction that is carried out by a public company or a "controlled entity" for the interest of any affiliate of the public company, members of the BOD, members of the BOC, majority shareholders, or controllers of the public company. A "controlled entity" in this context means an entity that is directly or indirectly controlled by the public company.

If an acquisition qualifies as an affiliated transaction under the scope of OJK Regulation No. 42, the public company must:

(i) have sufficient procedures to ensure that the affiliated transaction is carried out in accordance with common business practices;

(ii) appoint an independent appraiser to issue a fairness opinion report;

(iii) comply with public disclosure requirements;

(iv) submit the public disclosure documentation as well as the supporting documents to OJK; and

(v) obtain prior approval of independent shareholders through a General Meeting of Shareholders (**GMS**) if the affiliated transaction;

- meets the materiality threshold of transactions that must be approved by GMS of the public company, namely:

  a. Generally: transaction value ≥ 50 per cent of the public company's equity.

  b. Specifically for sale/purchase of shares or business segments, the following shall apply:

     (A) Transaction value ≥ 50 per cent of the public company's equity;

     (B) $\frac{\text{Transaction object (asset) value}}{\text{Public company's total asset value}} \geq$ 50% of the public company's equity;

     (C) $\frac{\text{Net profit of the transaction object (asset)}}{\text{Public company's net profit}} \geq$ 50% of the public company's equity; or

     (D) $\frac{\text{Revenue generated from the transaction object (asset)}}{\text{Public company' s revenue)}} \geq$ 50% of the public company equity;

  c. If the public company has negative equity: transaction value ≥ 25 per cent of the public company's total asset value;

- is specifically deemed by OJK to require independent GMS approval; or
- may cause disruption to the business of the public company.

8.4 Conflict of interest transactions

Pursuant to OJK Regulation No. 42, a conflict of interest transaction is a transaction between a public company or a controlled entity and any party (whether affiliated or not), which contains a conflict of interest element, namely when the economic interests of the public company conflict with those of the members of the BOD, members of the BOC, majority shareholders, or controllers, and where such conflict may result in losses or adversely affect the public company.

A public company that is involved in a conflict of interest transaction must:

(i) implement sufficient procedures to ensure that the affiliated transaction is carried out in accordance with the common business practice;

(ii) appoint an independent appraiser to issue a fairness opinion report;

(iii) announce an information disclosure to public;

(iv) submit an information disclosure as well as its supporting documents to OJK; and

(v) obtain prior approval from the independent shareholders through a GMS.

8.5 Implications of the acquisition for the employees of the target company

Under Articles 154A and 156 of Law No. 13 of 2003 on Manpower as last amended by Regulation of the Government in Lieu of Law No. 2 of 2022 on Job Creation (**Manpower Law**), in the event of an acquisition of a company (including public companies) which leads to a change of employment terms (such that they become less favourable for the employees), and the employees are not willing to continue the employment relationship, the company may terminate the employment relationship and the terminated employees will be entitled to receive 0.5x severance payment, 1x long service pay and compensation in lieu of rights (**Termination Package**).

There are differing views in Indonesia as to how the provisions of the Manpower Law as mentioned above apply in practice. This is largely due to the use of the words "the company may" (as opposed to "the company must"). There are two common interpretations:

(i) The first interpretation is that, in the event of an acquisition, employees who do not wish to continue their employment will be entitled to ask the company to terminate their employment and, if the employee does so, then the employer must then terminate the employment relationship and pay the Termination Package.

(ii) The second interpretation, which is more common and which we consider to be the correct interpretation, is that the right of employees to seek termination and to receive the Termination Package is subject to the company's decision as to whether it will terminate the employment relationship, or not. The employee is still free to terminate the employment relationship: however, it would not be entitled to the Termination Package unless the company agrees.

In practice, it is very likely that employees (or labour unions) of a public company will take the first interpretation and perceive that the transaction, if it leads to the employment terms becoming less favourable for the employees, will give rise to the right of the employees of the public company to ask for termination and receive the Termination Package.

Please note that the severance and long service pay amount will be determined by the number of months the employee has been employed and a multiple of the employee's monthly salary, while the compensation in lieu of rights payment is determined by the number of such employee's remaining benefits (e.g. annual leave, transportation fee).

In practice, employees have demanded, and received, a payment even when the change of control is indirect.

8.6 Key commercial questions

Are advisers required?
Yes. The laws and regulations require opinions and/or reports from law firms, accounting firms and independent appraisals. Furthermore, although not regulated by Bapepam/OJK regulations, it is also typical for the parties to appoint financial advisers to advise the parties on the accounting and financial aspects of the merger and acquisition.

Is the offeree obliged to make information available to an offeror?
No.

Can the offeree take action to frustrate an offer?
No.

Can an offeror prevent the offeree from disclosing its identity to the market?
No.

Can the offeree grant exclusivity or pay an inducement fee to an offeror?
The regulations are silent on this issue. Therefore, this action can be conducted as long as agreed contractually by the parties (but, to the best of our knowledge, it is an unusual practice in Indonesia). However, if such an arrangement is conducted, then the parties must disclose it to the OJK and IDX (and the OJK and/or IDX can object to such action).

Can an offeror enter into special arrangements with the offeree's management or other key shareholders?
Yes. Such arrangements must be disclosed to the OJK and IDX.

Can information be given to key shareholders in advance?
No. Information must be made equally available to all offeree shareholders (and persons with information rights) as nearly as possible at the same time and in the same manner. Meetings with shareholders should be chaperoned by the financial adviser to ensure information is shared equally.

Can an offeror obtain irrevocable commitments?
The regulations are silent on this issue. Therefore,this action may be conducted as long as agreed contractually by the parties (but, to the best of our knowledge, it is an unusual practice in Indonesia). However, if such an arrangement is conducted, then the parties must disclose it to the OJK and IDX (and the OJK and/or IDX can object to such action).

Can the offeree provide financial assistance for a bid, such as security or loans?
The regulations are silent on this issue. Therefore, this action may be conducted as long as agreed contractually by the parties (but, to the best of our knowledge, it is an unusual practice in Indonesia). However, if such an arrangement is being conducted, then the parties must disclose it to the OJK and IDX (and the OJK and/or IDX can object to such action).

Can an offeror force the offeree to de-list?
No.

Indicative timeline for an acquisition of a public company in Indonesia

The parties (seller and buyer) will appoint professionals (such as lawyer, auditor) to handle and prepare for the acquisition.

D Day

1. Kick-off meeting and commencement of Conditional Sale & Purchase Agreement (CSPA) drafting and negotiation by the seller, the purchaser and the supporting professionals.
2. Legal consultant to start preparing the necessary documentation.

D Day – D +10: Drafting CSPA
Issuance of Acquisition Negotiation Disclosure (optional if agreed by both parties

D +10

Signing of the CSPA

The CSPA must include the following two conditions precedent (CPs):

1. Crossing/transfer via IDX of the acquired shares will be effected at a time determined by the parties after the signing of the CSPA.
2. As per capital market regulations, the purchaser must conduct a tender offer after an acquisition has occurred.

D +13

D +14

Pursuant to OJK Regulation 9/2018, notification and announcement to the public and OJK must occur no later than one working day (WD) after the signing of the CSPA:

1. Notification of the commencement of the acquisition process by way of the signing of the CSPA to:
   a. Target Company (TC);
   b. OJK; and
   c. Indonesia Stock Exchange (IDX).
2. Announcement of the commencement of the acquisition process by way of the signing of the CSPA in at least one Indonesian daily newspaper with nationwide circulation or on IDX's website (copy of this announcement must be submitted to OJK no later than two WD after the announcement date).

D +19

1. Completion by the securities broker dealers of:
   a. Crossing/transfer of sale shares on the negotiated market of IDX; and
   b. Book-entry settlement of such crossing/transfer in KSEI (as a delivery without payment settlement).
2. Registration of the purchaser as the owner and holder of sale shares pursuant to the securities ownership list of TC issued by KSEI or the securities administration bureau of target company.
3. Completion process of other conditions precedent as set forth in CSPA.
4. Signing of joint statement on closing by the vendor and the purchaser.
5. Payment of acquisition price by the purchaser to the vendor in accordance with the CSPA.

The acquisition process is completed and deemed effective upon finalisation of the above steps.

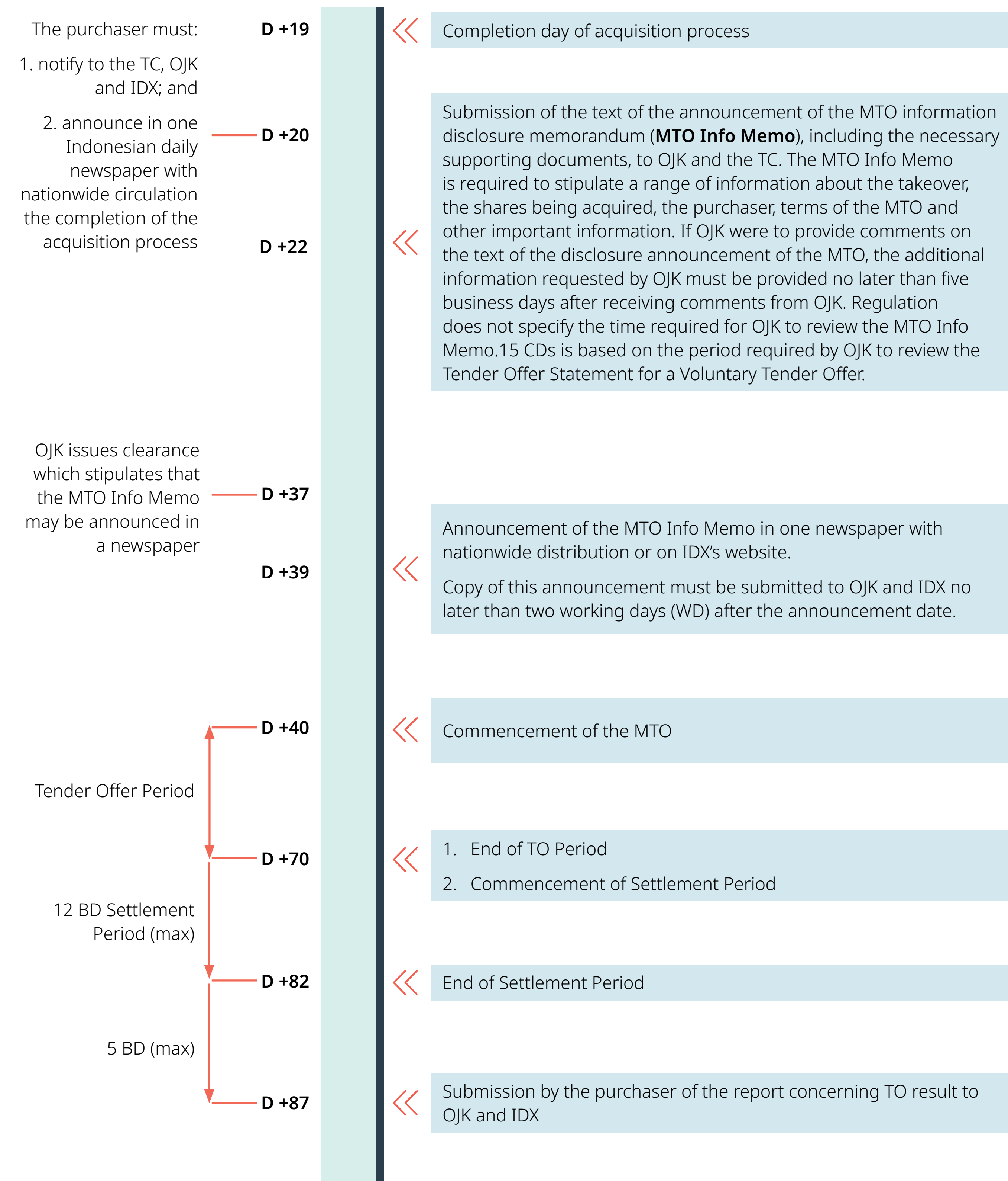
D +20

The purchaser must:

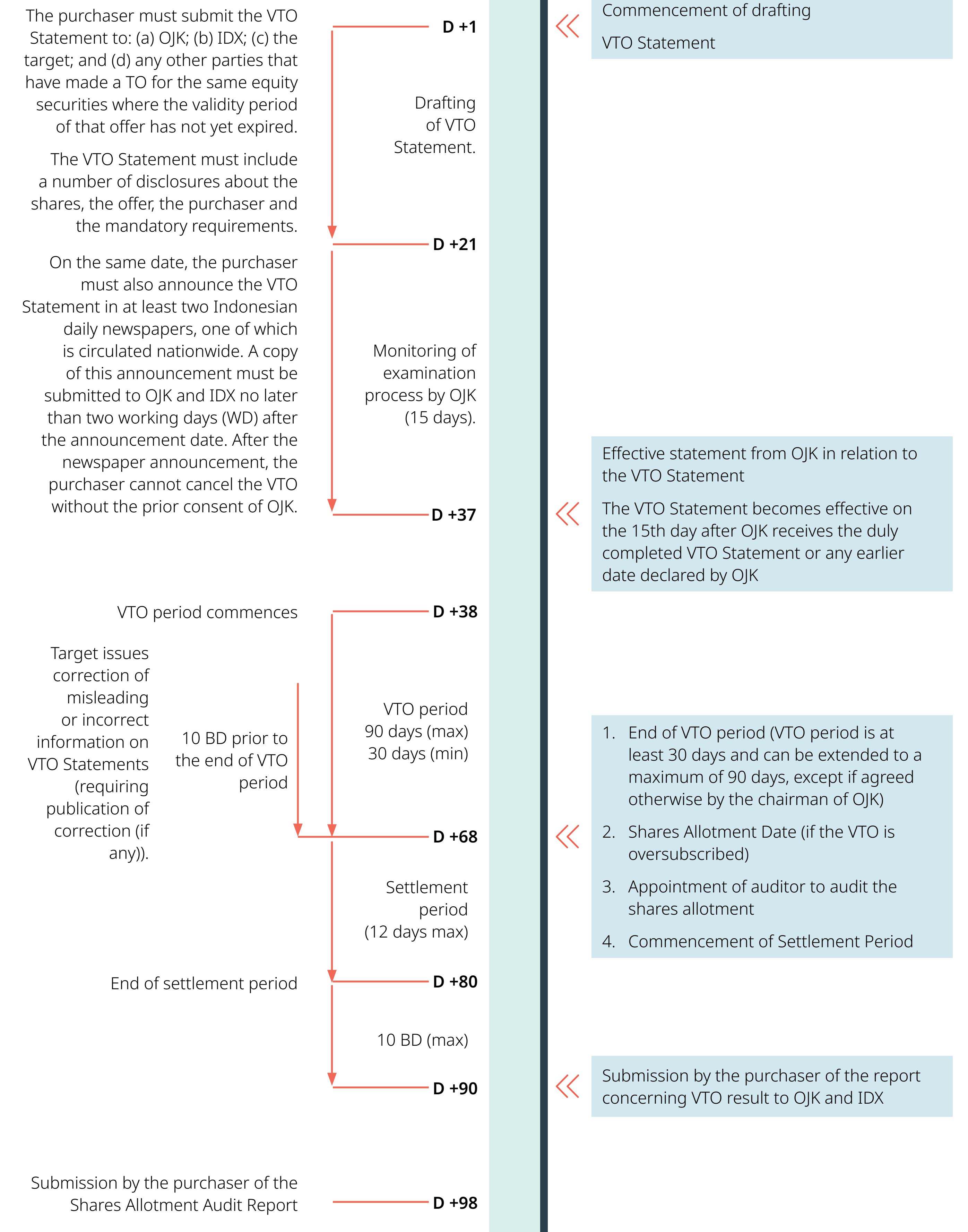
1. notify TC, OJK and IDX; and
2. announce in one Indonesian daily newspaper with nationwide circulation or on IDX's website the completion of the acquisition process.

Copy of this announcement must be submitted to OJK and IDX no later than two WD after the announcement date.

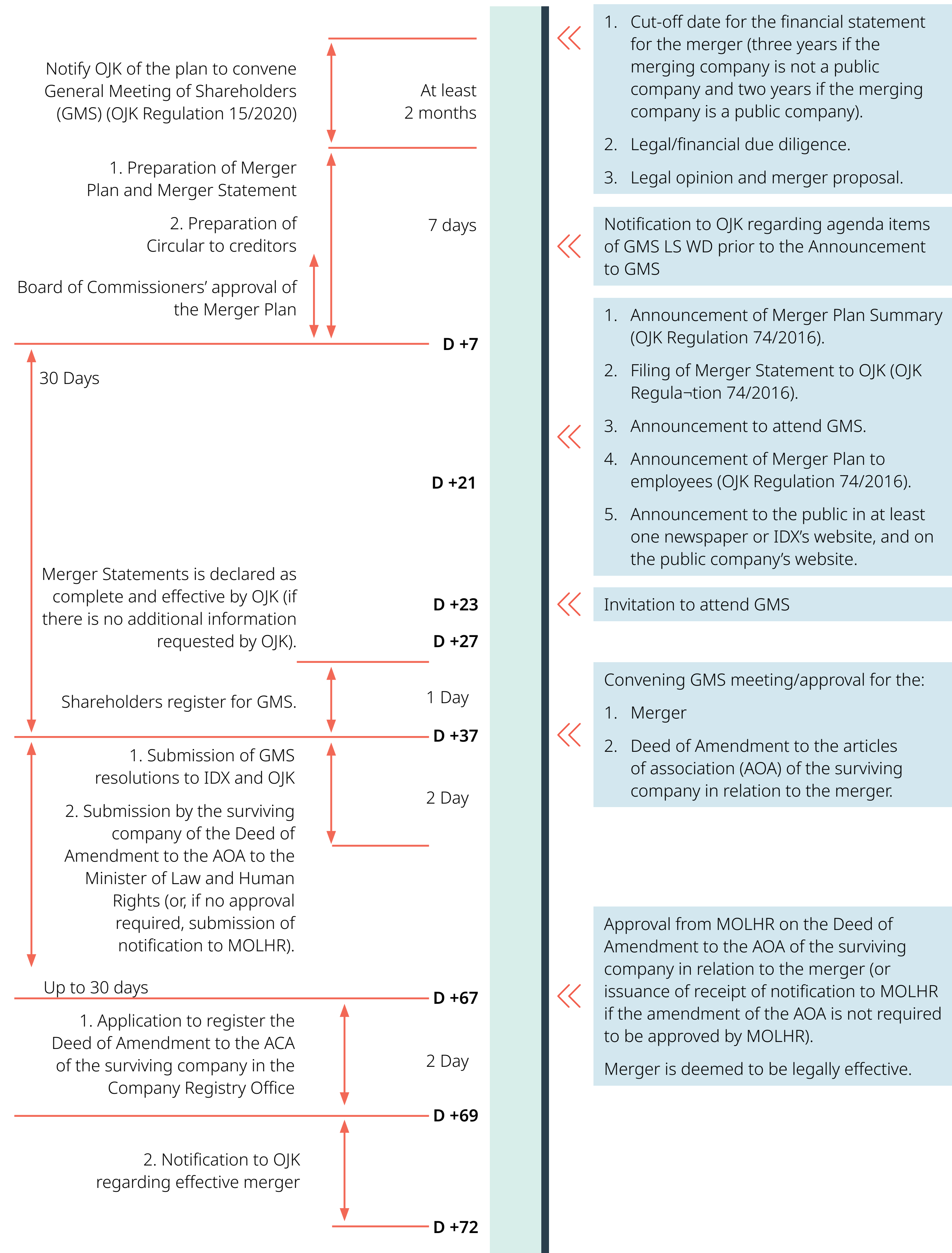
Indicative timeline of a mandatory tender offer conducted due to acquisition of a public company in Indonesia



Indicative timeline for a voluntary tender offer of shares in a public company in Indonesia



Indicative timeline of a public company merger in Indonesia



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9 Ireland

9.1 Regulation

The Irish Takeover Panel Act 1997, as amended (the **Takeover Act**), the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006, as amended (the **Takeover Regulations**) and the Irish Takeover Panel Act 1997, Takeover Rules 2022 made thereunder (Takeover Rules) apply to the change-of-control (acquisition of shares carrying 30 per cent of voting rights) and certain other M&A transactions involving an Irish-registered target with voting shares (currently or in the past five years) admitted to trading on:

- the Main Securities Market or Euronext Growth markets (or any other market) of the Irish Stock Exchange plc (**ISE**);
- another market operated by the ISE (e.g. Euronext Growth);
- the London Stock Exchange (including AIM); or
- the New York Stock Exchange or Nasdaq.

The Takeover Regulations and the Takeover Rules may also apply to change-of-control transactions involving a non-Irish registered target with voting shares admitted to trading on the ISE (but not in its country of incorporation).

The Takeover Rules, which are based on seven general principles set out in the Takeover Act, contain detailed provisions applicable to the conduct of takeovers. The Takeover Rules are administered by the Irish Takeover Panel (the Takeover Panel) which has statutory powers to make rulings and give directions to ensure compliance with the Takeover Act's general principles and the Takeover Rules.

Following changes made in 2022, the Takeover Rules are now very similar to the UK's City Code on Takeovers and Mergers.

9.2 Structure

There are three main methods for acquiring an Irish public company:

- a takeover offer;
- a scheme of arrangement; and
- a cross-border or domestic merger.

(a) Offer

A bidder may make a general offer to the target company shareholders to acquire their shares, which must be conditional on the bidder acquiring, or having agreed to acquire shares conferring more than 50 per cent of the voting rights of the target. The remaining shareholders may then be compulsorily acquired by the squeeze-out process discussed below.

(b) Scheme

Schemes of arrangement under the Companies Act 2014 as amended (the **Companies Act**) are the most common form of takeover in the Irish market. They can take the form of a transfer scheme (shares are transferred to the bidder in return for consideration) or a cancellation scheme (shares are cancelled in return for consideration).

To become binding on shareholders, the scheme must be sanctioned by the High Court of Ireland and be approved by shareholders of each class, representing not less than 75 per cent of the shares of each class present and voting at a general meeting of the target company, or at a meeting of the relevant class of shareholders at which a quorum of two persons holding not less than one-third in nominal value of each such class is present.[1]

(c) Merger

Irish companies may also be acquired by merger. There is a statutory procedure under the European Communities (Conversions, Mergers and Divisions) Regulations 2023 (the **Cross-Border Mergers Regulations**) providing for business combinations between Irish companies and other EEA-incorporated companies.

A merger requires the approval of 75 per cent of the votes cast, at a general meeting of the target shareholders, together with the issue of a pre-merger certificate by the High Court.

There is a similar procedure available by means of a domestic merger under part 17 of the Companies Act 2014, which requires the terms of merger to be approved by special resolution and to be confirmed by the court on application by the parties to the merger jointly.

(d) Squeeze-out of minority shareholders

Minority shareholders can be squeezed out using a statutory procedure once certain thresholds are met. For an offer, the threshold for a target company listed on a regulated market is 90 per cent (80 per cent is the threshold if not listed on a regulated market). A scheme of arrangement requires the approval of shareholders of each class, representing not less than 75 per cent of the shares of each class, at a meeting at which a quorum of holders of one-third of the issued share capital is present and voting at a general, or relevant class meeting of the target company, together with the sanction of the High Court of Ireland.[2]

1 A different sanction threshold of 75 per cent in value and a majority in number of shareholders voting applies to companies whose shares are not admitted to a Central Securities Depositary under the EU CSDR regulation – principally those companies not listed or admitted to trading in Ireland or the UK.

2 See footnote 1.

For companies listed on Euronext Dublin, the Euronext Dublin rule book provides that certain transactions with parties connected to the company (e.g. a director or substantial shareholder) must be approved by a general meeting of the company's shareholders.

9.3 Secrecy and announcements

Before a public announcement concerning an offer or possible offer of an Irish-incorporated listed public company to which the Takeover Rules apply, all persons must maintain strict confidentiality in respect of the offer or contemplated offer and may only pass information concerning it to another person if necessary and if that person accepts the need for secrecy.

(a) If there is a leak

If, prior to an announcement, the target is the subject of rumour and speculation or there is an anomalous movement in its share price, unless the Takeover Panel consents otherwise, an appropriate announcement must be made to the market. Prior to an approach, the responsibility for making such an announcement lies with the bidder; following an approach, the responsibility shifts to the target.

(b) Firm intention to make an offer

When a bidder and its financial advisers are satisfied that the bidder is in a position to make the offer, the bidder must make a firm intention announcement in the terms set out by Rule 2.7 of the Takeover Rules. This announcement is to include the consideration offered and other terms and conditions.

9.4 Disclosure of interests and stakebuilding

Rule 8.3 of the Takeover Rules requires an opening disclosure by the offeree, a securities exchange offeror, a 1 per cent plus shareholder in the offeree or securities exchange offeror and certain exempt principal traders connected with the offeror or offeree.

The Irish Takeover Panel Act 1997, Substantial Acquisition Rules, 2022 (**SARs**) require an acquirer to disclose to the target and the Takeover Panel any acquisition of voting rights in a target that, when aggregated with its existing holding, exceeds 15 per cent of the target's voting rights. If the acquirer already holds between 15 and 30 per cent of the voting rights of the target, any acquisition that increases this percentage holding over a percentage point must be disclosed.

SARs 3 and 4 restrict the timing of acquisitions, such that a person may not, in any period of seven days, acquire shares (or rights over shares) in the target carrying 10 per cent or more of its voting rights if, following the acquisition, that person would hold shares (or rights over shares) carrying between 15 to 30 per cent of the voting rights in the target. This is a principal feature of difference from the UK's City Code on Mergers and Takeovers.

(a) Insider dealing/market abuse

Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2004 on market abuse, as amended (**MAR**) and the European Union (Market Abuse) Regulations 2016 regulate insider dealing and market manipulation by imposing significant obligations on issuers.

(b) Disclosure

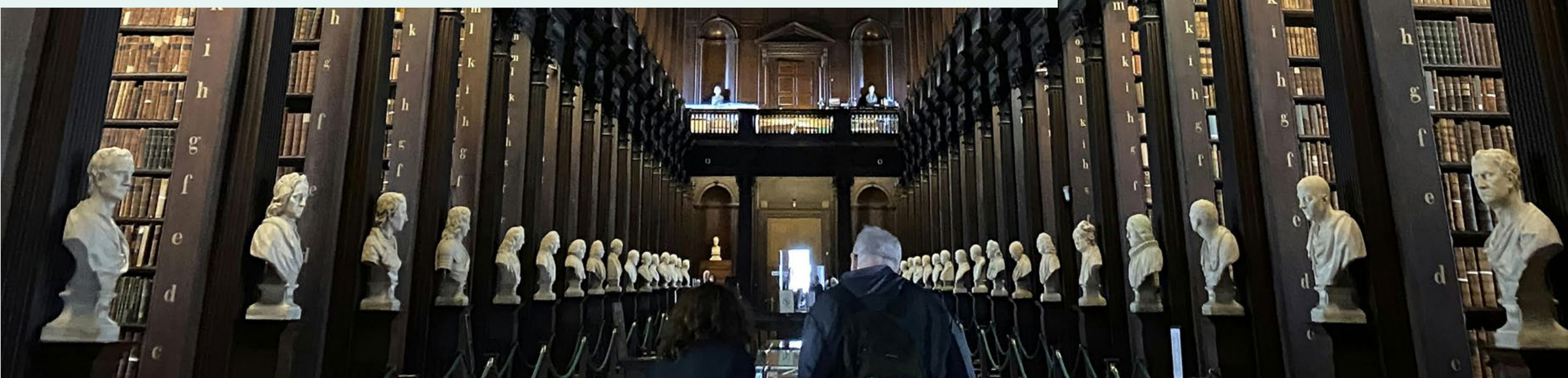
MAR requires issuers to disclose inside information directly concerning them to the public as soon as possible. Where an issuer delays an announcement pertaining to inside information so as not to prejudice its "legitimate interests" (if certain conditions are met), the issuer must inform its regulator in writing of this decision and provide a written explanation of how the conditions for the delay were satisfied, immediately after the information is disclosed to the public.

The Transparency Regulations require a stakeholder to notify a listed company once the percentage of voting rights acquired by that stakeholder reaches, exceeds or falls below 3 per cent; and then for every 1 per cent thereafter.

The Companies Act requires notification within a prescribed time frame where there is a change in the percentage of shares held by a person in a public company resulting in the interest reaching, exceeding, or falling below 3 per cent, or where the 3 per cent threshold is exceeded both before and after the transaction, but the percentage level in whole numbers changes (fractions of a percentage being rounded down).

(c) Price floor

Where the offeror or a person acting in concert with it has, in the 3-month period before the firm intention announcement, acquired securities in the offeree in the same class which is subject to the offer, the consideration per security in the offer cannot be less than that paid by the offeror in the pre-announcement acquisition. The Takeover Panel can extend this period to 12 months before the firm intention announcement if it deems it more appropriate in the circumstances.



(d) Mandatory offer required
The Takeover Rules will require a person or persons acting in concert to extend an offer for a listed company if they acquire control of a company or, if they already control a company, acquire additional securities such that their aggregate percentage of voting rights in the company increases by 0.05 per cent in any period of 12 months (other than in the case of a single holder of securities who already holds securities conferring more than 50 per cent of voting rights).

9.5 Cash confirmation

Where an offer is for cash (or includes an element of cash), the bidder is required to ensure that its financial adviser confirms the availability of resources sufficient to satisfy full acceptance of the offer.

If the confirmation proves to be inaccurate, the Takeover Panel may direct the person who gave the confirmation to provide the necessary resources, unless the Takeover Panel is satisfied that the person acted responsibly and took all reasonable steps to ensure the cash was available.

9.7 Key commercial questions

Are advisers required?
Under the Irish Takeover Rules, a bidder may only announce a firm intention to make an offer when it and an independent financial adviser are satisfied that the bidder is, and will continue to be, able to implement the offer.

If an offer has been received by the company, its board of directors has a duty to obtain competent independent advice on the terms of the offer and any revised offer. The board must send a circular to its shareholders setting out the substance and source of the advice, and the considered views of the board.

Is the target obliged to make information available to a bidder?
Target companies do not have additional disclosure obligations to a bidder although voluntary disclosure of additional information is usual in the lead-up to a recommended bid. With limited exceptions, information given by a target to one bidder must be made available to all bidders if specifically requested by other bidders.

Can the target take action to frustrate a bid?
The target board is prohibited from taking certain actions (except pursuant to an existing contract) without shareholder or Takeover Panel consent, or both, in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent.

Following the identity of the bidder being made public, the Takeover Rules apply a mandatory 42-day period on both unwelcome and welcome approaches within which the bidder must either announce a firm intention to make an offer or announce that it does not intend to do so (a 'put-up or shut-up' direction). Where the bidder announces that it does not intend to make an offer, subject to certain exceptions, the bidder will be precluded from announcing or making an offer or possible offer for the target for six months.

Can a bidder prevent the target from disclosing its identity to the market?
No. Once a target has become obliged to make an announcement relating to the offer or voluntarily chooses to, it may announce the identity of the party which has made the approach.

Can the target grant exclusivity or pay a break fee to a bidder?
Break fees are permissible under the Takeover Rules provided that the Takeover Panel has expressly consented to them. The Takeover Panel customarily consents to break-fee arrangements that are, subject to specific quantifiable third-party costs, a cap of 1 per cent of the value of the offer and subject to receiving written confirmation from the target board and its financial adviser that they consider the break or inducement fee to be in the best interest of the target shareholders.

While such arrangements might generally be prohibited by financial assistance restrictions in the Companies Act, there is a specific exemption which permits them.

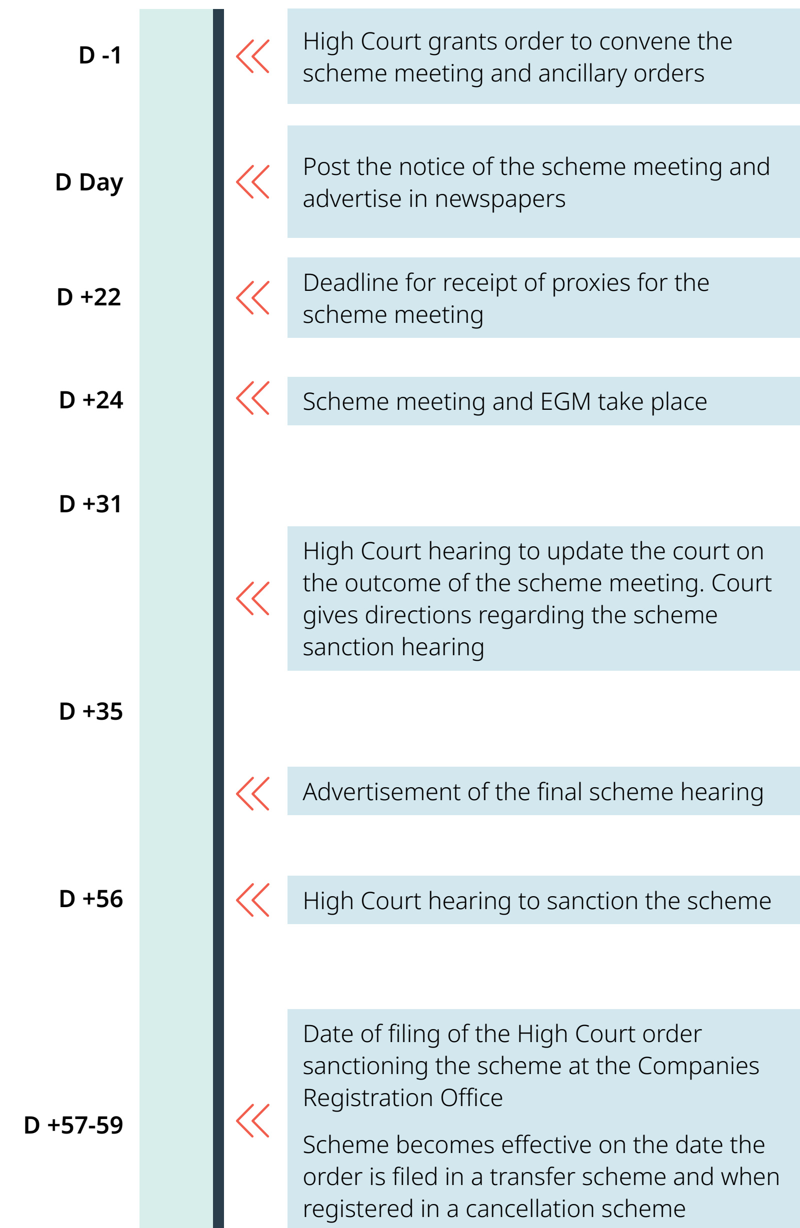
Can a bidder enter into special deals with the target's management or other key shareholders?
The bidder may do so only if the Takeover Panel consents and full disclosure is made in respect of any deals. The consent of any independent shareholders in the target may also be required.

Can information be given to key shareholders in advance?
All target shareholders must be treated equally. Each must be given sufficient time and information to reach a properly informed decision on an offer.

Can a bidder obtain irrevocable commitments?
Yes, the directors of the target company may agree to non-solicitation requirements or provide irrevocable commitments or letters of intent to accept an offer. There are restrictions on the manner and timing of the seeking of these commitments.

Can the target provide financial assistance for a bid, such as security or loans?
No, a public company is prohibited from giving any financial assistance which would have the effect of materially reducing its net assets. Break-up fees are an exception to this as outlined above. There are procedures in the Companies Act by which a private company can give financial assistance in certain circumstances.

Indicative timeline for an Irish takeover by way of a scheme



Note that this is an idealised timeline, assuming a 21-day advertisement period and no pause for satisfaction of regulatory consents or conditions and assumes that the Takeover Panel, which must be served with copies of all documents before consideration by the shareholders/court, does not raise any objections. In practice, a scheme timetable is usually considerably longer.

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10 Italy

10.1 Regulation

Legislative Decree No. 58 of 24 February 1998, as subsequently consolidated and amended (the **Consolidated Financial Act** or **TUF**) and Regulation No. 11971 of 14 May 1999, as subsequently consolidated and amended (**Issuers' Regulation** or **RE**) are the principal sources of regulation for takeover bids in Italy. Any tendering procedure is subject to the prior approval and supervision of the Italian Supervisory Authority (**Consob**), which is also responsible for providing guidance and interpretation in connection with any queries raised by market players with respect to takeover rules. Such regulation applies to the following types of takeover bids:

(a) offers for securities of issuers having their registered office in Italy and admitted to trading on one or more Italian regulated markets;

(b) offers for securities of issuers whose registered office is located in an EU Member State other than Italy and admitted to trading exclusively on regulated markets in Italy;

(c) offers for securities of issuers whose registered office is located in an EU Member State other than Italy and admitted to trading on regulated markets in Italy as well as in other EU Member States other than the state in which the issuer has its registered office, if:

  (i) such securities were first admitted to trading on a regulated market in Italy; or

  (ii) such securities were simultaneously first admitted to trading on a regulated market in Italy, as well as on regulated markets of other EU Member States, provided that the issuer chooses Consob as supervisory authority and notifies the relevant foreign regulated markets and their supervisory authorities of such choice on the first trading day; and

(d) offers for securities of issuers having their registered office in Italy and admitted to trading exclusively on one or more regulated markets of EU Member States other than Italy.

TUF and RE are based on certain general principles which, among other things, set standards of good commercial behaviour, efficiency and transparency of the market for corporate control and fairness in dealing. All such rules are aimed at ensuring that fair and equal treatment of shareholders of the issuing company is maintained at all times and that the offering procedure is made in compliance with the applicable disclosure obligations.

In addition, Consob has issued several resolutions and communications, which provide guidelines and clarification on takeover regulation, and have been regularly amended in order to strengthen protection for minority shareholders, simplify the relevant procedures and reduce compliance costs for bidders.

10.2 Structure

Generally, public M&A transactions aimed at acquiring a majority interest in an Italian listed company may be implemented:

(a) by way of a recommended/friendly takeover bid on agreed terms between the bidder and the target; or

(b) by a hostile takeover bid.

A further distinction can be made between mandatory bids (see section 10.4 below) and voluntary offers, both of which may be friendly or hostile.

Offers can be made for cash (**OPA**), in exchange for other securities (**OPS**) or in exchange for a combination of both cash and securities (**OPAS**).

The intention or obligation to launch a takeover bid must be promptly notified to Consob and simultaneously announced to the market by means of a communication, the content and form of which are determined by Consob. At this point, the bidder must launch the takeover without delay and, in any event, by no later than 20 days thereafter by filing an offer document with Consob pursuant to Article 102 TUF and Article 38 RE. If the offer document is filed later than 20 days, it is deemed unacceptable and, as a consequence, the bidder is unable to launch another bid on the same category of financial instruments (issued by the same issuer) for the following 12 months.

Consob typically completes its review of the offer document within 15 days of its filing and will consent to it being published to the extent that the offer document contains adequate and sufficient information to enable shareholders of the target company to make a reasonable assessment of the offer. Consob may require additional information and/or impose particular publishing procedures or the issuance of particular guarantees.

Once published, the offer is irrevocable and any amendment is deemed null and void. The offer must be made on equal terms to all holders of the relevant classes of securities. If, after the date of the notice of the offer to Consob and during the offer period, the bidder (or the persons acting in concert with the bidder) acquires shares at a price higher than the offer price, then it is obliged to purchase the remaining shares from other shareholders at such higher price (the best price rule) and this obligation will remain binding for a period of six months after the completion of the offer.

The term of the offer period will be 15 to 40 days[1] for voluntary offers, and between 15 and 25 days[2] for mandatory takeovers. In any event, the offer period may only start five days after the publication of the offer document.

1. Note that Consob may choose to extend this period to a maximum of 55 days
2. Note that with respect to offers for debt securities the shortest possible term of the offer is set to 5 days instead of 15

Unlike mandatory bids, voluntary offers can be made subject to certain conditions provided that their fulfilment is not dependent upon the subjective judgement of the bidder or its directors or where the fulfilment of such conditions is in their hands. One of the most important conditions[3] is to obtain a minimum number of acceptances from the target's shareholders. Such conditions must be clearly stated in the offer document. The offer will become irrevocable upon expiry of the offer period where the relevant minimum number of required acceptances has been reached and the relevant conditions have been satisfied. The bidder may have the option (not the obligation) to purchase additional securities (even beyond the required minimum), provided that this intention has been specified in the offer document.

Finally, where an offer is conditional and the relevant conditions are not met, the bidder may waive the unfulfilled condition or let the offer lapse.

The management of the issuing company must deliver a report with an assessment of the offer and the potential effects that could derive from the acceptance and implementation of the offer.

An indicative timetable for the implementation of both voluntary and mandatory takeover bids is set out at the end of this section.

10.3 Secrecy and announcements

There must be absolute secrecy prior to the announcement to Consob and the market of the intention to launch a takeover bid. All persons privy to confidential information and, particularly, price-sensitive information concerning an offer must treat that information as secret and must conduct themselves so as to minimise the chances of accidental leaks of information. Notwithstanding this fact, the Consolidated Financial Act requires listed companies to disclose to the market price-sensitive information (see section 10.9 below). As a consequence, the target company is technically under an obligation to publicly disclose any information concerning the purchase of its shares by a third party as soon as such information becomes known. However, the target company may delay the disclosure if it deems that the (early) disclosure is not in the legitimate interest of the company and could jeopardise the negotiation relating to the bid. In particular, the delay is permitted provided that: (a) an immediate disclosure is likely to prejudice the legitimate interest of the target; (b) the delay in not likely to mislead the public; or (c) the target is able to ensure the confidentiality of that information.

If a leak occurs, the target is likely to be required to disclose the negotiations being conducted with the bidder even if the intention of the bidder to launch the offer is not yet firm. Generally, all announcements made by the target must be made by way of press release together with a notification to Consob and the Italian Stock Exchange.

3. By way of example, a voluntary bid could be made subject to the following conditions: (i) adoption of new by-laws by the target company or the amendment of by-laws to remove limitations relating to the possession of shares; (ii) receipt of antitrust clearance or obtaining relevant authorisations by public authorities; (iii) MAC clauses relating to the target; or (iv) financial covenants relating to the target.

10.4 Mandatory offer

Any person or entity who, as a result of acquisitions or increases of voting rights, holds a shareholding exceeding the 30 per cent threshold or holds more than 30 per cent of the voting rights[4] is required to launch a takeover bid addressed to all holders of securities carrying voting rights of the issuer and admitted to trading on a regulated market.

The abovementioned 30 per cent threshold applies also in the case of an acquisition of company's shares[5] where there is no other shareholder with a higher shareholding.

For each class of securities, the takeover bid must be made within 20 days at a price no lower than the highest price paid by the bidder, and by persons acting in concert[6] with the bidder, in the 12 months prior to issue of the notice to Consob (see section 10.2 above). In the absence of purchases of securities for a consideration during the 12 months prior to the issue of the notice, the takeover bid must be implemented for that class of securities at a price no lower than the weighted average market price with reference to the previous 12 months or any shorter available period. The aforesaid weighted average market price shall apply also in the case of a mandatory offer due to the exceeding of the relevant threshold for effect of increases of the voting rights, provided the absence of purchases of securities for an higher price during the 12 months prior to the issue of the notice.

4. According to the provisions set out in Article 127-quinquies, listed companies may provide in the by-laws for the issuance of shares with increased voting rights – up to a maximum of two votes for each share – provided that these shares are held by the same shareholder for an uninterrupted period of at least two years. Moreover, the by-laws may provide for the allocation of one additional vote upon the expiration of each 1-year period, following the above 2-year period, in which the share has been held by the same shareholder, up to a total maximum of ten votes per share. The introduction of this additional vote provision (i.e. up to ten votes) grants to the existing shareholders the right to withdraw from the company pursuant to article 2437 of the civil code. In this regard, the Issuers' Regulation has specified that, for the purposes of the application of the rules on mandatory offers, only the shares carrying increased voting rights for the appointment and revocation of the directors shall be taken into consideration. The issuer's treasury shares are not included in the calculation of the 30 per cent threshold in respect of shareholding and/or voting rights.

5. The threshold refers to shares carrying voting rights, as well as to shares carrying increased voting rights, for the appointment and the revocation of the directors.

6. The concept of person acting in concert is very broad and entails certain practical issues in determining whether persons are acting in concert or not, particularly relevant in relation to mandatory takeover bids. According to the TUF, persons are acting in concert when co-operate on the basis of an agreement (written or oral, express or tacit, valid or invalid) in order to (a) obtain, maintain or strengthen the control over a target company; or (b) hinder the success of a takeover bid on a target company. Furthermore, the TUF provides certain non-rebuttable presumptions whereby persons meeting certain factual requirements or performing certain conducts are deemed to be acting in concert.

The bid price may be constituted in whole or in part by securities. However, if:

(a) the securities offered in payment of the bid price are not admitted to trading on a regulated market in an EU Member State; or

(b) in the previous 12 months and until the close of the bid, the bidder or persons acting in concert with the bidder have made a cash purchase of securities granting at least 5 per cent of voting rights in the shareholder meeting of the issuer, the bidder must at least offer a cash payment as an alternative to payment in securities.

The rules on mandatory bids also apply to "chain bids" in which the 30 per cent threshold is indirectly exceeded as a result of the acquisition of the control (also as a consequence of increases of the voting rights) of a company (listed or unlisted) whose principal assets are represented by shares of the listed company having been indirectly acquired.

In addition, the obligation to launch a mandatory bid may also be triggered as a result of purchases, or increases of the voting rights, whereby persons or entities already holding more than 30 per cent of the shares, or more than 30 per cent of the voting rights (but without having the majority of votes in the shareholder meeting), purchase more than 5 per cent of the shares carrying voting rights, or increase the voting rights of 5 per cent, over a period of 12 months (consolidation bid).

Financial derivative instruments granting a long position over listed shares, including cash-settled derivatives, even if held indirectly, must also be taken into account for the purposes of calculating the 30 per cent threshold and the 5 per cent threshold. The overall number of shares underlying the relevant derivative instruments has to be taken into account in establishing whether the above thresholds have or have not been exceeded.

Treasury shares held (directly or indirectly) by the issuer are not considered a part of the capital included in the 30 per cent threshold. However, treasury shares must be taken into account where such threshold is exceeded due to direct or indirect purchases of treasury shares which have been approved by a resolution of the shareholders' meeting of the issuer including the vote of the controlling shareholders (i.e. shareholders having a stake jointly or individually representing more than 10 per cent of the capital of the issuer).

Moreover, there are a number of provisions under TUF and RE which establish exemptions from the obligation to launch a takeover bid under specific circumstances such as bail-outs of listed companies in financial distress, intra-group transfers, and mergers approved through a whitewash procedure, or the thresholds being exceeded as a result of an increase in voting rights following a cross-border merger, cross-border transformation or proportional demerger (where there is no charge in the direct or indirect control over the company resulting from said transactions).

Finally, special provisions have been introduced in relation to listed companies that meet particular size requirements, the so-called small and medium enterprises (**SME**)[7]. In particular, with regard to the thresholds relevant for the purposes of the mandatory offers, the TUF allows the SME to provide in their by-laws special thresholds, provided that these thresholds are not lower than 25 per cent and not higher than 40 per cent. Furthermore, the by-laws of the SME can provide that for five years from the listing of the company, the rules on consolidation bids will not apply.

7 According to the TUF, listed companies shall be deemed a SME if (i) on the basis of the last financial statements, also prior to the admission of the shares for trading, they have a turnover lower than €300 million; or (ii) in the last calendar year has an average market capitalisation lower than €1 billion. Listed companies exceeding both the aforesaid limits for three consecutive financial years, or calendar years, shall not be deemed SME.

10.5 Prior partial bids

The provisions regarding mandatory takeover bids set out in section 10.4 above will not apply where the relevant shareholdings in a listed company are acquired as a result of a takeover bid or an exchange tender offer of at least 60 per cent of the securities of each relevant category and provided that:

(a) the bidder and persons acting in concert with the bidder have not acquired a shareholding exceeding 1 per cent, including shares acquired under forward contracts maturing at a later date, in the 12 months prior to the initial notice to Consob (see section 10.2 above) nor during the offer period;

(b) the bid is subject to the approval of the majority of holders of the relevant securities, with the exception of securities held by (i) the bidder; (ii) the majority shareholder, (which, for these purposes, shall be a shareholder holding an interest greater than 10 per cent); and (iii) persons acting in concert with it; and

(c) an explicit exemption is authorised by Consob, after it has verified the occurrence of conditions (a) and (b) above.

10.6 Firm intention to make an offer

A firm intention to make an offer should only be announced when the bidder has every reason to believe that it can and will be able to implement the offer and to fulfil its payment/delivery obligations thereunder. In fact, where an offer includes an element of cash, the bidder must confirm to Consob that it has sufficient resources to satisfy full acceptance of the offer, and, in the case of a consideration other than cash, that it has adopted all reasonable measures to ensure fulfilment of all obligations undertaken.

10.7 Disclosure of interests and stakebuilding

Potential bidders may consider acquiring target shares on the market prior to or after approaching the target's board of directors. In fact, bidders are generally free to acquire shares of a listed company, insofar as this does not constitute a breach of the mandatory bid rules (see section 10.4 above) and of the rules on disclosure of significant shareholdings (see section 10.10 below), due to the fact that such purchases may have an impact on the pricing and/or form of consideration of the relevant bid. Rules on insider trading are applicable to any pre-bid acquisitions carried out while in possession of privileged information (however, the intention of the future bidder to launch an offer should not be deemed to amount to privileged information for the bidder). During the offer period the bidder and any interested parties are required to disclose on a daily basis to Consob and to the market (i) any sale and purchase of target shares and the relevant price and (ii) any transaction regarding financial derivative instruments. The bidder and any person acting in concert with it are required to disclose to Consob and the market their intention to sell target shares to third parties on the day before the actual sale is made.

10.8 Publicly available information

Basic information regarding listed companies' shareholders, directors and constitutional documents is made publicly available. Italian listed companies are required to make available their financial statements at their registered office, as well as at the offices of the relevant Chamber of Commerce, together with documents such as the reports of the board of directors and of the board of statutory auditors, the reports made by external auditors, and the minutes of the shareholder meeting approving the financial statements. The shareholder resolution approving the financial statements must also be made available to the market. Financial statements are posted on the company's website and are also disclosed to the Italian Stock Exchange. Information may be gathered in the course of a due diligence exercise, which would usually be carried out prior to the launch of a takeover bid. While hostile bidders will generally only be in a position to collect publicly available information, friendly bidders may approach the target's management and negotiate the information to be shared by entering into confidentiality agreements. However, more sensitive information would likely be withheld until the bidder proves an actual interest in the target. In any event, information may be disclosed to the extent that this does not breach the rules on disclosure of privileged information and market abuse.

In addition the listed companies are subject to disclosure obligations in relation to voting rights. In particular, the RE provides that, in case of increase or decrease of the voting rights, the issuer shall communicate to Consob and the market the total amount of the voting rights and the shares within five days from the occurrence of the increase/decrease.

10.9 Disclosure of price sensitive information and extraordinary transactions

A listed company, as well as its controlling persons or entities, must notify the market without delay of any non-public information concerning the company that, if disclosed, could have a material impact on its share price (privileged information). The information must be simultaneously disclosed to Consob. The dissemination of such information can be delayed only in limited circumstances specifically identified by Consob (see section 10.3 above).

Listed companies must also disclose information relating to "extraordinary" transactions such as mergers and demergers, significant purchases and disposals of assets, bond issues, amendments to the articles of association, purchases and disposals of their own shares, and capital increases and reductions.

10.10 Disclosure of significant shareholdings

Pursuant to Article 120 TUF and Article 117 RE, any person or entity holding an interest in the share capital of an Italian listed company is required to notify Consob and the relevant listed company of any contractual arrangements which cause the relevant shareholdings of such person or entity to:

(a) exceed the 3 per cent threshold, in the event that the company is not a SME;

(b) reach or exceed any of the following thresholds: 5, 10, 15, 20, 25, 30, 50, 66.6 and 90 per cent; and/or

(c) fall below any of the thresholds mentioned in paragraphs (a) and (b) above.

In calculating the relevant thresholds, the shares held by subsidiaries or agents on behalf of such persons or entities and/or the increase or decrease of voting rights subsequent to the adoption of increased voting right shares and upon the occurrence of the relevant requirements are also taken into account.

The notification is made by completing a form to be sent to Consob and to the listed company within four trading days of the date of the relevant transaction causing the shareholdings to reach, exceed or fall below one of the thresholds mentioned above.

In case of purchase of a shareholding exceeding the thresholds of 10, 20 and 25 per cent, the purchaser shall also notify Consob and the target company of the objectives it intends to pursue in the following six months. In particular, the declaration shall state:

(a) the means of financing the acquisition;

(b) whether it is acting alone or in concert;

(c) whether it intends to stop or continue its purchases, and whether it intends to acquire control of the issuer or in any way have an influence on the management of the company and, in such cases, the strategy it intends to adopt and the transactions to be carried out;

(d) its intentions as to any agreements and shareholders' agreements to which it is party;

(e) whether it intends to propose the integration or revocation of the issuer's administrative or control bodies.

If, within six months from the declaration, changes of intentions are made on the basis of objective circumstances that have occurred, a new reasoned statement must be addressed without delay to the company and Consob and brought to the knowledge of the public in the same manner.

Details of the shares held by the directors, as well as compensation plans based on shares or other securities in favour of directors (i.e. stock option plans), the employees or other associates of the company have to be duly disclosed.

Finally, Consob must be informed of the existence and contents of any shareholders' agreements regarding an Italian listed company. In particular, pursuant to Article 122 of TUF, within five days of their execution, details of such agreements must be: (i) disclosed to Consob; (ii) published in summary form in national newspapers; (iii) filed with the Companies' Register in the place where the listed company has its registered office; and (iv) disclosed to the listed company in question. Any failure to comply with these disclosure obligations makes such shareholders' agreements null and void.

10.11 Sell-out

If, as a result of a takeover bid for 100 per cent of the share capital of an Italian listed company, the bidder becomes the holder of at least 95 per cent of the share capital, the bidder will be required to purchase the remaining securities from any minority shareholders who so request (the sell-out right). Where more than one class of securities is issued, such obligation shall apply only to classes of securities in respect of which the 95 per cent threshold is reached.

Moreover, any person or entity becoming the holder of more than 90 per cent of the share capital represented by securities admitted to trading on a regulated market will be obliged to purchase the remaining securities admitted to trading on a regulated market by any holder thereof unless they are able to restore, within 90 days, a free float sufficient to ensure regular trading of such securities on the regulated market. Where more than one class of securities is issued, the commitment to purchase will apply only to classes of securities in respect of which the said 90 per cent threshold is reached.

In both cases referred to above, the purchase price will be equal to the price of the previous takeover bid, provided that (where the previous offer was a voluntary offer) the bidder has purchased securities amounting to not less than 90 per cent of the share capital with voting rights. Otherwise the purchase price will be determined by Consob taking into account the price of the previous bid or the weighted average market price of the target's shares in the six months prior to:

(a) the announcement of the intention to launch the bid pursuant to Article 102 of TUF; or

(b) the purchase triggering the obligation to launch a mandatory takeover bid.

10.12 Squeeze-out

If, as a result of a takeover bid for 100 per cent of the share capital of a listed company, the bidder becomes the holder of at least 95 per cent of the share capital of an Italian listed company, it has the right to purchase the remaining securities within three months of the expiry of the offer period (**squeeze-out right**), provided that the bidder has mentioned in the offer document the intention to exercise such right. Where more than one class of securities is issued, the squeeze-out right can be exercised only with regard to those classes of securities in respect of which the threshold of 95 per cent is reached.

10.13 Defensive measures – passivity rule

Unless approved by the ordinary or extraordinary shareholder meeting, as the case may be, Italian listed companies whose securities are involved in a takeover must abstain from executing any actions or transactions capable of counteracting or frustrating the achievement of the aims of the offer. This obligation will apply from the date of the notice pursuant to Article 102 of TUF until the closure or expiry of the offer period.

The mere search for competing offers does not constitute an action or transaction capable of frustrating the achievement of the offer. The liability of directors, members of the management board, supervisory board and general managers for any actions taken or transactions executed will subsist, and will remain unchanged notwithstanding the approval by the relevant corporate body.

Shareholder approval is also required for the purposes of carrying out any actions which are outside the scope of ordinary business and which are intended to be implemented wholly or partially during the offer period.

The by-laws of the relevant issuer may derogate, in whole or in part, from the aforesaid rules. In this case, the issuer is required to notify any derogations to Consob and to the supervisory authorities of other EU Member States in which its securities are admitted to listing on a regulated market or in which admission to listing has been requested. Any such differences must also be promptly disclosed to the market in accordance with the provisions set out in Article 114 of TUF.

10.14 Breakthrough rule

The by-laws of an Italian listed company, other than a cooperative company, may provide that, where a takeover bid or an exchange tender offer is launched involving securities issued by that company, the limitations to the transfer of shares provided for in the by-laws, and any restrictions to voting rights contained therein or in any shareholders' agreements, shall not apply to the bidder. Furthermore in the shareholder meetings of the issuer aimed to resolve upon defensive measures, increased voting rights shall not have effect.

In addition, if, as a result of a takeover bid, the bidder becomes the holder of at least 75 per cent of the share capital with voting rights, any restrictions to voting rights provided in the by-laws or shareholders' agreements and any special right or privilege regarding the appointment or removal of directors or statutory auditors, as well as any increased voting rights, will not apply to the bidder at the relevant shareholder meetings which, after the completion of the offer, will be held to approve the appointment/ removal of directors and/or statutory auditors and/or the amendment of the by-laws of the target.

In the event of a positive outcome of the bid, the bidder is obliged to pay a fair indemnity for any prejudice suffered by the shareholders as a result of the application of the breakthrough rule, provided that the relevant provisions of the by-laws or the contractual provisions contained in the shareholders' agreements creating such rights were in force prior to issue of the notice pursuant to Article 102 of TUF. The claim for indemnity must be submitted to the bidder, on penalty of lapse, within 90 days of the close of the bid and in any event within 90 days of the date of the shareholder meeting. If no agreement is reached, the amount of the indemnity will be decided by the court.

10.15 Reciprocity rule

The passivity rule and breakthrough rule (where provided for in the by-laws) will not apply where the offer is launched by a person or entity (or one of its subsidiaries) which is not subject to such rules, nor to equivalent provisions in the relevant jurisdiction. In case the offer is launched by persons acting in concert, it is sufficient that such provisions do not apply to just one of the bidders involved.

10.16 Key commercial questions

Are advisers required?
There is no specific provision requiring a bidder to appoint a financial adviser in order to launch a takeover bid. However, the Issuers' Regulation requires the bidder to disclose to Consob, the target and the market the identity of any advisers it does appoint. The target is not required to appoint financial advisers. However, given that the board of the target must publish a statement containing its comments and assessment of the offer, the management of the target is normally inclined to seek independent advice.

Is the target obliged to make information available to a bidder?
The target's management is not obliged to make information available to the bidder. However, as one of the principal duties of directors is to act in the best interests of the company, if the offer is worthy of consideration, the directors should pursue it and allow the due diligence to take place.

According to the Issuers Regulation, information made available to a bidder should be made available to any competing bidders.[8]

Can the target take action to frustrate an offer?
As a general rule, the target's board will refrain from taking any action capable of frustrating the outcome of the offer unless any defensive measures have been previously approved by a duly convened shareholder meeting. As outlined in section 10.13 above, the by-laws of the target may nonetheless provide that the passivity rule does not apply in whole or in part.

8 Competing offers may be launched up to five days prior to the end of the offer period of the previous takeover bid. Moreover, further to the launch of a competing offer, any acceptances of previous offers may be revoked.

Can a bidder prevent the target from disclosing its identity to the market?
No. The offer document (which is filed with Consob and disclosed to the market as outlined in section 10.2 above) must contain details of the bidder and the acceptance form indicates the identity of the bidder. Therefore, such information is made publicly available prior to the actual start of the offer period.

Can the target grant exclusivity or pay an inducement fee to a bidder?
Exclusivity agreements by which the target agrees to avoid negotiating with other potential bidders are not common practice in Italy. The bidder may nonetheless seek to achieve equivalent results by entering into exclusivity agreements with key shareholders of the target. It should, however, be highlighted that both standstill and exclusivity agreements are lawful in principle, but may be difficult to enforce.

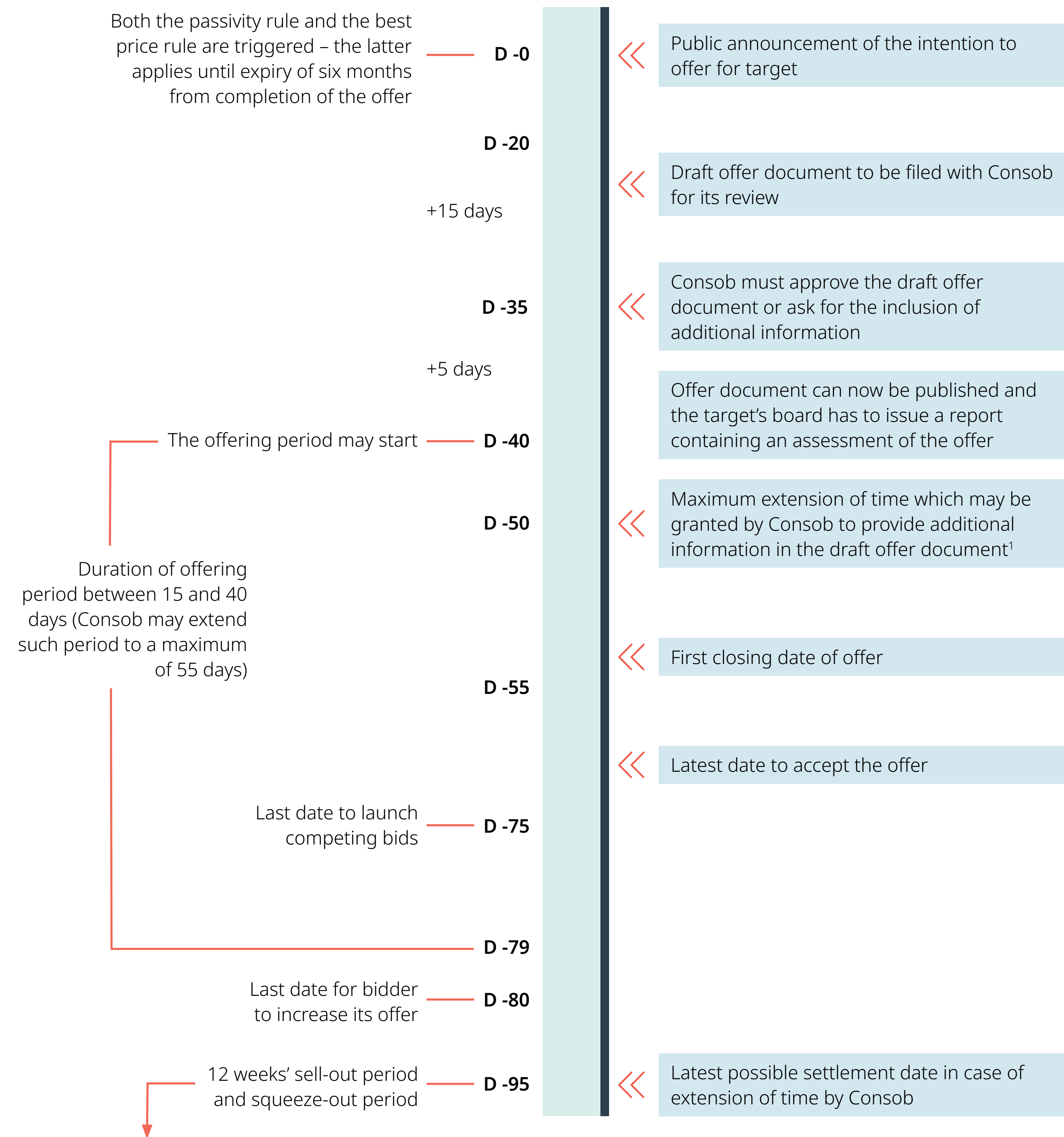
Can a bidder enter into special arrangements with the target's management or other key shareholders?
Yes. The bidder may seek to enter into exclusivity agreements and standstill agreements with the target's board and agree on the payment of break fees. However, such instruments are not commonly used in Italy and therefore their actual enforceability is not entirely clear.

Can information be given to key shareholders in advance?
No. Information must be made equally available to all target shareholders at the same time and in the same manner. The principle of equal treatment among target shareholders is one of the foremost principles of Italian takeover regulation.

Can the target provide financial assistance for a bid, such as security or loans?
As a general principle, Italian companies are prohibited from advancing loans or funds, or granting security for the purposes of facilitating the purchase or subscription for their own shares by an acquiring company. However, a whitewash procedure has been introduced by the most recent amendments to the financial assistance rules under the Italian Civil Code pursuant to which financial assistance may be granted provided that certain requirements are met and a specific procedure involving shareholder approval is completed.

Can a bidder force the target to de-list?
It should be noted that the Regulation issued by the Italian Stock Exchange states that, where the bidder becomes obliged to purchase the remaining shares pursuant to Article 108 of TUF following the acquisition of at least 90 per cent of the capital of a listed issuer, the relevant securities will be de-listed unless the bidder is able to restore the free float. Moreover, if it is possible to exercise the squeeze-out right pursuant to Article 111 of TUF, the relevant securities are suspended/revoked from listing.

Indicative timeline of a takeover by way of a voluntary offer in Italy



1. The term may be suspended only once until the required additional information is duly received.

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11 Japan

11.1 Regulation

The Financial Instruments and Exchange Act of Japan (Act No. 25 of 1948 as amended, the **FIEA**) and its associated rules and regulations is the principal source of regulation of tender offers in Japan. In addition, the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade of Japan (Act No. 54 of 1947 as amended, the **Anti-Monopoly Act**) regulates certain types of acquisitions of shares which may restrain competition in any particular field of trade. If a squeeze-out is carried out after a tender offer, the Companies Act of Japan (Act No. 86 of 2005 as amended) applies to the squeeze-out procedure depending on the type of the transaction scheme used, for example, a share-for-share exchange or "shares subject to call".[1]

11.2 Structure

Public M&A transactions in Japan are generally carried out using tender offers. A tender offer is a way to purchase listed shares of a public company from shareholders outside the stock exchange. In some situations, tender offers are required by the FIEA in order to ensure that all shareholders will be given the opportunity to sell their shares under the same terms. If a non-Japanese bidder makes a tender offer, that bidder is required to act through an attorney-in-fact resident in Japan who represents the bidder in relation to the filing and other tender offer regulations.

If a bidder contemplates acquiring 100 per cent ownership of the target company but all of the shares of the target company are not offered for sale by the shareholders through a tender offer, the bidder may acquire all of the remaining shares held by the minority shareholders through a squeeze-out procedure.

(a) Tender offer

Tender offer regulations will apply, and a purchase by tender offer under the FIEA will be required, if an acquisition of listed shares falls under any of the following categories (subject to certain exemptions):

(i) Off-exchange transactions

Where listed shares are purchased outside a stock exchange from more than ten sellers (when calculating the number of the sellers, the number of sellers selling the shares outside the stock exchange during the preceding 60-day period is included) and, as a result of the purchase, the total voting rights of the target company held by the purchaser and its related parties will exceed 5 per cent of the total voting rights of the target company.

Where listed shares are purchased outside a stock exchange and, as a result of the purchase, the total voting rights of the target company held by the purchaser and its related parties will exceed one-third of the total voting rights of the target company, regardless of the number of sellers (this includes cases where the purchaser already holding more than one-third of the total voting rights contemplates acquiring additional shares of the target company. This also applies to sections 11.2(a)(ii) and (iii) below).

(ii) Certain on-exchange transactions

Where listed shares are purchased through a trade outside regular trading session hours on a stock exchange such as the Tokyo Stock Exchange Trading Network System (ToSTNeT) and, as a result of the purchase, the total voting rights of the target company held by the purchaser and its related parties will exceed one-third of the total voting rights of the target company.

(iii) Purchase within a short period

Where more than 10 per cent of the listed shares are purchased through a series of transactions within a three-month period, including more than 5 per cent of the listed shares purchased through off-exchange transactions or certain on-exchange transactions, and, as a result of the series of purchases, the total voting rights of the target company held by the purchaser and its related parties will exceed one-third of the total voting rights of the target company.

(iv) Counter-purchase during other bidder's tender offer period

Where listed shares which amount to more than 5 per cent of the total voting rights of the target company are purchased by the purchaser (who has already held more than one-third of the total voting rights of the target company by itself and its related parties) during the period of a tender offer made by other purchaser.

1. The Financial Services Agency is currently reviewing the takeover regime in Japan, but no specific proposals have been made at the time of writing.

11.3 Disclosure

The FIEA requires both the bidder and the target company to disclose certain prescribed information through public notices and submission of certain documents to the regulator so that the shareholders of the target company are able to decide whether to participate in the tender offer. Key documents to be published or submitted by the bidder or the target company include:

(a) Public notice of the commencement of the tender offer

A tender offer must be commenced by issuing a public notice of the commencement of the tender offer (the **Commencement Notice**) containing the terms of the tender offer. Commencement Notices are usually published electronically on the Electronic Disclosure for Investors' NETwork (**EDINET**).

(b) Tender offer notification

A tender offer notification (the **Tender Offer Notification**) must be filed with the Kanto Local Finance Bureau on the day on which the Commencement Notice is issued. After the filing of the Tender Offer Notification, the bidder must provide the target company with a copy thereof.

The Tender Offer Notification is the most important and fundamental document to be published or submitted under the tender offer regulations under the FIEA. Accordingly, the Tender Offer Notification must include detailed information about the tender offer, such as: the purpose, the tender offer period, the offer price and other terms of the tender offer, information about the bidder and the target company, and agreements between the bidder and the target company, if any. In addition, the articles of incorporation and the company register of the bidder, any valuation report or opinion obtained from a third party (typically an investment bank, broker/dealer or accounting consultancy) in relation to the offer price (in the event of a management buyout or tender offer by a parent company), and certain other documents must be attached to the Tender Offer Notification.

(c) Target company's opinion

The target company is required to file an opinion report (the **Opinion Report**) with the Kanto Local Finance Bureau within ten business days from the day on which the Commencement Notice is issued. After filing the Opinion Report, the target company must provide the bidder with a copy thereof.

The Opinion Report must include the target company's opinion and basis for such opinion in relation to the tender offer, information regarding any shares held by directors and other officers of the target company and questions, if any, to the bidder in relation to the tender offer. Depending upon whether the tender offer is "friendly" or "hostile", the company states whether it supports or opposes the tender offer. In addition, according to the guideline issued by the Ministry of Economy, Trade and Industry, where the squeeze-out is scheduled to be carried out after the tender offer, details of the squeeze-out, such as the schedule, structure and any measures to be taken to ensure the fairness of the squeeze-out or to prevent conflicts of interest between the controlling shareholder and the minority shareholders, should be disclosed.

(d) Explanatory memorandum

A document explaining the tender offer must be prepared by the bidder and must be delivered to all shareholders of the target company who participate in the tender offer.

(e) Public notice/announcement of the result of the tender offer

The bidder must issue a public notice of, or announce the result of, the tender offer (the **Result Notice**) on the day following the last day of the tender offer period.

(f) Report of the result of the tender offer

A report of the result of the tender offer (the **Result Report**) must be filed with the Kanto Local Finance Bureau on the day on which the Result Notice is issued. After filing the Result Report, the bidder must provide the target company with a copy thereof.

11.4 Regulations regarding the tender offer

(a) Tender offer period

The tender offer period must be not less than 20 business days and not more than 60 business days after the issue of the Commencement Notice.

(b) Number of shares to be purchased

The bidder may set out in the Commencement Notice and the Tender Offer Notification the condition for the minimum number of shares (i.e. if the total number of shares offered for sale by the shareholders does not reach the number of shares designated in the Commencement Notice and the Tender Offer Notification, the bidder will not purchase the shares offered for sale) or the maximum number of shares to be purchased (i.e. if the total number of shares offered for sale by the shareholders exceeds the number of shares proposed to be purchased, the bidder will not purchase the shares offered for sale in excess of the number of shares proposed to be purchased).

(c) Offer price

The offer price must be set on the same terms for all target shareholders.

(d) Changes to tender offer terms

For the purpose of the protection of the shareholders of the target company, the FIEA prohibits certain changes in the terms of the tender offer which are disadvantageous to the shareholders. These include a reduction in the offer price, acceleration of the tender offer period, an increase in the number of shares in the minimum tender condition or a reduction in the maximum number of shares to be purchased.

(e) Obligation to purchase all shares offered for sale

The bidder is required to purchase all of the shares offered for sale, unless the condition for the minimum number of shares or the maximum number of shares to be purchased is set out in the Commencement Notice and the Tender Offer Notification and such condition is applied.

(f) **Prohibition of purchase outside the tender offer**
The bidder and its related parties are prohibited from purchasing the shares of the target company outside the tender offer during the tender offer period (subject to certain exceptions).

(g) **Cancellation/withdrawal of the tender offer/tender**
The bidder may not, after issuing the Commencement Notice, withdraw or cancel the tender offer unless (i) the bidder states in the Commencement Notice and the Tender Offer Notification that the tender offer may be withdrawn in the event of an important change in the business or property of the target company or its subsidiary or any other circumstance that would significantly impede the purpose of the tender offer (limited to those specified by a Cabinet Order under the **FIEA**); or (ii) a decision of commencement of bankruptcy proceedings is made against the bidder or any other material change in circumstances as specified by such Cabinet Order.

Shareholders who have tendered their shares are free to withdraw their tender during the tender offer period. The bidder is prohibited from charging any fee to, or seeking damages or reimbursement of costs from, withdrawing shareholders in relation to the withdrawal.

(h) **Anti-Monopoly Act**
The Anti-Monopoly Act prohibits the acquisition of shares where it creates a business combination that may substantially restrain competition in any particular field of trade.

The Anti-Monopoly Act also requires acquirers to notify the Japan Fair Trade Commission in advance regarding acquisitions of shares which meet the criteria designated in the Act with respect to the total amount of domestic sales and the percentage of voting rights of the target company to be held by the acquirer after the proposed acquisition. The criteria are set out below:

- if the total amount of domestic sales of the bidder and other companies belonging to the same "Corporate Group" (a group of companies consisting of the ultimate parent company of the bidder and its subsidiaries) exceeds ¥20 billion; and
- if the total amount of domestic sales of the target company and its subsidiaries exceeds ¥5 billion.

Percentage of voting rights of the target company to be held by the bidder after the acquisition:

- if the percentage of voting rights of the target company to be held by the bidder and other companies belonging to the same Corporate Group after the acquisition will exceed 20 per cent (where such percentage is 20 per cent or less before the acquisition); or
- if the percentage of voting rights of the target company to be held by the bidder and other companies belonging to the same Corporate Group after the acquisition will exceed 50 per cent (where such percentage is 50 per cent or less before the acquisition).

(i) **Companies Act**
The regulations under the Companies Act will apply to several methods of squeeze-out that a bidder may carry out after a tender offer in order to acquire all of the remaining shares of the target company held by minority shareholders. These methods include direct share purchases from the minority shareholders, share-for-share exchanges and use of "shares subject to call". The regulatory requirements (such as a requirement for a public notice or an amendment to the articles of incorporation of the target company) will differ depending on the method chosen for the squeeze-out procedure.

11.5 Key commercial questions

Are advisers required?
No. However, target companies obtain independent advice in the course of the Opinion Report to ensure fairness especially when utilising an MBO or tender offer carried out by their parent company. In the case of an MBO or a tender offer as a result of which the target company is expected to be de-listed, the rules of the Tokyo Stock Exchange require the target company to submit to it a report obtained from an independent third party (e.g. an investment bank or accounting firm) in relation to the tender offer price.

Is the target company obliged to make information available to a bidder?
No. As a result, the bidder usually carries out the tender offer without any due diligence of the target company where such tender offer is "hostile".

Can the target company take action to frustrate an offer?
Yes. The target company can take such action including the issue of new shares or stock options. The target company can also make known its views in relation to the bidder through the Opinion Report (see section 11.3(c) above).

Can a bidder prevent the target company from disclosing its identity to the market?
No. A potential bidder may not prevent the target company from making announcements relating to a possible tender offer at any time that it considers appropriate.

Can the target company grant exclusivity or pay an inducement fee to a bidder?
The FIEA does not prohibit the target company from granting exclusivity or paying an inducement fee to the bidder. However, such arrangement has a risk of a breach of fiduciary duty by the directors of the target company under the Companies Act depending on the terms and conditions of the proposed tender offer, including the tender offer price. If such an arrangement is made, it must be specified in the Tender Offer Notification (see section 11.3(b) above).

Can a bidder enter into special arrangements with the target company's management or other key shareholders?
Yes, provided that the offer price is set on the same terms for all target shareholders, including key shareholders. The arrangement between the target company's management and the bidder is required to be specified in the Tender Offer Notification.

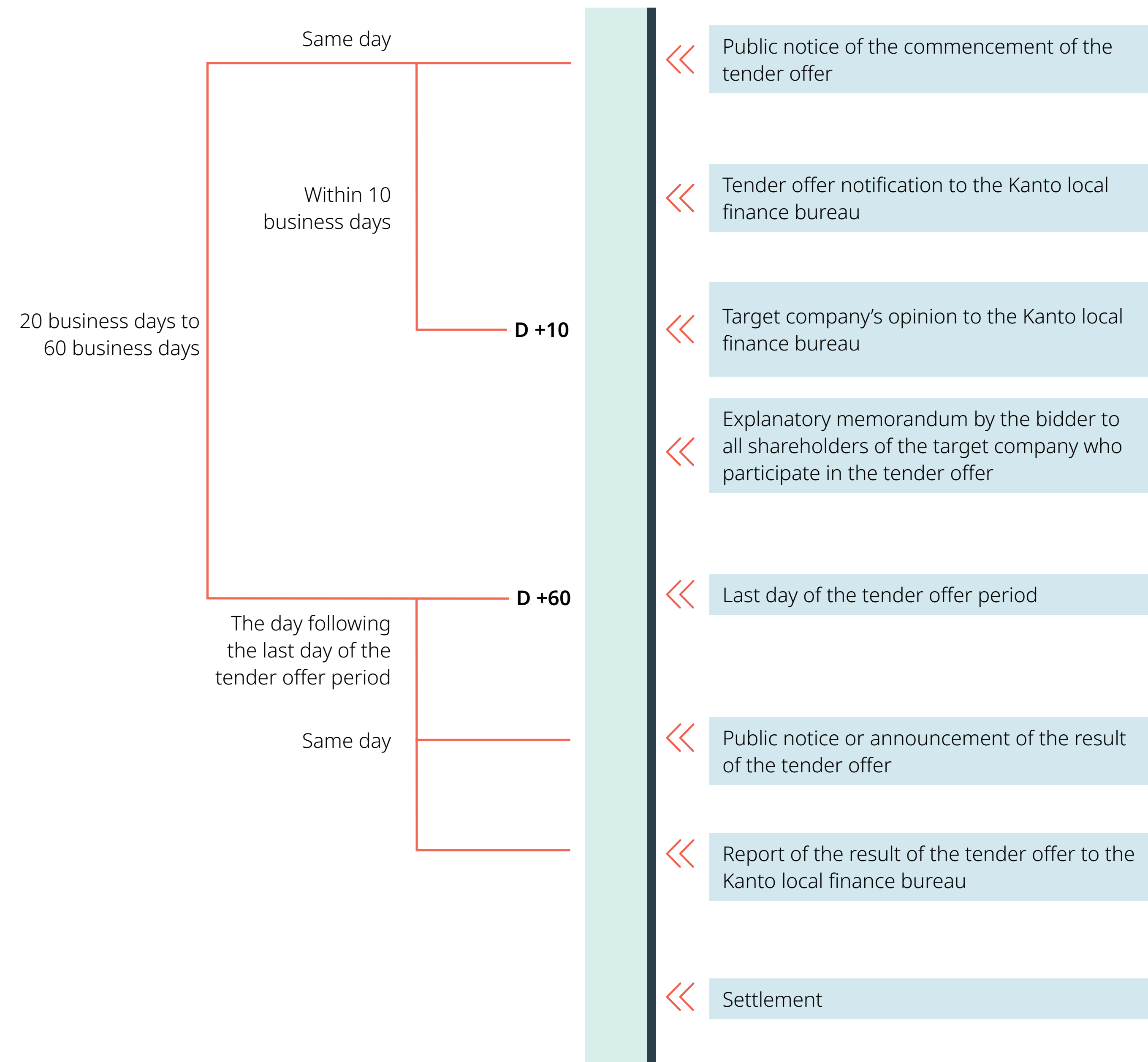
Can information be given to key shareholders in advance?
Yes. Bidders may consult with key shareholders in advance to ensure that key shareholders will participate in the tender offer.

Can a bidder obtain irrevocable commitments?
The FIEA does not prohibit such irrevocable commitments; however, there is a possibility that such irrevocable commitments are not enforceable given that shareholders who have tendered their shares are free to withdraw their tender during the tender offer period under the FIEA.

Can the target company provide financial assistance for a tender offer, such as security or loans?
The FIEA does not prohibit such financial assistance by the target company. Such financial assistance is required to be specified in the Tender Offer Notification.

Can a bidder force the target company to de-list?
Yes. Depending on the result of the tender offer and the squeeze-out procedure (if applicable), the target company will be de-listed pursuant to the applicable rules of the stock exchange.

Indicative timeline for a takeover offer in Japan



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12 Luxembourg

12.1 Regulation

Public takeovers and related offers in Luxembourg are mainly governed by the Luxembourg law on public takeover offers dated 19 May 2006 (the **Takeover Law**). General laws on companies will also continue to apply pursuant to the Luxembourg law on commercial companies dated 10 August 1915, as amended (the **Company Law**). Furthermore, a squeeze-out or sell-out may be made pursuant to the Luxembourg law on squeeze-out and sell-out dated 21 July 2012 (the **Squeeze-out and Sell-out Law**).[1]

The Takeover Law covers all target companies (i) which have their registered office in a Member State of the European Union or European Economic Area and (ii) whose shares are admitted to trading on a regulated market in one or more Member States of the European Union or European Economic Area. However, this is interpreted restrictively and a link has to exist with the Grand Duchy of Luxembourg (i.e. either (i) the company has its registered office in Luxembourg or (ii) its shares are admitted to trading on the regulated market of the Luxembourg Stock Exchange).

Under the Takeover Law, the Commission of Supervision of the Financial Sector (*Commission de Surveillance du Secteur Financier*, or **CSSF**) is the responsible authority for any takeover offer, if:

- the company has its registered office in Luxembourg; and
- its shares are admitted to trading on the regulated market of the Luxembourg Stock Exchange.

Should the company have its registered office in Luxembourg, but its shares are not admitted to trading on the regulated market of the Luxembourg Stock Exchange, the competent authority is the authority of the country in which the shares are admitted to trading. However, pursuant to article 4(2)(e) of the Takeover Law, in matters relating to information to be provided to the employees of the target company and in matters relating to company law, in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid as well as the conditions under which the board of the target company may undertake any action which might result in the frustration of the bid, the Luxembourg law is applicable and the competent authority is the CSSF (joint competence scenario).

The Takeover Law is guided by general principles such as the equal treatment of the target's shareholders and protection of the minority shareholders, as well as securing good functioning of the market on which the target's shares are traded (e.g. no falsification of the share price).

1 It should be noted that the Squeeze-out and Sell-out Law is not applicable during and for a period of six months after the lapse of all rights that may result following a takeover offer under the Takeover Law.

12.2 Structure

The Takeover Law regulates public takeover offers (the **Offer**).

(a) Offer

An Offer is a contractual offer made by the bidder to the target's shareholders to acquire their shares, usually subject to certain conditions, in view of (or following) the obtaining of control over the target. The most important condition that is usually included in an Offer is that the Offer is accepted by shareholders representing a minimum number of shares in the target.

A bidder may be willing to set its acceptance condition at 95 per cent, given that a bidder can compulsorily acquire the remaining shares in the target in accordance with the squeeze-out procedure set out in the Takeover Law (see section 12.2(d) below). If it is doubtful whether the bidder will reach the 95 per cent threshold (or if it is not crucial to reach such a threshold) it may set a lower threshold, which will generally not be below the threshold allowing it to amend the articles of association of the target. For a Luxembourg public limited liability company (*societe anonyme*) this means that the Offer will be conditional upon acceptance by shareholders representing at least two-thirds of the share capital. Other thresholds may be obtained to de-list the target (in which case the threshold will depend on the majority requirements to de-list the company from the relevant stock exchange).

If a shareholder (solely or acting in concert with other parties) acquires control of a company, the Takeover Law obliges that shareholder to make a mandatory offer to the remaining shareholders to acquire all of their shares. The Takeover Law defines "control" over a company which has its registered office in Luxembourg as holding one-third of the voting rights. When calculating this percentage, all the securities of the target company shall be taken into account excluding the securities carrying voting rights only in specific circumstances. A voluntary offer can be made at any time when a shareholder holds less than one-third of the voting rights.

An indicative timetable for the implementation of an Offer is included at the end of this section.

(b) Scheme of arrangement

Other jurisdictions (such as England and Wales) permit a scheme of arrangement as an alternative to an Offer to acquire a target company. Such a scheme does not exist under Luxembourg law.

(c) Merger

A merger between the bidder and the target company may, in certain circumstances, be considered as an alternative to an Offer. A merger is governed by the Company Law. A merger is more difficult to implement if the Offer is hostile, as the merger plan needs to be agreed between the boards of directors of the merging companies (the shareholders of the target company must then replace the existing board of directors by a board which will be favourable to the merger). A further difference is that the compensation to be granted to the shareholders of the target company in the case of a merger consists (mainly) of shares of the absorbing company (with a payment of a cash portion only up to a 10 per cent maximum). Finally, the result of a merger is different from a successful Offer. Whereas in the case of an Offer the target continues to exist as a separate entity, the target will cease to exist in a merger: the assets and liabilities will be transferred to the absorbing company instead.

(d) Compulsory acquisition of minority shareholders

Once a bidder holds shares representing not less than 95 per cent of the capital carrying rights and 95 per cent of the voting rights in the target, it may require the remaining minority shareholders to sell and transfer their respective shares (squeeze-out).

If the target has different classes of shares in issue, the squeeze-out procedure is applicable only for those classes in which the 95 per cent threshold has been reached. The right to squeeze-out the minority shareholders has to be exercised within three months from the end of the acceptance period for the Offer. The CSSF as competent authority will ensure that the consideration is fair (the Takeover Law provides for an assumption that the consideration is fair (i) following a voluntary takeover offer, if the bidder has acquired at least go per cent of the shares granting voting rights during the offer period for such consideration, and (ii) following a mandatory takeover offer, if it corresponds to the consideration offered for such mandatory takeover offer). A cash consideration must always be offered.

12.3 Secrecy and announcements

Under inside information rules it is forbidden for any person having inside information to communicate such information to another person. The target must publish any inside information relating to it as soon as possible.

(a) Acquisition of one-third or more

The shareholder/bidder will need to make an announcement as soon as possible following the acquisition that triggers a mandatory offer. However, the obligation to make a mandatory offer is not applicable if control is obtained following a voluntary Offer.

The announcement obligation following the acquisition of a controlling stake in a target under the Takeover Law is one of many disclosure requirements (see section 12.4(c) below).

(b) Firm intention to make an offer

Once the bidder has decided to make an Offer, it has to (i) inform the CSSF and (ii) publish such intention. Once the intention to make the Offer has been published, the bidder and the target have to inform their respective works councils or, if none, their employees of the Offer.

The Offer will be published by way of an offer document which must contain the main points of the Offer and any conditions (such as the minimum amount of shares to be acquired under the Offer).

An Offer may only be announced once the bidder has confirmed that it has the financial resources required to implement the Offer and, in the case of a (partial or full) non-cash consideration, it has taken all reasonable steps to confirm that it can comply with the obligations under the Offer.

12.4 Disclosure of interests and stakebuilding

Depending on the liquidity of the stock and the number of willing sellers in the market, a potential bidder may consider purchasing target shares in the market either before or after approaching the target's board. Such acquisitions may have serious consequences for an offer. The following are some of the issues that will be likely to be relevant to any share-buying strategy:

(a) Insider dealing/market abuse

So as to avoid any insider dealing/market abuse concerns, no acquisitions should be made if a bidder or anyone acting in concert with it has any price-sensitive information relating to the target.

(b) Offer structure

A squeeze-out procedure may be initiated even if the relevant threshold (95 per cent) is not reached during the Offer procedure, i.e. it is possible to first acquire a certain amount of shares in the target in the market.

(c) Disclosure

Disclosure and Transparency Rules

Irrespective of the existence of an Offer for a company, if a shareholder's aggregate interest in a company reaches, exceeds or falls below 5, 10, 15, 20, 25, 33.1/3, 50 or 66.2/3 per cent, it must notify the respective company of this as soon as possible and within four trading days at the latest. Upon receipt of such notification and within three trading days, the notified company itself needs to make such information public pursuant to the disclosure rules applicable to regulated information under Directive 2004/109/EC (Transparency Directive).

The Takeover Law

The Takeover Law contains certain disclosure requirements during the Offer period: the bidder is obliged to file with the CSSF and publish the number of shares and voting rights it holds (or any concert party holds) in the target directly or indirectly (i) every week from the publication of the offer document; (ii) during the last week of the Offer period on every morning; and (iii) on the evening of the last day of the Offer period.

(d) Price floor

The Takeover Law provides that, in the case of an increase of the Offer consideration, such increased consideration is offered to all shareholders of the target (including those who have already accepted the Offer).

In the case of a mandatory Offer, following acquisition of control over the target, the price paid by the bidder (or any concert party) during the 12 months preceding the Offer will be the floor price. If, after the Offer period has started, but prior to its expiration, the bidder (or any concert party) acquires shares in the target for a price higher than that stated in the Offer, such higher price will be applied as the price for the Offer.

(e) Cash consideration

Generally, the consideration for the shares in the target can be cash, securities or a combination of both. However, if the securities proposed as consideration are not publicly traded on a regulated market of at least one Member State of the European Union or the European Economic Area, then the Offer must contain a cash alternative as consideration. The same applies if (i) the bidder (or its concert parties) has acquired at least 5 per cent of the shares granting voting rights in the target for a cash consideration during 12 months preceding the Offer period or during the Offer period; or (ii) in a squeeze-out scenario in accordance with article 15(5) of the Takeover Law.

(f) Mandatory offer required

As set out in section 12.2(a) above, if a bidder and its concert parties acquire one-third or more of a target's shares, then a mandatory takeover offer is required.

12.5 Key commercial questions

Are advisers required?

The Takeover Law does not require any party to the Offer to appoint advisers. However, in practice, both the bidder and the target will appoint legal and financial advisers (major shareholders of the target may also appoint separate advisers).

Is the target obliged to make information available to a bidder?

Apart from information to be made public by each listed company, a Luxembourg-incorporated target under the Takeover Law is required to publish certain information in its annual financial report pursuant to the Luxembourg law of 11 January 2008 on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (e.g. capital structure, restrictions on transfer of shares, restrictions on exercise of voting rights, shareholders' agreements (if known to the company), special control rights pertaining to any shares, rules governing the appointment and removal of members of the management board, and the powers of the management board).

In the case of an Offer supported by the target, the target will probably also make available certain information during a due diligence process.

Can the target take action to frustrate an offer?

A target whose registered office is in Luxembourg may opt for the passivity of its management board during an Offer period, in which case the board must have prior authorisation from the general shareholder meeting to frustrate an Offer.

Furthermore, the target's board may take frustrating action if a bidder itself (or its parent company) has decided to opt out in relation to the rules relating to frustrating action, with respect to an Offer.

Can a bidder prevent the target from disclosing its identity to the market?

Subject to applicable insider trading rules, negotiations between the bidder and the target can be kept confidential until an Offer is officially made (in any event until the decision to make the Offer is published).

Can the target grant exclusivity or pay an inducement fee to a bidder?

The Takeover Law does not prohibit the granting of exclusivity or payment of an inducement fee.

Can a bidder enter into special arrangements with the target's management or other key shareholders?

No. The target's shareholders of the same class have to be treated equally, so special arrangements are not possible.

Can information be given to key shareholders in advance?

No. Shareholders of the same class must be treated equally. In addition, the rules on insider dealing must be observed.

Can a bidder obtain irrevocable commitments?

Yes, this is generally possible. However, if the bidder (or a concert party) does not comply with any provision of the Takeover Law, any shareholder who has committed to transfer its shares or accepted the Offer may cancel such commitment/acceptance.

Can the target provide financial assistance for a bid, such as security or loans?

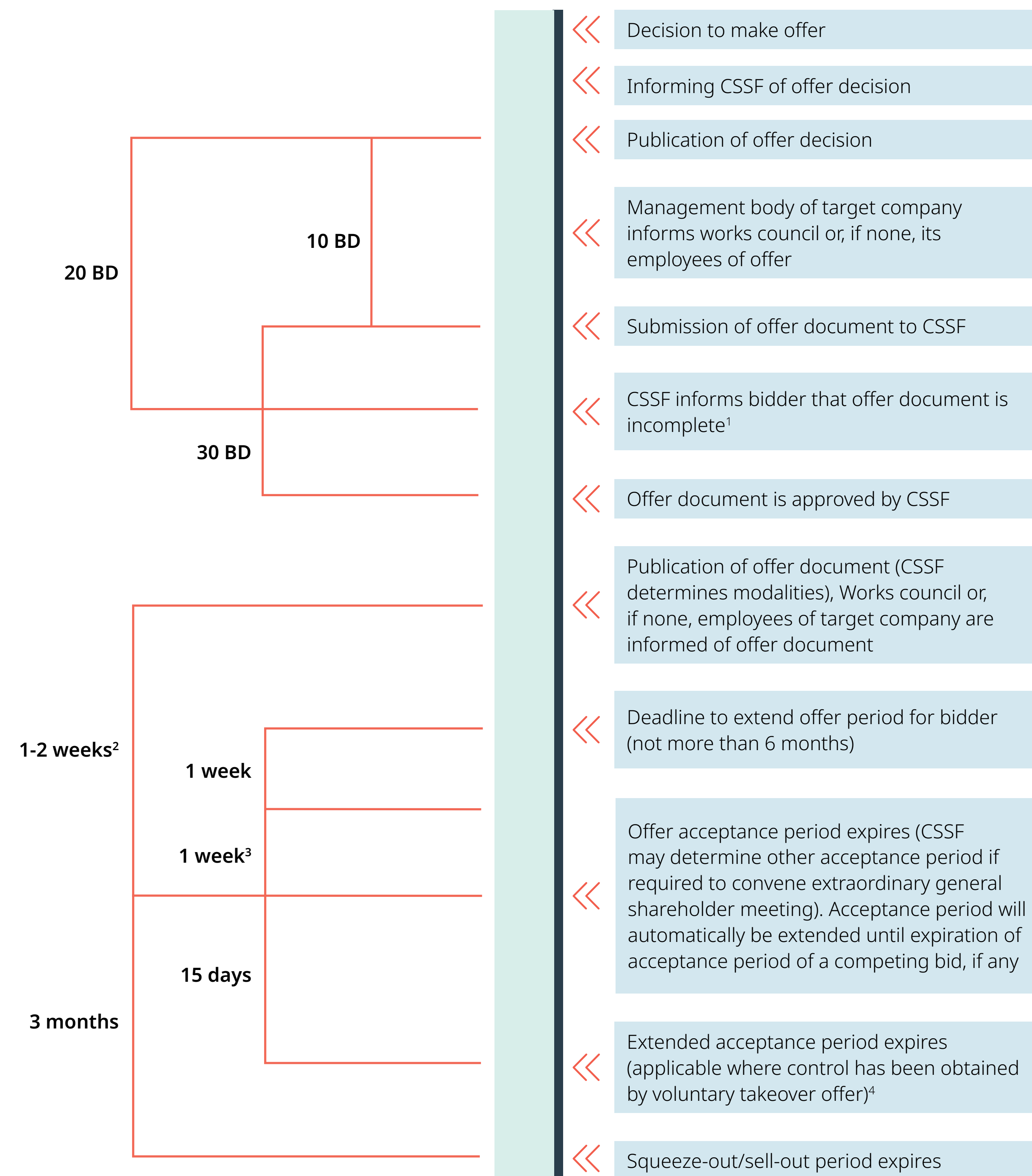
No. The Company Law generally prohibits the granting of financial assistance in the form of providing loans, advances or securities in view of the acquisition of its shares (subject to certain exemptions). The Company Law provides for a whitewash procedure, but this is difficult to implement and rarely used in practice.

Can a bidder force the target to de-list?

The decision to de-list is a decision of the board of the Luxembourg target (depending on where the target is listed, shareholder approval may also be required). The shareholders cannot directly influence the board to take such action.

The board will have to consider such de-listing and the impact on all shareholders.

Indicative timeline for a public takeover bid in Luxembourg



1. If applicable.
2. Weekly information/publication on shareholding and voting rights of bidder in target company.
3. Daily information/publication on shareholding and voting rights of bidder in target company.
4. If applicable.

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13 Singapore

13.1 Regulation

The Code on Takeovers and Mergers (the **Code**) is the principal source of regulation for public M&A transactions in Singapore. It is administered and enforced by the Securities Industry Council (**SIC**). The Securities and Futures Act 2001 of Singapore (the **SFA**), the Companies Act 1967 of Singapore (the **Companies Act**) and the listing manual of the Singapore Exchange Securities Trading Limited (the **Listing Rules**) also apply to public M&A transactions in Singapore.

The Code regulates takeovers, mergers and certain corporate actions (such as rights issues and share buybacks) affecting (i) corporations (whether or not incorporated in Singapore) with a primary listing of their equity securities in Singapore; (ii) real estate investment trusts; (iii) business trusts under the Business Trusts Act 2004 of Singapore with a primary listing of their units in Singapore; (iv) unlisted Singapore-incorporated public companies with more than 50 shareholders and net tangible assets of S$5 million or more; and (v) unlisted registered business trusts with more than 50 unitholders and net tangible assets of S$5 million or more.

13.2 Structure

Offers for corporations and entities regulated by the Code are commonly implemented in one of two ways: (i) by way of a contractual offer (an **Offer**); or (ii) a statutory scheme by way of arrangement pursuant to the laws of the company of incorporation of the target company (a **Scheme**).

(a) Offer

An Offer is a contractual offer made by the bidder to the target's shareholders to acquire their shares, subject to a number of terms and conditions.

The Code generally requires that a bidder must make an offer (referred to as a **mandatory offer**) to acquire all of the shares of the target not already owned by it, if the bidder (either alone or together with those acting in concert with it) acquires 30 per cent or more of the voting rights of the target, or where the bidder (either alone or together with those acting in concert with it) holds not less than 30 per cent (but not more than 50 per cent) of the voting rights of the target and subsequently acquires in any period of six months additional shares carrying more than 1 per cent of the voting rights.

A bidder may also make a voluntary offer for all of the shares in the target not owned by the bidder, or the offer may be a partial offer which is for a specified number of shares in the target (provided that the requirements for partial offers under the Code are satisfied).

The most important condition to an Offer is the acceptance condition, which makes the offer conditional on the bidder's receiving not less than a certain number of acceptances. For a voluntary offer, the Code requires that the bidder receives, at a minimum, sufficient acceptances to take its overall voting rights in the target (when aggregated with any other shares which it, and those acting in concert with it, hold in the target) to over 50 per cent, except for partial offers. As for a mandatory offer, it must be conditional upon the bidder's having received acceptances to take its overall voting rights in the target (when aggregated with any other voting rights which it, and those acting in concert with it, hold or have agreed to acquire) to over 50 per cent.

Typically, a bidder making a voluntary offer for a Singapore-incorporated target will set its acceptance condition at 90 per cent as, once a bidder has acquired not less than 90 per cent of the shares of such target, it may be able to compulsorily acquire the remaining shares in such target under the statutory squeeze-out procedure set out in the applicable company laws. In addition, the shares of the target company will be suspended from trading if the free float requirement under the Listing Rules are not met, which may motivate shareholders to accept the offer.

An indicative timetable for the implementation of an Offer is included at the end of this section.

(b) Scheme

A Scheme is a statutory procedure whereby a target agrees to an arrangement with its shareholders. As a Scheme is implemented by the target, the structure is only viable when an offer is recommended by the board of the target rather than hostile.

In addition to satisfying the requirements under the laws of the place of incorporation of the target for the Scheme to become effective, in order to de-list, the target (if listed on the Singapore Exchange) must also comply with the requirements under the Listing Rules.

For de-listing of companies which implement a Scheme under the Companies Act and the Listing Rules, a fair and reasonable exit offer (which includes a cash alternative as the default alternative) must be offered and the Scheme must be approved by a majority in number representing 75 per cent in value of the target shareholders present and voting, either in person or by proxy, at a court-convened meeting and sanctioned by the court, with the bidder and its concert parties abstaining from voting. Once sanctioned, the Scheme is binding on 100 per cent of the target's shareholders irrespective of the way in which they voted; no squeeze-out of the minority is required.

A Scheme may not be appropriate if the target has an active minority which is opposed to the bid. A large number of small shareholders can block a Scheme if they comprise a simple majority in number of those attending and voting at the meeting.

An indicative timetable for the implementation of a Scheme is included at the end of this section.

(c) Squeeze-out of minority shareholders

If a takeover is implemented as an Offer, it is likely that the bidder will want to compulsorily acquire the shareholdings of any minority shareholders who have not accepted the Offer. This process is known as "squeeze-out" and, under section 215 of the Companies Act, becomes available if the target is incorporated in Singapore and where the bidder has, by virtue of acceptances of an Offer, acquired or unconditionally contracted to acquire not less than 90 per cent of the shares of such target within four months after making the Offer (excluding the shares already held at the date of the offer by the bidder and its related parties).

On reaching this threshold, the bidder is entitled to give a compulsory acquisition notice to the holder of any shares to which the Offer relates and which the bidder has not acquired or unconditionally contracted to acquire. Where an Offer is made for more than one class of share capital, the 90 per cent test is applied, and the right is exercisable separately in respect of each class.

A squeeze-out will not be necessary if a takeover is implemented as a Scheme as, once effective, a Scheme is binding on shareholders holding the class of shares to which the Scheme relates.

13.3 Secrecy and announcements

There must be absolute secrecy before the announcement of an offer.

All persons privy to confidential information, particularly relating to an offer or contemplated offer, must treat that information as secret and must conduct themselves so as to minimise the chances of an accidental leak of information. Such information should only be communicated on a "need-to-know" basis and only if the recipient is aware of the need for secrecy. In practice, code names should always be used.

When conducting preliminary offer-related discussions, the parties involved should be aware that extending discussions beyond "a very restricted number" of persons can give rise to an obligation to make an announcement due to the increased risk of information leaking, particularly if there is an undue movement in the parties' share prices or significant increase in the volume of share turnover.

The Code has strict rules about when an announcement is required and divides the responsibility for making an announcement between the bidder (or potential bidder), a potential vendor (i.e. holder(s) of shares carrying 30 per cent or more of the voting rights of the target which may be in discussions with the bidder (or potential bidder)) and/or the target, according to the circumstances. In all cases of doubt, the SIC should be consulted. The target must also comply with the disclosure requirements in the Listing Rules.

Outlined below is a summary of when an announcement is required:

(a) If there is a leak

(i) Before an approach

Before an approach to the target's board, the bidder (or potential bidder) and/or a potential vendor will normally be responsible for making an announcement if:

a. the target is the subject of rumour or speculation about a possible offer; or

b. there is undue movement in the target's share price or a significant increase in the volume of share turnover,

and there are reasonable grounds for concluding that the actions of the potential bidder and/or potential vendor (whether through inadequate security, purchase of the target's shares or otherwise) have directly contributed to the situation.

(ii) Following an approach

Following an approach, a target will be obliged to make an announcement if it is the subject of rumour or speculation about a possible offer, or there is an undue movement in its share price or a significant increase in the volume of share turnover, whether or not there is a firm intention to make an offer.

(b) If there is no leak

Even if there is no leak, a target must make an announcement when negotiations or discussions between the bidder and the target company are about to be extended to include more than a very restricted number of people.

If an announcement of a firm intention to make an offer is premature or inappropriate, a holding announcement can be made by a bidder, vendor or target (whether voluntary or obligatory) that talks are taking place (without naming the potential bidder), or that a potential bidder is considering making an offer. Monthly updates setting out the progress of the talks, or the consideration of the offer or possible offer, are thereafter required until a firm intention to make an offer for the target, or a decision not to proceed with an offer, is announced.

The offer period commences from the time an announcement is made of a proposed or possible offer (with or without terms).

(c) Acquisition of 30 per cent or more of voting shares

If a bidder either alone or together with its concert parties acquires voting rights in the target crossing certain thresholds, thereby triggering a mandatory offer as set out in section 13.2(a), the bidder is required to make an announcement immediately upon an acquisition of shares which gives rise to the obligation to make a mandatory offer.

The announcement obligations under the Code are not the only disclosure requirements which apply to the acquisition of shares. For more information on the thresholds which trigger announcement obligations, see section 13.4 (c) below.

(d) Firm intention to make an offer

An announcement is required when a bidder notifies the board of the target of its firm intention to make an offer.

A firm intention to make an offer should only be announced when the bidder and its financial advisers are satisfied that it can and will be able to implement the offer in full and, where an offer includes an element of cash, the bidder's financial adviser (or another appropriate third party) has confirmed that it has sufficient resources available to satisfy full acceptance of the offer (following completion of the "cash confirmation" process as further detailed in section 13.5).

In addition to the mandatory announcement obligations outlined above, a potential bidder may also choose to make a possible offer announcement detailing the conditions which the firm intention to make an offer is subject to (referred to as a pre-conditional offer). This type of announcement is often used where regulatory clearances required to complete the offer are unlikely to be obtained within the normal Code timetable.

13.4 Disclosure of interests and stakebuilding

Depending on the liquidity of the stock and the number of willing sellers in the market, a potential bidder may consider purchasing target shares in the market either before or after approaching the target's board.

Such acquisitions may have material implications for an offer. The following are some of the issues likely to be relevant to any stakebuilding strategy:

(a) Insider dealing/market manipulation

So as to avoid any insider dealing/market manipulation concerns, no acquisitions should be made if a bidder or anyone acting in concert with it has any price-sensitive information relating to the target (which it may become aware of, for example, through the conduct of due diligence on the target before a potential bid is made), until such information becomes public or is no longer price-sensitive.

(b) Offer structure

Deciding when and/or if to stakebuild may also be affected by the bid structure.

If the bid is to be implemented as an Offer, generally speaking, any shares in a Singapore-incorporated target acquired by the bidder prior to the posting of the offer document are not shares to which the offer relates, and do not count towards the 90 per cent squeeze-out threshold under the Companies Act.

If implemented as a Scheme, the acquisition of shares by a bidder would effectively take shares out of the hands of target shareholders who may otherwise vote in favour of the Scheme. In addition, to comply with the de-listing requirements in the Listing Rules, any shares held by the bidder and its concert parties cannot be counted in the vote in favour of the Scheme, so while they can be voted against a competing acquirer's proposed scheme (or used to oppose a competing offer), such shares will be of no assistance in achieving the voting thresholds required to implement the bidder's proposed Scheme.

(c) Disclosure

(i) Disclosure of interests under the SFA

Irrespective of the existence of an offer for a company, if a shareholder's aggregate interest in a company reaches or exceeds 5 per cent, or if its holding subsequently changes by a whole number percentage above 5 per cent, or falls below 5 per cent, it must notify the company within two business days pursuant to the SFA and such notification will be publicly available on the Singapore Exchange.

These disclosure requirements mean that it is highly likely that any pre-announcement stakebuilding reaching or exceeding 5 per cent will result in a bidder's name being made public in connection with the possible bid.

(ii) The Code

The Code's disclosure regime applies to the target company, the bidder and each of their concert parties and associates for the period up to six months before and during any offer. Any person to whom the disclosure regime applies must make a dealing disclosure if it deals in the relevant securities of the target or the bidder (where shares in the bidder are being issued as consideration for the offer) by no later than 12:00 noon on the dealing day following the date of the relevant dealing.

(d) Price floor

(i) Voluntary and partial offers

The highest price paid by the bidder or any person acting in concert with it for any target shares during the offer period and within three months prior to its commencement will set the floor price for any voluntary or partial offer for target shares of that class.

(ii) Mandatory offers

The highest price paid by the bidder or any person acting in concert with it for any target shares during the offer period and within six months prior to its commencement will set the floor price for any mandatory offer for target shares of that class referred to in section 13.2(a).

(e) Type of consideration

Voluntary and partial offers may be in cash or securities or a combination of both. However, if a bidder (together with its concert parties) acquires for cash consideration, during the offer period and within six months prior to its commencement, shares carrying 10 per cent or more of the voting rights in the target, the offer must be for cash consideration or accompanied by a cash alternative at not less than the highest price paid by the bidder or any of its concert parties during the offer period and within six months prior to its commencement.

Mandatory offers must be in cash or be accompanied by a cash alternative.

13.5 Cash confirmation

When a bidder announces a firm intention to make an offer for the target and such offer is for cash or involves an element of cash, the Code requires the announcement to contain an unconditional confirmation by the bidder's financial adviser (or an appropriate third party) that sufficient resources are available to the bidder to satisfy full acceptance of the offer. The cash confirmation must be repeated in the formal offer/scheme document.

In most cases, due diligence is required before a financial adviser (or other suitable third party) will permit the cash confirmation to be given, as the Code states that any information in the offer documents should meet the highest standards of care and accuracy. In addition, the party making the cash confirmation must act responsibly and take all reasonable steps to assure itself that the cash would be available to satisfy full acceptance of the offer, failing which it may be expected to produce the cash itself.

13.6 Key commercial questions

Are advisers required?
Yes, both the bidder and the target require advisers. The Code requires the board of the target to seek competent and independent advice and the substance of that advice must be made known to the shareholders of the target. The Code also requires the offer announcement to include an unconditional confirmation by a financial adviser (or an appropriate third party) that the bidder has sufficient resources to satisfy full acceptance of the offer.

Is the target obliged to make information available to a bidder?
Not specifically, but if a target has made information available to one potential bidder it must on request be furnished equally and promptly to other bona fide or potential bidders (even if they are less welcome). Such other bidders should specify the questions to which they require answers.

Can the target take action to frustrate an offer?
Not without the approval of the target's shareholders at a general meeting.

Can a bidder prevent the target from disclosing its identity to the market?
A potential bidder must not attempt to prevent the board of the target from making an announcement relating to a possible offer at any time that it considers appropriate to comply with the disclosure requirements in the Code and the Listing Rules. It may be possible to agree with the target not to name the possible bidder while also making the market aware of an approach which may lead to an offer (subject to conditions).

The identity of the bidder and the ultimate offeror or ultimate controlling shareholder of the offeror must be disclosed in an announcement of a firm intention to make an offer.

Can the target grant exclusivity or pay an inducement or break fee to a bidder?
Yes, but subject to certain safeguards, which must be observed. An inducement fee or break fee must be minimal (normally no more than 1 per cent of the value of the target, calculated by reference to the offer price) and the target company's board and its financial adviser must confirm to the SIC in writing that each of them believes that the fee is in the best interests of the shareholders of the target, in addition to complying with other requirements.

Full disclosure on any inducement or break fee arrangement is required in the announcement of a firm intention to make an offer and in the offer document, and the relevant documents must be available for inspection. The SIC should be consulted at the earliest opportunity in all cases where such arrangement is proposed.

Can a bidder enter into special arrangements with the target's management or other key shareholders?
Not without the consent of the SIC and subject to the disclosure requirements in the Code.

Can information be given to key shareholders in advance?
Information must generally be made equally available to all target shareholders (and persons with information rights) as nearly as possible at the same time and in the same manner. Upon execution of a confidentiality undertaking, some advance disclosure may be permissible (e.g. to obtain irrevocable commitments), provided that all information is subsequently shared equally. Meetings with shareholders must be chaperoned by the financial adviser to ensure information is given equally.

Can a bidder obtain irrevocable commitments?
Yes, if there is no special deal involved. A special deal is one where there are favourable conditions attached which are not extended to all shareholders. Bidders will often seek irrevocable commitments (or non-binding letters of intent) from key shareholders.

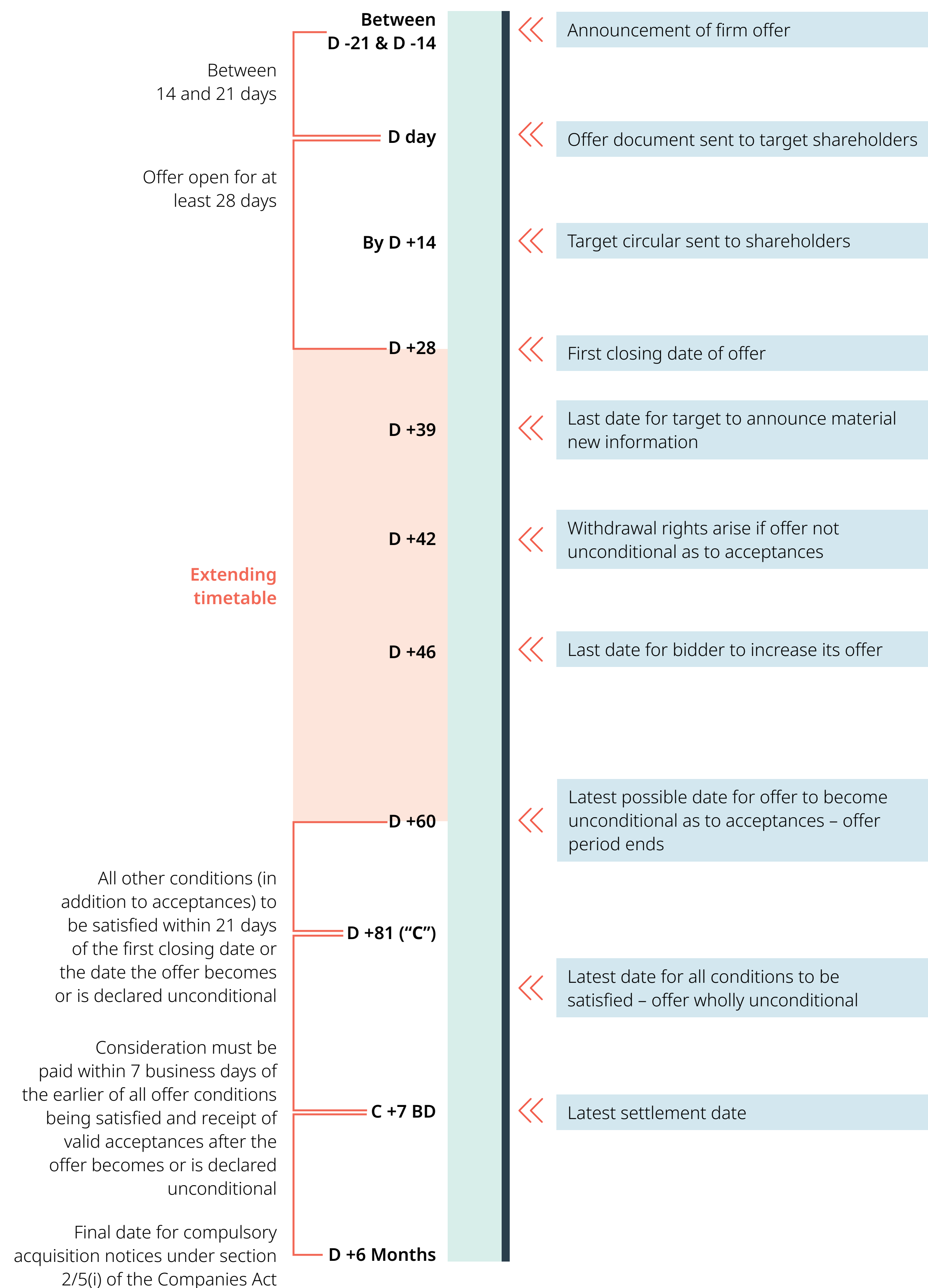
Can the target provide financial assistance for a bid, such as security or loans?
No. Under the Code, if another bona fide offer has been communicated to the board of the target or may be imminent, such financial assistance by the target may amount to frustrating action, which is prohibited under the Code unless approved by the target's shareholders.

For completeness, a public company incorporated in Singapore is prohibited under the Companies Act from giving financial assistance to acquire its shares, unless, among other things, the whitewash procedures requiring shareholder approval are complied with, the financial assistance does not exceed the prescribed threshold, is in the best interests of the company, and/or does not materially prejudice the interests of the company or its shareholders or its ability to pay its creditors.

Can a bidder force the target to de-list?
In an Offer, the bidder can procure the de-listing of the target after compulsory acquisition (i.e. after the squeeze-out of minority shareholders – see section 13.2(c)). In a Scheme, the de-listing can occur once the Scheme is effective. In both cases, the target must apply to the Singapore Exchange to de-list and satisfy the de-listing requirements, including a fair and reasonable exit offer and approval by a majority in number representing at least 75 per cent in value of issued shares held by independent shareholders. The target will remain listed if these conditions are not met. In addition, the shares of the target will be suspended from trading if the free float requirement under the Listing Rules is not met. Accordingly, if, following an Offer, the bidder, despite holding more than 90 per cent of the total number of issued shares in the target, fails to squeeze-out minority shareholders or obtain the relevent approvals to delist, the target remains listed and it may be required to take steps to restore the public float to the minimum required level, unless a waiver from the Singapore Exchange is obtained.

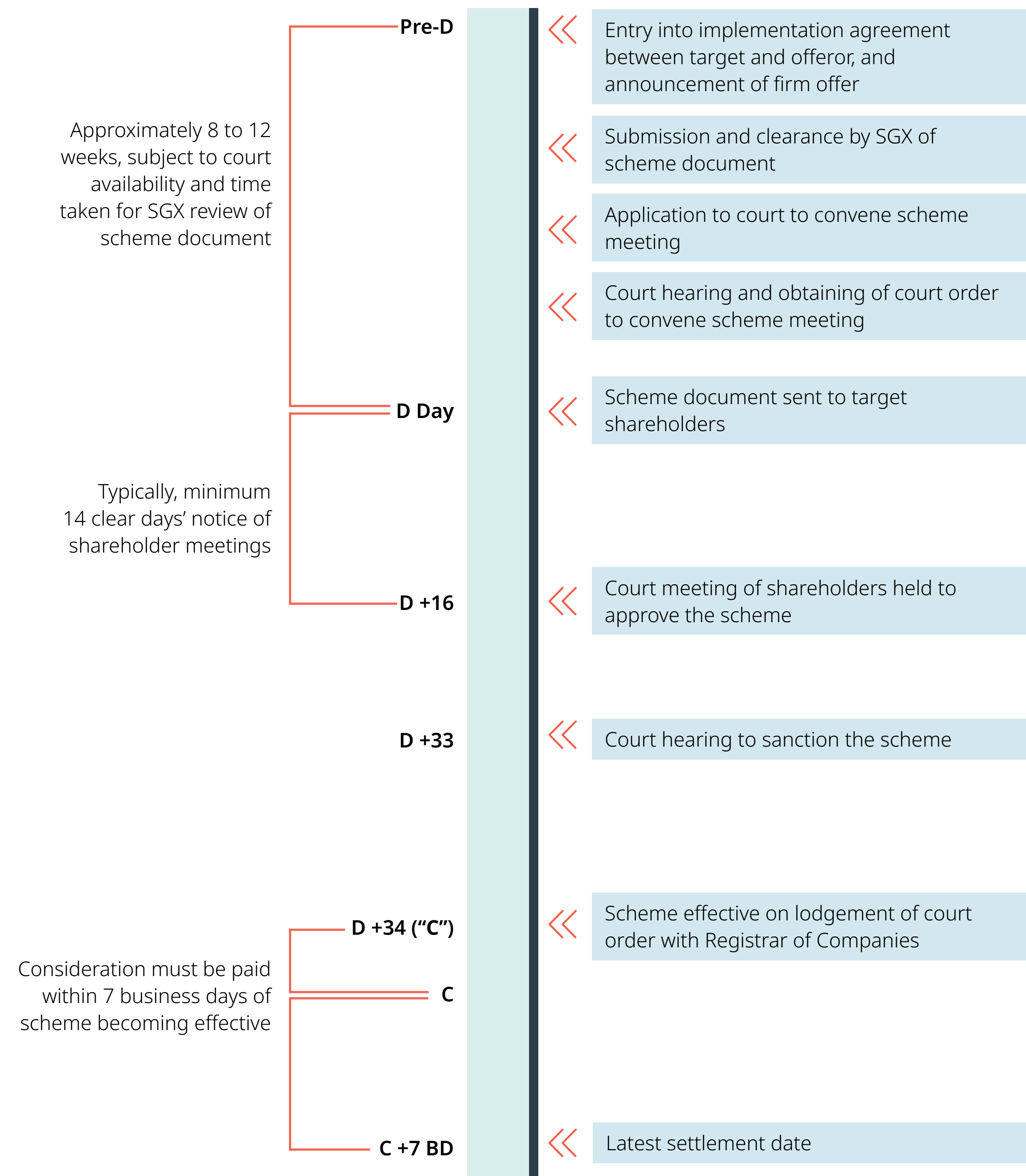
This chapter is written by Ashurst ADTLaw. ADTLaw LLC and Ashurst LLP together form Ashurst ADTLaw, a Formal Law Alliance (FLA), which allows our clients to access Singapore law advice from ADTLaw under one integrated platform.

Indicative timeline for a Singapore takeover by way of an offer



Assumptions: No competition or other regulatory clearances required and no competitive bid situation.

Indicative timeline for a Singapore takeover by way of a scheme of arrangement



This indicative timeline may vary depending on the court's availability and time taken by the Singapore Exchange to approve the scheme document.

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14 Spain

14.1 Regulation

The regulation of takeovers in Spain is based on the EU Takeover Directive (Directive 2004/25/EC, the **Directive**) and is specifically governed by Law 6/2023 of 17 March on Securities Markets and Investment Services (**LMV**) and by Royal Decree 1066/2007 of 27 July on takeover bids (the **Regulation**). This legislation regulates offers for the following companies:

(a) all offers for companies which have their registered offices in Spain if any of their securities are admitted to trading on a regulated market in Spain or on an MTF (MTFs to be further regulated);

(b) all offers for public companies which have their registered offices in another EU country if none of their securities are admitted to trading in such country but:

  (i) are only admitted to trading on a regulated market in Spain; or

  (ii) were initially admitted to trading, for the first time, on a regulated market in Spain; or

  (iii) were initially admitted to trading, for the first time, simultaneously on two regulated markets located in different EU countries but, at the time, the issuer opted to be regulated by Spanish legislation by means of a notice sent to the relevant market authorities of both countries; and

(c) all offers for public companies which have their registered offices outside the EU and whose securities are not admitted to trading on any EU-regulated market other than a regulated market in Spain.

14.2 Structure

Offers may only be implemented by means of a conventional offer, which may be voluntary or mandatory. The rules governing voluntary and mandatory offers vary depending on the type of offer.

(a) Mandatory offers

Mandatory takeover bids must be filed with the Spanish market regulator, the *Comisión Nacional del Mercado de Valores* (**CNMV**), after control of a company has been acquired. Only voluntary bids are to be filed prior to the acquisition.

Partial bids are possible in cases of voluntary bids, but mandatory bids have to be launched for 100 per cent of the company's issued securities with voting rights (or which may convert or give the right to acquire securities with voting rights, i.e. convertible bonds, warrants, etc.).

A mandatory bid must be filed, by law, when a bidder (either by itself or acting in concert with others) has gained control of the company. It is understood that a bidder has control if it:

(i) holds 30 per cent or more of a company's total voting rights, either directly or through agreements; or

(ii) acquires a smaller stake but has appointed, solely as a result of such acquisition or together with any prior appointments, more than half of the members of the board of directors of a company (within a 24-month period following the acquisition).

Both of these are considered instances of having acquired "control". The term "control" in this section means that either of the above thresholds has been reached.

Control can be obtained directly or by reaching agreements with others. It may also be gained by "indirect or subsequent control" where, for example, a parent/holding company is acquired or where a listed company reduces its capital and as a consequence one shareholder sees its percentage of voting rights increase by over 30 per cent. Further examples of "indirect or subsequent control" are set out in section 7 of the Regulation.

As an exception to the obligation to launch a bid if the bidder has obtained control, the CNMV shall lift the obligation to launch a mandatory bid if someone else owns a stake equal to or higher than that of the affected bidder, always on the condition that the status quo which gave rise to the exception, remains unchanged, and that the bidder which gained the exemption does not use its voting rights to appoint members of the board that, altogether, make up more than half of the board.

Mandatory offers may not be conditional on a minimum number of acceptances of the offer. The offer consideration must be an "equitable consideration" as defined by the Regulation.

If an entity which has control of the company does not make a mandatory offer, then its "voting rights" in relation to shares held in the company will be suspended and it may be fined for an infringement of the Regulation.

(b) Voluntary offers

Voluntary offers occur when the bidder does not have prior control of the company. These may be conditional on a number of factors (e.g. a minimum level of acceptances). The offer consideration may be any consideration the bidder wishes to offer. The bidder is always entitled to waive the condition if it has not been met.

Voluntary bids may be made for whichever percentage of the company the bidder wishes to acquire, although if it happens to acquire control of the target, then a further mandatory bid will be necessary, unless the offer was made for an equitable price or the voluntary bid has been accepted by holders of more than 50 per cent of the securities to which the bid relates.

(c) Compulsory acquisition of minority shareholders

Mandatory offers cannot be subject to conditions, so the bidder has no way of ensuring that it will obtain a certain percentage of the company. However, if a bidder wants to acquire 100 per cent of the company, it may compulsorily acquire the shares of any minority shareholders who have not accepted the offer. This process is known as a "squeeze-out", but it only becomes available when the bidder has met a double condition:

(i) that, by virtue of acceptances of the offer and/or together with any shares it previously had, the bidder holds 90 per cent or more of the total voting rights of the target company; and

(ii) that the offer has been accepted by 90 per cent or more of the holders of the voting rights to which the offer relates.

On reaching this threshold, the bidder can give a compulsory acquisition notice to the holder of any shares to which the offer relates and which the bidder has not acquired or unconditionally contracted to acquire. Where an offer is made for more than one class of share capital, the 90 per cent test is applied, and the right is exercisable separately in respect of each class.

Note that when this threshold is reached, shareholders also have a compulsory sell-out right where they can force the bidder to buy their shares at the offer price (even if the offer was not initially directed at them).

An indicative timetable for the implementation of an offer is included at the end of this section.

14.3 Secrecy and announcements

(a) Secrecy

Disclosure of inside information by any person intending to make an offer must comply with MAR Regulations 596/2014 regarding "market soundings". In particular: (i) the information should be necessary to enable the shareholders to form an opinion on their willingness to sell; and (ii) the shareholders' willingness to sell must be reasonably required for the decision to make the offer.

From the time the public announcement is made, the bidder, its directors, top executives, its controlling shareholders, its advisers, persons acting in concert with it and other persons involved in the transaction shall refrain from disseminating or publishing by any means whatsoever any information or particulars not contained in the prior announcement of the offer.

Additional MAR Regulations regarding secrecy, inside information restrictions and the prohibition of market manipulation also apply.

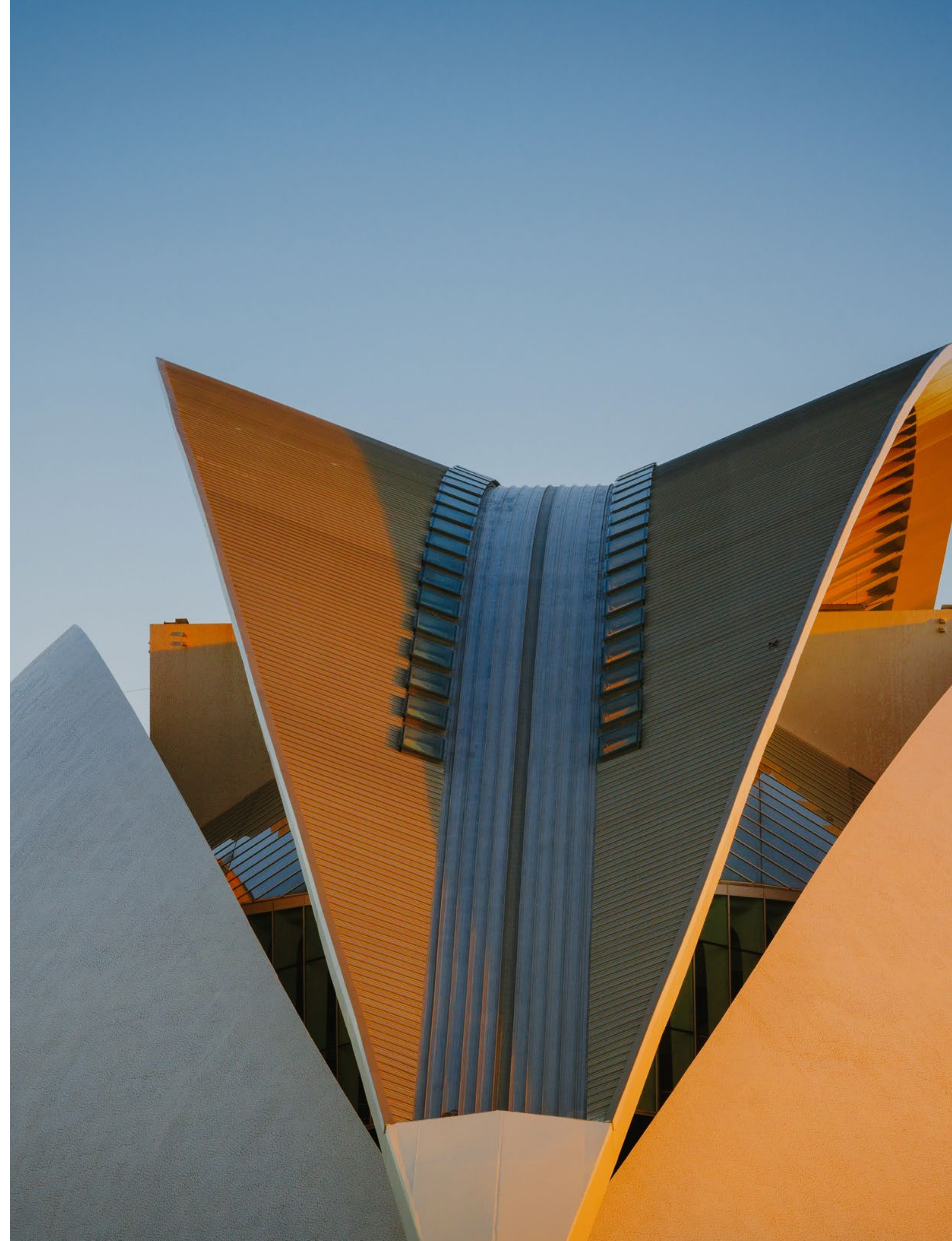
(b) Announcements

For both mandatory and voluntary bids, an announcement must be made to the market: in the case of mandatory bids as soon as possible after control has been acquired and in the case of voluntary bids as soon as the decision to launch a bid has been taken and the bidder has made sure it has sufficient economic resources available to meet its obligations under the offer.

If the announcement is delayed, care should be taken that there are no leaks, so as to avoid infringing market abuse regulations.

Within one month from either (i) the announcement of the intention to bid (in voluntary offers) or (ii) the moment control has been acquired (in mandatory offers), the offer has to be filed before the CNMV.

In addition to the mandatory announcement obligations required by the Regulation, a potential bidder may also make a possible offer announcement detailing the terms on which an offer might be made. This type of announcement is often used to start a virtual bid and put pressure on the target's board to start to negotiate with the potential bidder.



14.4 General procedure

In all offers, the procedure starts with an announcement made to the CNMV and made public by it through its website.

A prospectus must be drafted in accordance with the specifications set out by the CNMV and filed with some additional documents before the CNMV, which will then authorise the offer (or request additional information or documents).

A bank guarantee must be filed to secure full and timely payment of the offer.

Once authorised, a new announcement will be made, which will mark the start of the acceptance period during which shareholders decide whether or not to accept the offer. During this time, competing offers may be presented and/or the bidder(s) may improve the offer.

At the end of the acceptance period, acceptances will be made public, conditions (if any) will be seen to have been met or not, and, if applicable, the offer will be settled and cleared.

In the meantime, the target's management body must make a public announcement indicating whether it thinks the offer is reasonable (i.e. acceptable to shareholders) or not. A recommendation not to accept the offer by the target's management body means that the offer is deemed to be hostile.

(a) Application and prospectus

Within one month from either (i) the announcement of the intention to bid (in voluntary offers) or (ii) the moment control has been acquired (in mandatory offers), the bid has to be filed before the CNMV.

The bid is a writ requesting authorisation of the offer and outlining the main characteristics of the offer. It has to include (at least) (i) a copy of the relevant corporate resolution approving the Offer and (ii) an offer prospectus.

Any bid requires an offer prospectus. This will contain all the information regarding the offer, as well as other relevant documentation attached to it (e.g. the bank guarantee, a certificate of the bidder's relevant body approving the decision to launch the offer, a certificate of incorporation of the bidder and audited financial statements of the bidder for the previous financial year), and must be submitted to the CNMV for approval. Normally, shortly after submission, the CNMV will require the bidder to provide further information about the offer, which will be included in a final version of the prospectus prior to its approval by the CNMV. Once the CNMV has approved the takeover offer, the prospectus becomes public and must be made available to any interested parties.

Other documents to be filed alongside the prospectus, such as the "bank guarantee", may be delivered up to seven business days later. Once all documents have been properly filed, the CNMV will indicate whether it accepts the submission of the offer for review within three business days. This does not mean the offer has been authorised, just that it has been properly filed and will be reviewed for authorisation.

(b) The bank guarantee

In the case of an offer with a cash element, it is in the interests of the target's shareholders to ensure that a bidder is capable of paying the full amounts stated in the prospectus. Therefore, legislation requires the bidder to deliver to the CNMV (at the time of filing the offer or within seven calendar days of filing) a bank guarantee to ensure compliance with the obligations of the offer.

The bidder must provide either (i) a bank guarantee or (ii) documentation proving that a deposit has been opened in a bank for the full amount of the offer. Failing this, the offer will not be approved.

The guarantee must be issued by a credit institution. As a general rule, the CNMV will not accept guarantees provided by entities that form part of the bidder's group.

(c) Authorisation by the CNMV

Authorisation by the CNMV may be declined if the offer does not comply with applicable legislation. The bidder is entitled to appeal against the CNMV's refusal to authorise.

The decision whether or not to authorise must be made by the CNMV within 20 working days from the date of submission of the offer, or from the date of the submission of additional information if the CNMV has requested any. Once a decision has been taken the CNMV communicates such decision to the bidder, the target company, the stock exchange and any other regulatory bodies or entities which may need to be notified in a given case. The CNMV's decision must be justified.

(d) Irrevocable bids

Bids are essentially irrevocable and can only be withdrawn in specific circumstances expressly stated in the Regulation. In general, bids may only be revoked:

(i) for failure to obtain the regulatory approvals (or competition approvals if the bidder has expressly conditioned its offer on the basis of receiving competition clearance);

(ii) if a competing bid has been authorised; or

(iii) in cases in which, for reasons outside the bidder's control, the offer can no longer succeed or is clearly not viable (if the CNMV gives its approval).

Voluntary bids may also be withdrawn if the shareholder meeting of the target has taken an action or approved a resolution which makes it impossible for the bidder to maintain its offer (in this case, with the CNMV's prior approval).

14.5 Consideration

Mandatory bids must be made for an "equitable price". Such price will be "the highest price paid or agreed for the same securities by the bidder, or by persons acting in concert with him/her, over a period of 12 months prior to the bid". The consideration does not necessarily need to be in cash, although in mandatory bids the bidder always has to offer a cash alternative.

If the bidder has not acquired any securities within the preceding 12-month period (for example, when the obligation to launch a mandatory bid is triggered by the appointment of directors once the initial 12-month period after the acquisition has elapsed), then the equitable price must not be lower than the price calculated in accordance with the specific valuation rules set forth in the Regulation for de-listing bids.

The CNMV is authorised to adjust the equitable price in accordance with certain parameters set out in the Regulation and when there are special circumstances.

Voluntary bids need not be launched at an equitable price, but if as a result of a voluntary bid the bidder acquires control of the target then a mandatory bid (this time for an equitable price) must be launched. However, if the voluntary bid was initially launched for an equitable price, no further bid will be necessary. Furthermore, no further bid will be necessary if the voluntary bid has been accepted by holders of more than 50 per cent of the securities to which it was directed (even if the bid was not made for an equitable price).

An offer may be improved at any time prior to the last five calendar days of the acceptance period. A bidder may associate itself with a third party in order to improve the offer. Both these amendments must be reflected in a supplement to the initial prospectus, which is also subject to approval by the CNMV.

14.6 Offer conditions

Mandatory bids may only be subject to the condition of obtaining competition clearance. Voluntary bids can be subject to any type of condition permitted by law and deemed acceptable by the CNMV.

In general, CNMV considers a condition acceptable when it meets the following requirements (analysed case by case): (i) its fulfilment depends on events beyond the control of the bidder; (ii) it is configured or defined in a sufficiently precise way so that its verifiability is feasible and simple; (iii) its fulfilment can be verified before the end of the period for acceptance of the offer; and (iv) it is reasonable and proportionate.

Traditional conditions specified in the Regulation include amendment of the target's by-laws to lift any voting restrictions in place or to eliminate anti-takeover regulations, the establishment of a minimum percentage of acceptances or the approval of the bid by the bidder's general shareholder meeting.

The condition relating to the obtaining of financing is not considered admissible by the CNMV.

The bidder is allowed to waive any conditions at any time. Also, any conditions will be automatically lifted if the bidder buys shares in the market once the bid has been announced.

14.7 Regulatory consents and competition clearance

Takeovers may lead to concentrations requiring anti-trust clearance and may also be subject to other regulatory authorities (e.g. in relation to foreign investment control or the consent of an industry regulatory body).

The offer may be conditional upon obtaining competition clearance. If clearance is not given or is conditional, then the bidder will be entitled to withdraw. In mandatory bids the bidder will also have to divest until it holds voting rights below the 30 per cent threshold. In the interim, the bidder will not be able to exercise its voting rights.

Regarding other regulatory consents, the CNMV will accept the submission of the bid but will not authorise the offer until the consent has been obtained. In mandatory offers, the bidder will not be entitled to make use of its voting rights in excess of the 30 per cent threshold until such authorisation or consent has been obtained. If it is not given, the bidder will be forced to sell its voting rights, until it holds less than 30 per cent, within a three-month period.

14.8 Disclosure of interest and stakebuilding

Depending on the liquidity of the stock and the number of willing sellers in the market, a potential bidder may consider purchasing target shares in the market before launching an offer.

Such acquisitions may have serious consequences and the following are some of the issues that are likely to be relevant to any share-buying strategy:

(a) Insider dealing/market abuse

So as to avoid any insider dealing/market abuse concerns, no acquisitions should be made if a bidder or anyone acting in concert with it has any price-sensitive information relating to the target. Knowledge that a bidder is itself considering an offer is not a defence to market abuse and insider dealing.

(b) Offer price

Acquisitions at a higher price will alter the equitable price to be paid for the offer and may imply considerable additional cost.

(c) Offer structure

Deciding when and/or if to stakebuild may also be affected by the offer structure.

Any shares acquired by the bidder prior to the posting of the offer document are not shares to which the offer relates, and therefore cannot count towards: (i) the 90 per cent squeeze-out threshold; or (ii) the 50 per cent acceptance required to avoid launching a mandatory bid after a previous voluntary bid through which the bidder gained control of target.

(d) Disclosure

Irrespective of the existence of an offer for a company, a shareholder must notify the issuer and the CNMV if its aggregate voting rights in a company change to reach, exceed or fall below any of the following thresholds: 3, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 60, 70, 75, 80 and 90 per cent. Disclosure should be made within four trading days from (and including) the day immediately following the relevant trade date. The CNMV would normally make this public to the market, which may cause market speculation regarding the shareholder's intentions. If such speculation affects the price of the relevant securities, the CNMV may require a clarificatory announcement to be made by the bidder to stop any rumours.

(e) Price floor

An acquisition of interests in target securities after the announcement will set the offer price at no less than the highest price paid during that time. The same is true of acquisitions made once the offer has commenced. The bank guarantee must be increased accordingly.

(f) Cash consideration

If a bidder (together with its concert parties) acquires for cash consideration shares in the target after the offer announcement and the consideration for the offer is not entirely cash, these acquisitions will grant the shareholders of the target the right to demand a full cash payment as settlement of the offer at not less than the highest price paid during that time.

(g) Mandatory offer required

If a bidder and its concert parties acquire 30 per cent or more of a company's shares, then a mandatory takeover offer for that company is required which can have no conditions.

14.9 Passivity rule

The management of the target is subject to a general passivity obligation, which arises when the offer is announced. However, management is allowed to take defensive measures as long as they are authorised by the general shareholder meeting (the **GSM**) by special majorities, or if there is no reciprocity (i.e. if the bidder is not subject to a similar passivity rule) and the GSM has previously authorised such lack of passivity obligations in cases of no reciprocity.

The passivity obligation starts once the offer has been announced and ends when the results of the offer are published. From that moment onwards and until the outcome of the offer has been published, the governing body, any managers of the target, any group company and its directors or any other person acting in concert with the target will have to obtain the authorisation of the GSM before they take any action which may frustrate the successful outcome of the bid. They may also act without GSM approval as long as such actions are later ratified by the GSM.

Traditionally there is only one exception, which is the search for alternative offers (white knights).

The CNMV will normally accept those actions expressly waived by the bidder.

14.10 Key commercial questions

Are advisers required?
Advisers are not required by law, but in practice it will be impossible without them. Management of the target almost always appoints a financial adviser in order to obtain a fairness opinion on the price, as it would base the recommendation on whether or not to accept the offer on this opinion.

Is the target obliged to make information available to a bidder?
Not specifically, but if a target has made information available to one potential bidder it must be furnished to other potential bidders (even if they are less welcome), provided that the new recipients keep it confidential, use it solely for the purposes of formulating the competing offer and the information is necessary for such launching.

Can the target take action to frustrate an offer?
Not without the approval of the GSM or waiver of the bidder. See previous section regarding the Passivity Rule.

Can a bidder prevent the target from disclosing its identity to the market?
Normally it can not, but it can be done in certain cases if: (i) there is a confidentiality agreement in place; (ii) there is fair reason to keep this secret – such as a possible negative effect on the shares of either, assuming the target is also a public company; (iii) there have been no leaks; or (iv) the CNMV has not requested that it be made public.

Can the target grant exclusivity or pay an inducement fee to a bidder?
The Regulation only provides for break-up fees to cover the expenses of the first offeror in the event of competing bids and with a limit of 1 per cent of the total amount of the offer.

Can a bidder enter into special arrangements with the target's management or other key shareholders?
Any such agreement will be restricted by the passivity obligation (regarding management) and the principle of equal treatment of all shareholders that are in the same circumstances (regarding key shareholders).

Irrevocable commitments are, however, common and many times they include break-up fees and rollover agreements. See question below.

Can information be given to key shareholders in advance?
Market soundings may be possible under the MAR Regulation. After the offer is announced, all information must be made equally available to all target shareholders (and persons with information rights) at the same time and in the same manner.

Can a bidder obtain irrevocable commitments?
Yes. Bidders will often seek irrevocable commitments (or non-binding letters of intent) from key shareholders, but these will normally require a commitment to launch the offer in exchange. Note that if such agreements exist they must be disclosed in the prospectus.

Can the target provide financial assistance for a bid, such as security or loans?
No. A target is prohibited from providing any gifts, loans or security and from giving any other financial assistance.

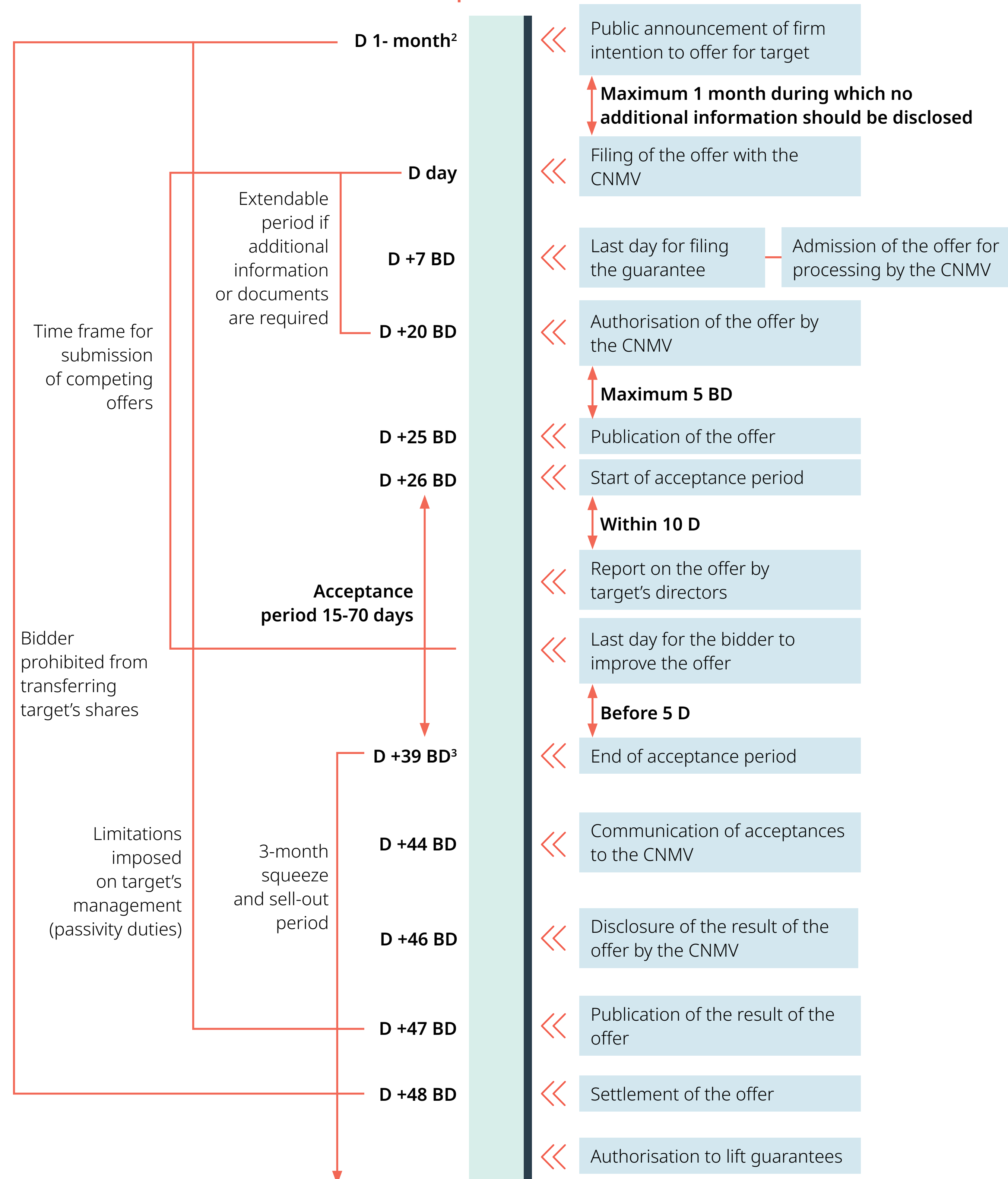
Can a bidder force the target to de-list?
Yes, either by a de-listing bid or when any of the following circumstances occur:

(a) where sell-out or squeeze-out rights apply;

(b) when there has been a preceding bid for an appropriate de-listing price launched for 100 per cent of the company and as result of which the bidder has acquired at least 75 per cent of the target's voting capital. In this case, the bidder must put forward an irrevocable "purchase order" to be kept open for a certain duration, whereby it commits to purchase any outstanding shares for the same price as in the takeover bid; or

(c) when the GSM agrees on a procedure which the CNMV considers equivalent to a de-listing bid and offers the same shareholder protection. This procedure usually consists of the GSM approving an irrevocable purchase order for a price that is appropriate for a de-listing bid and that has only been authorised in the past for companies with very small free float.

Indicative timeline of a takeover offer in Spain[1]



1. Timeline for an unconditional voluntary cash takeover bid without considering competing offers. It does not cover the scenario in which prior notification of the transaction to the competition authorities is required.
2. We have specified those cases in which Spanish provisions refer to business days (BD). When legislation is silent about business days or calendar days we have assumed they are calendar days, although different doctrinal views have been taken on this issue.
3. This 39-BD period is the result of adding to the number of days before the start of the acceptance period as exposed in the timeline (26 BD) the minimum acceptance period set out in Spanish legislation (15 days) which, for consistency and information purposes only, has been converted into 13 BD. 26 BD + 13 BD = 39 BD.

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15 United States

15.1 Background

In considering US regulation of public M&A transactions, it is important to understand that the US regime can apply whenever the target has shares that are beneficially held by US residents. In other words, the target does not have to be a US company for the US rules to apply and, in the case of a publicly traded company, the chances are there will be at least some US beneficial holders. Therefore, it is generally considered prudent to assume that the US rules will apply to any public M&A transaction and to consider the implications at the outset.

It is also important to remember that any company, regardless of where it is incorporated, that has a class of shares (which can include American Depositary Shares (**ADSs**)) registered under the US Securities Exchange Act of 1934, as amended (the **Exchange Act**), and that is therefore subject to the ongoing US reporting regime[1], is considered a "US public company". There are, however, certain differences in how the regulatory regime applies depending on whether the company is a US domestic company or a "foreign private issuer"[2]. In this section, the term "US public company" is used to refer to any company whose shares are registered with the US Securities and Exchange Commission (the **SEC**), regardless of where it is incorporated.

15.2 Regulation

The principal source of regulation of tender offers under the US federal securities laws for public M&A transactions is the Exchange Act and the rules and regulations promulgated thereunder.[3] In addition, if the consideration to be offered includes securities (whether equity or debt), the US Securities Act of 1933, as amended (the **Securities Act**), will also apply.[4]

15.3 Structure

Acquisitions of US public companies are generally structured either as mergers or as tender offers. Which approach is used will depend on a number of factors including commercial considerations, tax considerations, timing and whether the deal is agreed or hostile. Mergers are often used when the target is incorporated in the United States. Whether a merger structure can be used when the target is incorporated elsewhere will depend on the target's home country laws.

(a) Mergers

In a merger, typically the two companies will enter into a merger agreement that is subject to shareholder approval. If either party is a US-incorporated company, the process of obtaining approval of its shareholders will be subject to the requirements of the US securities laws governing proxy solicitation, and the law of the state where the company is incorporated will also be relevant. If the consideration being paid includes securities, then the Securities Act will also apply and it will be necessary to register the securities or, if feasible, rely on an exemption from registration.[5]

(b) Tender offers

Although the US securities laws set forth regulations governing tender offers, they do not actually define the term. There are two frequently used court interpretations that provide guidance in deciding what constitutes a tender offer. The first, commonly known as the "Wellman test", sets out eight factors to be used in evaluating whether a transaction is a tender offer, although not all the factors need to be present in order for a transaction to constitute a tender offer. They are:

(i) active and widespread solicitation of public shareholders for the shares of an issuer;

(ii) solicitation for a substantial percentage of the issuer's shares;

(iii) an offer to purchase made at a premium over the prevailing market price;

(iv) firm rather than negotiable terms of the offer;

1 In most cases, if a company has shares registered in the United States, those shares will be listed on a US exchange, but a listing is not required.

2 The difference typically depends on where the company is incorporated, but in certain circumstances a company incorporated outside the United States will nonetheless be regulated as a US domestic company. A company incorporated outside the United States will be a "foreign private issuer" unless (a) more than 50 per cent of its shares entitled to vote for directors are beneficially held by US residents and (b) either (i) the majority of its directors or executive officers are US citizens or residents or (ii) more than 50 per cent of its assets are located in the United States or (iii) its business is administered principally in the United States.

3 The relevant provisions are sometimes also referred to as the "Williams Act".

4 This section addresses only the US federal securities laws. If the target is incorporated in the United States, the bidder will also need to consider the laws of the state where the target is incorporated. In addition, regardless of where the target is incorporated, if the consideration to be offered includes securities, the bidder may need to consider the securities laws of the states where the target's US shareholders are located.

5 This section assumes the target is a US public company, which means it may be difficult to find an applicable exemption from the registration requirements. See section 15.4(b).

(v) an offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;

(vi) an offer open only for a limited period of time;

(vii) pressure on shareholders to sell their shares; and

(viii) public announcement of a purchasing programme concerning the target preceding or accompanying rapid accumulation of large amounts of the target's securities.

The second test, referred to as the "Hanson test", looks at whether, in the light of all the circumstances, it is likely that the target shareholders will lack the information they need to make a carefully considered evaluation of the proposed transaction if the tender offer regulations do not apply.

Tender offers can be made for any type of security. This section focuses on the regulations applicable to an offer made for the common stock/ordinary shares of a company.

15.4 Tender offers

(a) Exchange Act

All tender offers are subject to Regulation 14E under the Exchange Act. Furthermore, if the target is a US public company, the offer will also be subject to Regulation 14D under the Exchange Act.

(i) Regulation 14E

Regulation 14E imposes the following requirements:

a. The offer must be open for no fewer than 20 US business days. A US business day is any day other than a Saturday, Sunday or US federal holiday and is defined as 12.01 am to 12.00 midnight Eastern time (although, in practice, there is a small amount of flexibility on the first or last day of an offer).

b. Following an increase or decrease in the consideration being offered or the percentage of the class of securities being sought,[6] the offer must remain open for a further ten US business days and, following any other material change to the terms of the offer, it must remain open for a further five US business days.

c. Payment for the securities that are the subject of the offer must be made "promptly" after the close of the offer. What constitutes "promptly" for these purposes is not defined, but there is guidance that it will be determined by reference to the practices of the financial community, including current settlement practices (note that as of 28 May 2024, the US settlement cycle will change from T+2 to T+1).

d. The length of an offer cannot be extended unless there is a public announcement indicating the number of securities tendered to date issued no later than 9:00 am Eastern time on the US business day after the scheduled expiration of the offer (or, if earlier, the earliest opening of trading on any US exchange where the securities are traded).

e. No later than ten US business days after the commencement of the offer, the target must publish, or send or give to its shareholders, a statement that: (i) recommends or rejects the offer; (ii) says that it expresses no opinion on the offer and is remaining neutral; or (iii) states that it is unable to take a position regarding the offer, and includes the reasons for its position. If there is any material change in the target's position, it must promptly provide an amended statement.

f. Subject to certain exceptions, from the time the offer is publicly announced until it closes, persons involved with the offer (including the bidder, its affiliates and its advisers and their affiliates) may not, directly or indirectly, purchase or arrange to purchase the securities that are the subject of the offer or related securities (which are any securities that are immediately convertible into, exchangeable for or exercisable for the securities that are subject to the offer) other than pursuant to the offer. "Public announcement" for these purposes is defined as any oral or written communication by the bidder that is reasonably designed to inform, or has the effect of informing, the public or security holders in general about the tender offer. Note that public announcement of the offer is very often not the same as, and may well occur some time before, formal commencement of the offer.

In addition, all tender offers are subject to the US anti-fraud and anti-manipulation rules.

(ii) Regulation 14D

If the tender offer is for the shares of a US public company, then, in addition to complying with Regulation 14E, the offer needs to comply with Regulation 14D, which imposes the following requirements:

a. As soon as practicable on the date the offer commences, the bidder must file a tender offer disclosure document, known as a Schedule TO, with the SEC and provide a copy to the target and any other bidder that has filed a Schedule TO with respect to the same class of shares. The relevant disclosure requirements are contained in Regulation M-A under the Exchange Act.

b. The target may not make any solicitation or recommendation regarding the tender offer unless, as soon as practicable on the date it does so, it files a Tender Offer Solicitation/Recommendation Statement on Schedule 14D-9.

c. The tender offer must be made to all holders of the class of shares being sought.

d. The highest consideration paid to any shareholder for tendered shares must be paid to all shareholders tendering shares.

e. Any person who tenders shares in the offer must have the right to withdraw them at any time until the offer closes.

6 Under the US rules, it is possible to undertake a "partial tender offer", whereby the bidder seeks to acquire less than 100 per cent of the outstanding shares. Additional requirements apply in the case of a partial tender offer.

f. Following the closing of the initial offer, a bidder may commence a subsequent offering period as long as:

   (i) the bidder announces the results of the initial offer no later than 9:00 am Eastern time on the next US business day after it closes and immediately begins the subsequent offering period;

   (ii) the bidder immediately accepts and promptly pays for all shares tendered in the initial offer;

   (iii) the subsequent offering period is at least three US business days;

   (iv) the offer is for all outstanding shares of the class (i.e. there can be no partial tender offers);

   (v) the bidder immediately accepts and promptly pays for any shares tendered in the subsequent offering period as they are tendered (note that the bidder is not required to offer withdrawal rights during a subsequent offering period); and

   (vi) the bidder offers the same type and amount of consideration in both the initial and the subsequent offering periods.

There are also certain limitations applicable to publicity and announcements in connection with an offer subject to Regulation 14D.

If the offer has not yet commenced, a communication will not be deemed to constitute commencement of the offer (triggering the obligation to file the Schedule TO) so long as (A) the announcement does not contain the means for target shareholders to tender their shares and (B) all written communications relating to the offer from the time of the first public announcement are filed with the SEC no later than the date on which they are made.

The target may make communications relating to the offer prior to the time it commences as long as the communication is filed with the SEC no later than the date it is made. Once the offer commences, the restriction on making any solicitation or recommendation until the response statement on Schedule 14D-9 has been filed may limit the target's ability to make any communications relating to the offer. This can be a particularly thorny issue in a hostile offer context. It is permissible for the target to publish what is known as a "stop-look-and-listen" communication prior to filing its Schedule 14D-9. However, this communication may only identify the offer, indicate that the target is considering the offer, state the date on which the target expects to be able to make its recommendation and request that its shareholders delay making any decision until such time as the Schedule 14D-9 is filed.

(iii) Exemptions from the tender offer rules

If the target is a "foreign private issuer", there may be exemptions from some or most of the rules governing tender offers. The availability of the exemptions depends on the level of US share ownership, which is measured on the basis of beneficial ownership. In order to determine the level of US ownership, the bidder must "look through" any banks, brokers or other nominees appearing on the target's register with an address in the target's jurisdiction of incorporation, the jurisdiction of its principal trading market (if different) or in the United States by making reasonable enquiries as to the residence of the beneficial owners of the shares. In addition, (A) the calculation must be made on a date that is no more than 60 days before and no more than 30 days after the date the offer is publicly announced; (B) if there are ADSs or Global Depositary Shares over the target's shares, the underlying shares must be included in calculating the total number of shares outstanding and those held by US holders; (C) securities convertible or exchangeable into target shares are not counted; and (D) any target shares held by the bidder must not be included in either the numerator or the denominator. There are certain accommodations available if the bidder is not able, after reasonable effort, to obtain information about the amount of shares beneficially held by US holders or if the offer is a hostile one. In addition, a subsequent bidder is entitled to rely on the same exemption as the initial bidder without doing an independent analysis.

Tier I

The Tier I exemption is available if no more than 10 per cent of the target's shares are beneficially held by US residents. Tier I provides virtually a complete exemption from the procedural requirements of the US tender offer rules, although an offer that qualifies for Tier I relief will still be subject to the anti-fraud and anti-manipulation rules. Under Tier I, the bidder must make any offer document available to target shareholders in the United States in English. Furthermore, if the offer would otherwise be subject to Regulation 14D, the bidder must submit the English language offer document to the SEC under cover of Form CB and, if the bidder is a foreign company, appoint an agent for service of process in the United States by filing Form F-X. If the bidder or its advisers intend to make purchases of the securities that are the subject of the offer outside the offer, an exemption from the prohibition on that activity is available for a Tier I offer as long as the offer document contains certain language indicating that those purchases may occur. In a Tier I offer, the bidder may offer US shareholders only cash consideration, notwithstanding that it is offering non-US shareholders consideration that includes securities, as long as the bidder reasonably believes that the amount of cash being offered is substantially equivalent to the value of the consideration being offered to non-US shareholders.

Tier II

The Tier II exemption is available if no more than 40 per cent of the target's shares are beneficially held by US residents. Tier II provides the following relief:

- The bidder can conduct separate offers for US holders and non-US holders, as long as the US offer is made under terms at least as favourable as the non-US offer.
- Notice of extensions of the offer can be made in compliance with the target's home country rules.
- Payment made in accordance with the standards of the target's home country will be considered "prompt".
- In commencing a subsequent offering period, compliance with the standards of the target's home country will satisfy the requirements regarding timing of the announcement and prompt payment.
- If required by foreign law, the payment of interest on securities tendered during a subsequent offering period is permitted.
- Subject to certain conditions, the bidder may suspend withdrawal rights (if applicable) during the time securities tendered in the initial offer are being counted.
- Subject to certain conditions, if offering different forms of consideration (i.e. a "mix and match election"), the bidder can establish a limit on the availability of one or more forms of consideration.
- Subject to certain conditions, the bidder and its financial advisers can make purchases of the securities that are the subject of the offer outside the offer.

As can be seen, with the exception of the last point, Tier II relief is of limited benefit if the tender offer is not subject to Regulation 14D.

(iv) Exclusion of US shareholders

Although the US tender offer rules on their face relate to all tender offers, if there is no jurisdictional nexus with the United States then there is no basis for the rules to apply. Accordingly, if the target is not a US company and the offer does not involve the use of "US jurisdictional means", then there should be no need to comply with the US requirements. In practice, avoiding the use of US jurisdictional means requires that there be no communication of any sort with anyone in the United States and no dissemination of the offer document or any communications relating to the offer in or into the United States. This latter point typically requires implementing certain procedures with respect to websites and other forms of electronic communications as any site or communication freely accessible from the United States will be deemed to have been disseminated there.

As a practical matter, it will likely be difficult to exclude US shareholders if the target is a US public company. If the target is not a US public company, whether it makes sense to try to exclude US shareholders will depend principally on the percentage of shares held in the United States (i.e. will the bidder be able to reach the compulsory acquisition threshold under the laws of the target's home country without the participation of US shareholders) and whether the bidder is willing and able to comply with the requirements of Regulation 14E. If securities are being offered as consideration, the bidder's ability to comply with the requirements of the Securities Act may also be a consideration.[7]

(v) Beneficial ownership reporting

In order to prevent bidders from secretly assembling significant stakes in target companies without the target's knowledge, the Exchange Act requires that any person (or persons acting together as a group) who acquires in excess of 5 per cent of a US public company file a beneficial ownership report with the SEC. With certain exceptions, the form must be filed within five business days after crossing the 5 per cent threshold and must indicate if the acquirer has any intention of changing or influencing control of the issuer. The beneficial ownership report must be amended within two business days if there is any material change in the information reported, including an increase or decrease of 1 per cent or more in the holding or a change in the reason the stake was acquired.

7 A bidder may be able to avoid having to register securities under the Securities Act by making cash available to the US shareholders. This can be done either by offering a cash alternative that must be taken by US shareholders for whom no exemption from the registration requirements of the Securities Act is available or, if feasible, undertaking a "vendor placement". In a vendor placement, the bidder (or a third party on behalf of the bidder) sells outside the United States the securities that would otherwise be issued to US shareholders and the proceeds are remitted to the US shareholders. There are a number of factors to be considered in determining whether a vendor placement is feasible in any particular situation including, but not limited to, the level of US shareholding in the target, the amount of the bidder's securities to be issued as compared to the amount outstanding before the offer, the size and liquidity of the market for the bidder's securities and whether the vendor placement would be permissible under any applicable equal treatment rules. If the target is a US public company and the US equal treatment rules apply, the bidder would need to obtain an exemption from those rules from the SEC in order to conduct a vendor placement.

(b) Securities Act

If the consideration being offered in a tender offer includes securities of any sort (i.e. the offer is an "exchange offer"), then, in addition to complying with the US tender offer rules, the bidder will need to consider the Securities Act. The basic requirement of the Securities Act is that any offer or sale of a security must be registered or made pursuant to an exemption from the registration requirements. As a practical matter, if the target is a US public company, it may be difficult to find an exemption, meaning the bidder will have to comply with the registration requirements. If the bidder is not itself already a US public company, this requirement can add significant cost and time to a transaction as the bidder will have to provide significant disclosure about itself and will also become subject to the ongoing US reporting regime.

- One exemption that could, potentially, be available even if the target is a US public company is contained in Rule 802 under the Securities Act. This exemption is similar to the Tier I exemption and provides that in an exchange offer (or other form of business combination) where the target is a foreign private issuer, the offer of securities will be exempt from the Securities Act registration requirements if no more than 10 per cent of the target's shares are beneficially held by US residents.
- If the target is not a US public company, it may be possible to structure the tender offer so that only those US shareholders that are eligible to participate in an exempt offering, such as a private placement transaction, actually receive the securities.

15.5 Schemes of arrangement

In certain jurisdictions, such as England and Wales and Australia, an acquisition can be accomplished using a process known as a scheme of arrangement. Broadly speaking, this process requires the target shareholders to vote on the transaction, which is then submitted to a court for approval. Under the US securities laws, this type of transaction is not considered to be a tender offer and is therefore not subject to the tender offer rules. Moreover, if securities are being offered as part of the consideration, there is an exemption available from the registration requirements of the Securities Act, meaning target shareholders in the United States can receive the securities.[8]

The US regime can apply whenever the target has shares that are beneficially held by US residents, meaning a takeover can be governed by US regulations as well as those of another jurisdiction. In such cases, the timetable for the transaction will be determined primarily by the target's local jurisdictional requirements, subject to any additional applicable requirements of the US regime.

8 If the securities being offered are debt securities, they will be subject to the requirements of the Trust Indenture Act of 1939, as amended (the TIA), notwithstanding the exemption available from the registration requirements of the Securities Act. In some acquisitions of UK companies, the bidder makes available loan notes, which are debt securities that provide tax advantages to target shareholders that are UK taxpayers. To avoid having to comply with the TIA requirements, the loan note alternative is generally not made available to target shareholders in the United States.

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