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Malta

Mergers & Acquisitions

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Malta.

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Malta: Mergers & Acquisitions

1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

The key laws relevant to a local M&A transaction include the following:

i. The Companies Act (Chapter 386) which regulates the general principles of company law;
ii. The Civil Code (Chapter 16), which is the primary piece of legislation that regulates contractual relationships and their many facets;
iii. The Commercial Code (Chapter 13), which regulates, from a general standpoint, commercial transactions;
iv. Where the target is subject to regulatory licenses, reference must be made to any applicable law. These would include:
    - The Gaming Act (Chapter 583) for gaming companies
    - The Investment Service Act (Chapter 370) for investment companies
    - The Financial Institutions Act (Chapter 376) for payment services and electronic money institutions amongst others
    - The Banking Act (Chapter 371) for credit institutions
    - The Insurance Business Act (Chapter 403) for insurance companies
v. Taxation related laws including:
    - The VAT Act (Chapter 406)
    - The Income Tax Act (Chapter 123)
    - The Income Tax Management Act (Chapter 372)
vi. Other ancillary legislation which may come into play, such as the following:
    - The Competition Act (Chapter 379);
    - Control of Concentration Regulations (LN294 of 2002)
    - The Employment and Industrial Relations Act (Chapter 452)
    - National Foreign Direct Investment Screening Office Act (Chapter 620)
    - Various intellectual property related laws including the Copyright Act (Chapter 415), the Trademark Act (Chapter 597), and the Patent and Designs Act (Chapter 417)

The above listed laws would also include any applicable subsidiary legislation and relevant regulation issued by the relevant authorities.

With regard to key Maltese regulatory authorities in the M&A sphere, the following should be of particular note:

i. The Malta Financial Services Authority (MFSA), which is the regulatory body entrusted with the licensing and supervision of financial services companies.
ii. The Office for Competition within the Malta Competition and Consumer Affairs Authority (MCCAA), which oversees competition-related facets of M&A.
iii. The Malta Gaming Authority (MGA), which is the local gaming regulator.
iv. The Department of Employment and Industrial Relations, which is the department responsible for overseeing employment-related matters.
v. The Malta Business Registry (MBR), which is the local company registry.

2. What is the current state of the market?

Owing to Malta's business-friendly mentality and attractive tax regime, the jurisdiction has managed to withstand the various economic and geopolitical tensions and uncertainties, together with the COVID-19 pandemic. This has aided in preserving the free flow of M&A transactions.

Malta's attractiveness is also enhanced due to its EU membership, allowing easy access to the EU markets,making it the go-to jurisdiction for FDI and cross-border acquisition. Moreover, Malta's financial services and fintech sectors have proven, together with the gaming and betting industry, their ability to stand the test of time.

3. Which market sectors have been particularly active recently?

The following industries have experienced an increase in M&A activity:

- Financial Services & Fintech: Malta boasts an excellent financial services industry, which brings together sectors such as banking, insurance, investments funds, payments and crypto asset service providers (CASPs). Further growth is expected, specifically in relation to CASPs, with the entry into force of MICAR, which could potentially increase M&A activity.

- iGaming: Malta is a global leader in the remote and iGaming spheres, with the Maltese jurisdiction being home to some of the largest gaming operators in the world. Hence, M&A activity in the gaming sector is very strong and is expected to remain strong in the coming years. Furthermore, there has been an increase in M&A deals, with companies having smaller operators opting to merge in order to scale operations.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

i. Fiscal and Tax Considerations: Understanding Malta's regulatory and fiscal landscape is of critical importance. Changes to applicable regulations are constant and companies must obtain proper advice to best take advantage of the Maltese fiscal regime while remaining compliant with their applicable regulatory regimes.
ii. Sector-specific growth and consolidation: The continuous growth in businesses operating in sectors such as iGaming, financial services, pharmaceuticals and fintech augurs well for Malta to maintain its growth in the M&A sphere and continue developing as a business-friendly jurisdiction.
iii. Sensitivity to global economic conditions: The economic and geographic reality faced by Malta means that it is highly sensitive to the ever-shifting economic trends, such as interest rates, inflation and present geopolitical tensions.

5. What are the key means of effecting the acquisition of a publicly traded company?

Public M&A transactions are dealt with in a different manner. In this regard, the law empowers the MFSA, through the Capital Market Rules, to supervise the transfer of shares in a public listed company. The Capital Market Rules, which transpose the EU Takeover directive, deals with takeover bids under Chapter 11 of the rules. These rules have a significant effect on the entire mechanics of the transaction.

6. What information relating to a target company is publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

When the acquisition of a company is being considered, information which may be publicly accessed includes the following:

i. Financial Statements and Annual Reports:

- Listed entities must publish financial statements both on an interim, where and if required, and on an annual basis. Such financial statements include balance sheets and profit and loss statements. Non-listed entities are also required to publish their audited financial statements, but with a reduced level of detail.
- Memorandum and Articles of Association, which serve as the company's constitutive documents and contains information pertinent to the company's status, directors, share capital and representation rights, amongst others.
- Regulatory Filings and Corporate Information:
  - Licensing details (for regulated industries like financial services and iGaming) are normally made publicly available.
  - Information on legal disputes or insolvency proceedings are attainable from the Malta Courts website (https://ecourts.gov.mt/onlineservices/).

On the other hand, although the general rule is that no company is obliged to disclose due diligence information, the extent of information to be provided depends on various factors usually dealing with the negotiations . However, there are some disclosures which are compulsory, specifically when dealing with market abuse regulations and other transparency requirements for listed entitles.

7. To what level of detail is due diligence customarily undertaken?

In most cases, due diligence exercises are typically limited to Red Flag exercises on a set of pre-determined issues. The exercise would also typically involve materiality limits based on the size and interest of the target undertaking.

8. What are the key decision-making bodies within a target company and what approval rights do shareholders have?

The decision-making responsibilities rest with the board of directors who are left to deal with the general day-to-day running of affairs of any company. Other matters, however, are then reserved to the shareholders of the company, where decisions are then taken at the general meeting. This would typically include changes to the

company's Memorandum and Articles of Association and dissolution of the company amongst others. Companies are also free to reserve numerous matters to be decided upon by the shareholders. This would be dealt with in the Memorandum and Articles of Association of the company or in a private shareholders agreement.

9. What are the duties of the directors and controlling shareholders of a target company?

The directors have a primary fiduciary duty towards the company, and any acts they undertake must be taken in its best interest. These include the following duties:

1. Directors must prioritise the long-term health of the company, refraining from putting their interests in first place;
2. They should objectively assess any takeover offer and its impact on all stakeholders.
3. Directors also have the responsibility to ensure that there are no conflicts of interest which may cloud their judgement and must make decisions based on diligence and skill.
4. Specifically with regard to M&A transactions, directors are typically expected to inform shareholders of any offer involving takeover and treat all shareholders equally.
5. Moreover, for public companies, the directors may not seek to frustrate bids without shareholder approval. This emanates from the Capital Markets Rules.

Controlling shareholders, on the other hand, should not abuse majority control and ought to seek the input of minority shareholders when a takeover bid comes in.

In hostile transactions in public-listed companies, where there is no agreement between the Board of the target and acquirer, shareholder approval must be sought prior to taking any defensive actions.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

In Malta, employees may be afforded certain rights when a company undergoes an M&A transaction. Generally, while they are not endowed with any approval rights, they may provide their input in general consultations and to be granted access to information. They are also granted rights and certain protective measures under Maltese employment law.

11. To what degree is conditionality an accepted market feature on acquisitions?

Conditionality is widely used in private acquisitions to ensure that certain key requirements are met before completion. The most commonly-accepted conditions include approval from the respective Authority, such as approvals from the MFSA, the MGA and the MCCAA. Other conditions would typically also include the carrying out of specific obligations either by the sellers or the target, prior to the execution of the transaction, such as paying off certain debts.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

Typically, such undertakings of exclusivity are entered into contractually between the parties either through an exclusivity agreement or by inserting specific exclusivity clauses in any preliminary agreement entered between the seller and the buyer.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

In M&A transactions, potential acquirers often employ deal protection mechanisms with a view to minimising risks and ensuring that the transaction goes through without unnecessary impediments.

These include measures such as break fee mandates, which would be triggered in the event that the seller pulls out of the transaction, with the effect that a penalty would be due by the seller, in line with pre-contractual liability concepts. Break fees protect buyers from unnecessary burdens relating to due diligence and negotiation if the seller opts to accept another offer. Sellers sometimes opt to negotiate a reverse break fee, in which the buyer would need to pay compensation should they fail to go through with the deal.

14. Which forms of consideration are most commonly used?

In Malta, M&A transactions typically involve the following three primary forms of consideration:

i. Cash payments:

While cash transactions provide the buyer with an effective and efficient exit strategy, such deals require

that the buyer has a certain level of liquidity which can lead to additional due diligence on source of wealth and funds from the banking establishments receiving the funds.

ii. Payments of shares:

Share-based transactions occur when the acquirer offers their own shares instead of a payment in cash, providing the platform for the target company to maintain a level of involvement in the merged entity. This option is considered in strategic mergers where both parties see long-term value in combining their operations.

iii. Creation of hybrid structures:

A hybrid structure, combining cash and shares, is frequently used as a means to balance risk and liquidity. Here, the sellers are monetarily compensated, while being afforded the opportunity to retain a stake in the acquiring company. The structure aligns the interests of both parties, with sellers benefitting from the entity's immediate and future growth while reducing risks attributable to financial exposures. Where there is a cross-border M&A, consideration may also take the form of earn-outs, entailing that additional payments are made if financial targets are met after the acquisition would have been completed.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

In Malta there are no disclosure requirements for private companies, irrespective of scale. However, there are disclosure requirements for acquiring stakes in publicly traded companies, with such disclosures being strictly regulated under MFSA and EU transparency laws. These include:

1. Initial Disclosure Thresholds: Requirements for majority shareholding are delineated under Chapter 5 of the CMRs. This Chapter mandates that persons who purchase shares with voting rights attached therewith shall inform the issuer and the MFSA delineating the voting rights proportions held by the acquiring shareholder owing to said acquisition. This notification should be done whenever certain thresholds are exceeded.
2. Mandatory Takeover Threshold: When an acquirer exceeds 50% of voting rights, a takeover bid would need to be launched so as to ensure minority shareholder protection.

16. At what stage of negotiation is public disclosure required or customary?

Public disclosure is required at different stages of the M&A process, based on the impact of the deal on shareholders. Disclosure is typically done either once the negotiation becomes concrete, once the agreement is reached or once a formal takeover bid is made.

17. Is there any maximum time period for negotiations or due diligence?

Maltese law does not mandate a maximum time limit for negotiations or due diligence to be completed. However, general market practices dictate completion expectations. The due diligence phase is, by and large, dependent on the size of the transaction and covers aspects such as the target company's legal financial and tax compliance.

18. Is there any maximum time period between announcement of a transaction and completion of a transaction?

The law does not provide for a specific limit within which the transaction must be completed. Despite this, the timeframe is normally influenced by certain ancillary constraints and regulatory requirements. Therefore, M&A deals typically take 3 to 12 months from commencement to completion, but this is naturally dependent on the nature and complexity of the transaction at hand, since not every transaction is the same.

19. Are there any circumstances where a minimum price may be set for the shares in a target company?

Maltese law does not impose minimum pricing requirements.However for public listed companies, the Capital Market rules state that, where there is a mandatory takeover bid, the offer price must be equitable to protect minority shareholders and overall market integrity.

20. Is it possible for target companies to provide financial assistance?

The general position under local law is that financial assistance from the target company, which is a public-listed company, is prohibited. This restriction is in place to prevent risks such as market manipulation and

conflicts of interest, among others.

21. Which governing law is customarily used on acquisitions?

M&As in Malta are primarily governed by Maltese Law. However, in cases with a cross-border element, the parties may opt for the law of a foreign jurisdiction which is more closely associated with the parties.

22. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

Bids for public listed companies are regulated by the Capital Market Rules, whereby the offeror is typically required to draw up and make public an offer document within 21 days from when the offeror announced their intention to launch a bid on the target. The offer document must include specific information as outlined under the Capital Market Rules. The document must be provided to the MFSA before it is made public.

23. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

When a share transfer occurs, be it conducted in pursuit of an M&A transaction or a private sale, it must contain certain formalities which are required by the MBR. These include the filing of statutory forms such as the “Form T” and a notification related to the change in beneficial ownership (if any). The filing would also include other forms and documents depending on any changes brought about by the transaction.

With regard to tax and duties, certain exemptions may be applicable on stamp duty, which is normally at a rate of between 2% to 5%, together with several capital gains exemptions, depending on the nature of the transaction. For instance, should the company have more than 90% of its business outside of Malta, the DDT10 exemption would apply, exempting the company whose shares would have been transferred from paying stamp duty. Moreover, capital gains exemptions are applicable when the company in question is a publicly-listed company. When filing a share transfer, the submission would also include a separate filing with the Tax Unit, which filing comprises of several tax forms, and depending on the nature of the transaction, a copy of the transfer agreement, reports by relevant experts and copies of financial statements.

24. Are hostile acquisitions a common feature?

While hostile takeovers are permitted, they are quite rare.

25. What protections do directors of a target company have against a hostile approach?

The capital market rules state that. generally, the directors of the company cannot take or permit any action in the affairs of the target company that could result in:

- An offer being frustrated;
- The holders of the securities of the target being prevented from the opportunity to decide on the matter.

However, such actions are in fact allowed if:

- Such action is approved by an ordinary resolution of the company;
- The action is taken or permitted under a contractual obligation entered into by the Target, or in the implementation of proposals approved by the board of Directors of the Target, and the obligations were entered into, or the proposals were approved, before the Target received the takeover notice or became aware that the offer was imminent
- If the above two points do not apply, the action is taken or permitted for reasons unrelated to the offer with the listing authority's prior approval.

26. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

In Malta, a mandatory takeover offer must be made when an acquirer acquires a controlling interest in a publicly listed company. As soon as the threshold is reached, the acquirer will be bound to make an offer on the remaining shares to the minority shareholders at a fair and equitable price as determined by the capital market rules.

27. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

With regard to public companies, should an acquirer acquire 90% or more of the voting rights in the target, minority shareholders are granted sell-out rights, which means that they can force the majority shareholder to purchase their shares at a reasonable price.

From a general perspective, the law allows for the Unfair Prejudice Remedy. This flexible remedy empowers minority shareholders to take legal action against the majority shareholders where they believe that the company's affairs are being handled in an oppressive or discriminatory manner against them. In such instances, the Courts may decide on various options which include the granting of compensation, ordering that the shares be bought out, or ordering corporate restructuring in an effort to preserve minority rights.

28. Is a mechanism available to compulsorily acquire minority stakes?

Similarly to the sell-out rights, Malta adopts the notion of a squeeze-out mechanism under the capital market rules for listed companies, which allows a majority shareholder who would have acquired 90% or more of a company's voting rights to force the remaining shareholders to sell the acquirer their remaining shares at a fair price for cash. This right must be exercised within 3 months at the end of the time allowed for acceptance of the takeover bid.

For private companies, a merger by acquisition may only be executed if an extraordinary resolution is passed by the general meeting of both companies. In the event that there are dissenting shareholders, their shares may be redeemed at the shareholders' request as determined by agreement with the company or as determined by the court.

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