MERGERS AND ACQUISITIONS Q&A FORMAT

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The Companies Act (Chapter 386 of the Laws of Malta), the general law of Obligations governing contracts contained in the Maltese Civil Code (Cap 16 of the Laws of Malta) and the Listing Rules promulgated by the Listing Authority are the cornerstones of M&A regulation in Malta.

The financial services industry is regulated further by a number of legislative instruments, amongst which is The Financial Markets Act (Cap 345 of the Laws of Malta) ("FMA"), which makes provision for the designation of recognised stock exchanges and their regulation, the setting up of the Listing Authority that deals with the official admissibility of securities to listing on recognised stock exchanges, and the regulatory powers of the Listing Authority. The Listing Authority forms part of the single financial services regulator known as the Malta Financial Services Authority, the consolidated regulator for the securities industry, banking and insurance. The regulatory environment also establishes a regime to prevent market abuse through the Prevention of Financial Markets Abuses Act (Cap 476 of the Laws of Malta), which also deals with the prohibitions of insider dealing and other phenomena of market abuse such as market manipulation. The Listing Authority has promulgated the Listing Rules and transposed the Prospectus Directive and the Disclosure and Transparency Directives, apart from the Take-over rules already mentioned above.

1.2 Are there different rules for different types of public company?

Maltese law and regulation distinguishes between the acquisitions of companies whose equity securities are listed on a recognised stock exchange and those whose equity securities are not so listed. Whilst the Companies Act would apply to both types of companies, the take-over rules that would apply to the acquisition of listed companies are found in the Listing Rules published by the Listing Authority (the take-over rules are contained in Chapter 18 of the Listing Rules published by the Malta Listing Authority and can be accessed from www.mfsa.com.mt). The Companies Act and regulations made thereunder also deal with the public offer of securities and the basic prospectus requirements for such offers.

1.3 Are there special rules for foreign buyers?

There are no restrictions or limitations for inward foreign investment.

1.4 Are there any special sector-related rules?

Apart from general anti-trust filings that may be required in terms of the Regulations on Control of Concentrations 2002 (regulations issued in terms of the Competition Act, 1994 Cap. 379 of the Laws of Malta) for the purpose of transposing into Maltese law Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004), depending on the sector of industry where the target company may be authorised to undertake business, regulatory consents may be required. Typically, regulatory consent will be required in the case of targets that are licensed by a regulatory authority; for instance, companies licensed as credit or financial institutions under the Banking Act (Chapter 371 of the Laws of Malta) and/or Financial Institutions Act (Chapter 376 of the Laws of Act), or licensed operators under either of the Investment Services Act (Chapter 370 of the laws of Malta), the Insurance Business Act (Chapter 403 of the Laws of Malta, the Insurance Intermediaries Act (Chapter 487 of the Laws of Malta)), the Trust and Trustees Act (Chapter 331 of the Laws of Malta or the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta)).

1.5 What are the principal sources of liability?

In the case of companies whose securities are listed and traded on a regulated market these risks, although manageable, would normally be more far reaching than in the case of the acquisition of private companies or public companies whose shares are not publicly traded. The major risk, as in any M&A transaction, would be the unguarded contact with shareholders of the Company, sometimes the result of the over-zealousness of bidders or their advisers. The principles of the maintenance of a fair market and equality of shareholder treatment that permeates the listing rules for companies admitted to listing on a recognised exchange in Malta render this a risk area for allegations of market manipulation and/or insider trading.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Clearly, different transactions require different methods of approach. A substantial number of Maltese listed companies have a core shareholding that is held by one or more families traditionally at the forefront of entrepreneurial activity in Malta. Whilst such groups of shareholders would retain overall control of the company being invested in, the public float in most instances would be in the region of 25 per cent of a company's total issued share capital. This can have two opposing effects. If there is the agreement or consent of the controlling shareholder then an acquisition of control becomes an easier task whilst trying to acquire control in any other manner would be almost impossible. Acquisitions can take either the form of overall control or by taking a large enough equity stake through subscription by bringing the company within a joint control situation. Mergers have not been a common occurrence in the Maltese market. Reverse takeovers are also possible.

The takeover of more closely knit companies not having their shares publicly traded on a regulated market are by far more common in Malta. These would normally take the form of outright acquisitions, whether by way of an acquisition of shares in the target or by way of asset acquisitions. In most cases the transaction structures are driven by tax efficiency considerations which allows for creative and innovative transaction structuring.

2.2 What advisers do the parties need?

Depending on the type and scale of the transaction and on its complexity it is typical for there to be at least three sets of advisers, with each of the buyers, the sellers and the Company having its own advisers. These would normally include investment bankers (always present on the buy side), accountants and the legal advisers. In instances where the sellers are small public shareholders the role of the company and its directors becomes more significant so that it is the company and its directors that would be advising the public shareholders, who would not be acting as one front and would therefore not have their own advisers.

2.3 How long does it take?

There is no blueprint for how long an acquisition may take, but again depending on the type, scale and complexity of the transaction it would typically last between six to nine months. In terms of the Listing Rules, the timetable for an open offer must be approved by the Recognised Investment Exchange on which the issuer's securities are listed and traded.

2.4 What are the main hurdles?

Assuming a negotiated acquisition with a controlling shareholder, where control of the target will be acquired through the acquisition of one or just a few shareholders already exercising control over the target, the main hurdles would include first obtaining the approval in a general meeting of shareholders to provide the relative data and information to the prospective purchasers to enable them to undertake their own due diligence. In terms of the Listing Rules, where there is a proposed transaction for at least 10 per cent of the issued share capital of a listed company shareholder approval is necessary to provide confidential information to enable a *bona fide* offeror to make or to confirm a bid and any such information can only be provided under terms of confidentiality.

Once this hurdle is surmounted the next is the preparation of the data room and due diligence materials that will lead into the negotiation of the commercial terms of the deal and the preparation of documentation. In the event that the target is a regulated company, regulatory approval may also become necessary, apart from appropriate anti-trust filings. If negotiations are successful and the deal is closed, with the new owners obtaining control of the target, then within 7 days of acquiring control the offeror has to announce its intention to launch a mandatory bid to the remaining shareholders. No mandatory bid would be required in the event that control is acquired by a bidder following a voluntary bid made to all shareholders.

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

There is a level of flexibility in the process. However, the fundamental principle remains the equality of treatment of shareholders and the listing rules provide clear guidance on the offer price that should be made to the remaining shareholders. Indeed, listing rule 18.8, which requires a mandatory bid to be made, expressly requires that bid to be made at the *equitable price.* Rules 18.38 to 18.40 then determine how the equitable price is to be established.

The equitable price to be paid for securities is the highest price determined by the following criteria:

- the price offered for the security should not be below the weighted average price of the security or the security transactions made on a Recognised Investment Exchange during the previous six months;
- the price offered for the security should not be below the highest price paid for the security by the offeror or persons acting in concert with the offeror during the previous six months;
- the price offered for the security should not be below the weighted average price paid for the security by the offeror or persons acting in concert with the offeror during the previous six months;
- the price of the security should not be lower than ten percent below the weighted average price of the security within the previous ten trading days.

In addition, if after the bid has been announced and before the offer closes for acceptance, the offeror or any person acting in concert with him purchases securities that are priced higher than the offer price, the offeror shall increase his offer so that it is not less than the highest price paid for the securities acquired.

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

In terms of the Maltese Listing Rules a bid can be made either for cash or for other securities or a combination of both; however, in all instances a shareholder must be offered a full cash alternative. In view of this latter alternative there are no significant differences between the processes.

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

In the context of a mandatory bid the same terms are to be offered to all shareholders.

2.8 Are there any limits on agreeing terms with employees?

Provision is made for a consultative process with employees or their representatives, including the declaration by an offeror in the offer document of any strategy that it may have for employment in the target and the impact that the acquisition may have on employees and employment. Any limits relative to the shedding of employees or any change to the terms and conditions of employment are, however, to be determined by labour and employment legislation.

2.9 What documentation is needed?

Until such time as control is acquired from one or more shareholders, share purchase agreements may and normally will be required. If it is intended that control is to be acquired through a general but voluntary bid to all shareholders or once control has been acquired and a mandatory bid is to be launched, the offeror has to prepare and offer documentation to shareholders containing the terms of the offer and the intentions of the offeror for the business of the target. This is the principal document that is necessary in the context of a mandatory bid. The offer document should also contain a report by an independent expert that would report to shareholders on the consideration offered whether that is in the form of securities, cash or a combination of both. The opinion of the directors with respect to the offer being made is also another material document that would be required to be made publicly available.

2.10 Are there any special accounting procedures?

There are no special accounting procedures other than those prescribed in accordance with the International Financial Reporting Standards. A recent amendment to the Companies Act introduced the possibility of merger accounting in relation to the share premium account in the context of a takeover. In terms of this amendment, the provisions of the Companies Act regulating the maintenance of a share premium account shall not apply when the company issuing shares ("the issuing company") has secured at least an eighty per cent equity holding in another company in pursuance of an arrangement providing for the allotment of equity securities in the issuing company on terms that the consideration for the shares allotted is to be provided:

(*a*) by the issue or transfer to the issuing company of equity securities in the other company; or

(*b*) by the cancellation of any such shares not held by the issuing company.

2.11 What are the key costs?

Typically, the principal costs involved are:

(a) financial advisers' fees;

(b) legal counsel fees;

(c) fees of accountants and other professional advisers;

(d) marketing and PR costs; and

(e) printing, mailing and other administrative costs.

2.12 What consents are needed?

Apart from the approval by the shareholders of the target company, the main consents which would be required are regulatory and anti-trust approvals.

2.13 What levels of approval or acceptance are needed?

In terms of the Listing rules a bidder would only be able to squeeze-out minority shareholders upon acquiring 90 per cent of the target's issued share capital.

2.14 When is the consideration settled?

The time at which settlement of the consideration shall take place is normally determined in the offer document.

3 Friendly or Hostile

3.1 Is there a choice?

There are no legal or regulatory impediments to hostile bids. The Directors of a target however cannot generally take any defensive action that is calculated to an offer being frustrated or that could effectively deny the shareholders of an opportunity to decide on the merits of an offer. However, it would be possible for the directors to take such defensive tactics if the shareholders in general meeting approve the proposed action or if such action is taken pursuant to some contractual obligation of the target entered into prior to the offer having been made or for reasons unrelated to the offer and with the approval of the Listing Authority.

3.2 How relevant is the target board?

The target board is required to set out its opinion to the shareholders and to draw up and make available to the public a document setting out its opinion of the bid and the reasons on which it is based. Once these opinions are published, it will be a matter for the shareholders to determine the outcome of the offer.

3.3 Does the choice affect process?

The process would only be marginally affected in the case of a hostile bid which would still require the full process to take its course and the publication of an offer circular to all shareholders. Whilst the offer in these circumstances would be encountered by a negative opinion of the directors to the shareholders, ultimately it is the general meeting of shareholders that would decide whether to accept the offer.

4 Information

4.1 What information is available to a buyer?

In a hostile bid, the only information available to the bidder will be information that is publicly available. A target board that provides information to one bidder that it considers desirable may be forced to divulge information to others, who may include its competitors.

4.2 Is negotiation confidential?

Negotiations may be conducted confidentially. However, in terms of the Listing Rules the board of the target is under the obligation to notify the Malta Financial Services Authority (the "MFSA") without delay upon becoming aware that any person intends to: (i) acquire directly or indirectly a controlling interest in the target; (ii) increasing directly or indirectly an existing holding which is not a controlling interest but which results in that person acquiring a controlling interest in the target; (iii) reducing, directly or indirectly, a controlling interest so as to cause it to cease to be a controlling interest; or (iv) or divesting itself, directly or indirectly, of a controlling interest.

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Further to the disclosures required as in question 4.2 above, there are no specific requirements regarding disclosure of information about prior negotiations or transfer of information between the bidder and the target.

4.4 What if the information is wrong or changes?

The law provides little protection for the bidder if the information available to the buyer is wrong or changes. The Listing Rules do not provide for an option to revise, withdraw or declare void a bid on the basis of it having made reliance upon incomplete or false information on the target.

The offeror may revise a bid in order to increase an existing component to the consideration, to add a cash component to the consideration, or to extend the time allowed for the acceptance of a bid (but not beyond the maximum permitted ten weeks). A bid may only be withdrawn or declared void, with the authorisation of the Listing Authority, if there are competing bids and the offeror decides to withdraw his bid or where a condition of the bid announced in the offer document is not fulfilled or otherwise in exceptional circumstances.

The Companies Act affords some level of protection against the risk of the target's directors acting carelessly or in bad faith in the run up to an acquisition. There is, in fact, the possibility of seeking redress against any director or expert answerable for wilful or negligent misconduct in the preparation and the implementation of the amalgamation, or otherwise in the performance of his duties. Such director or expert, if found guilty, would be liable for all damages occasioned to any shareholder of any of the amalgamating companies as a consequence of his misconduct.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Subject to any required disclosures having been made (see question 5.2 below), shares can be bought outside the offer process.

5.2 What are the disclosure triggers?

If a member's shareholding surpasses the threshold of 5% of the issuing company's shares (to which voting rights are attached), the company is under the duty to immediately inform such member of his obligation to notify the company itself as well as the Listing Authority. When a member acquires or disposes of shares (to which voting rights are attached) and the proportion of such shares exceeds or falls below the thresholds of 5%, 10%, 15% 20%, 25%, 30%, 50%, 75% and 90% of the company, the member is under the duty to notify the company and the Listing Authority.

Under Chapter 18 of the Listing Rules, within seven days of acquiring a controlling interest in the company, an offeror is obliged to inform the Listing Authority of a bid and must announce his decision to launch the bid. Such a bid must be announced only after: the offeror ensures that he can fulfil in full any cash consideration, if such is offered; and/or after taking all reasonable measures to secure the implementation of any other type of consideration.

Not later than 21 calendar days from announcing his decision to launch a bid, the offeror shall draw up and make public an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid, which offer document shall be communicated to the Listing Authority prior to it being made available to the public.

Furthermore, not later than ten calendar days from the closing of the acceptance period, the offeror and the target must inform the Listing Authority and make public the necessary, relevant and complete results of the takeover. Such an announcement would need to contain the following information:

(i) the absolute number of securities of every kind of securities acquired by the offeror during the acceptance period;

(ii) the ratios of the different classes and types of securities that were included in the takeover bid; and

(iii) separate calculations for the participation and voting rights acquired by the offeror and persons acting in concert.

5.3 What are the limitations?

Provided the offeror complies with any disclosure obligations and, when required, the obligation to make a mandatory bid to protect minority shareholders in a company, there are no limitations on the ability to accumulate shareholdings outside the offer process.

6 Deal Protection

6.1 Are break fees available?

There are no rules specifically addressing availability of "break fees" or similar payments. Where any agreement is entered into (e.g. in the case of a merger process or in the case of any separate share purchase transaction), the parties thereto are free to make provision for break fees or payments of that nature.

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

Maltese law imposes no restriction and a target may agree that it will not seek alternative or competing bids, provided the target board exercises its general duty of care and acts in the interests of the shareholders.

It is important to note that a target board's decision to seek alternative bids does not require the authorisation of the shareholders in general meeting.

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

From the time the target board receives the information that a decision has been taken to make a bid until the result of the bid is published or the bid lapses, the target board must seek the authorisation of the shareholders in general meeting before taking any action which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the target.

Furthermore, if the target has received a takeover notice or has reason to believe that a bona fide offer is imminent, the target board may not agree to take any action which could effectively result in an offer being frustrated or the holders of securities of the target being denied an opportunity to decide on the merits of an offer.

The target board is in a position to permit the issue of shares or sale of assets only if such action:

(i) has been approved by an ordinary resolution of the target;

(ii) is taken or permitted under a contractual obligation entered into by the target, or in the implementation of proposals approved by the target board, 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; or

where (i) and (ii) do not apply, the action is taken or permitted for reasons unrelated to the offer with the prior approval of the Listing Authority.

6.4 What commitments are available to tie up a deal?

There are no specific rules established or specific legal instruments available in this respect.

7 Bidder Protection

7.1 What deal conditions are permitted?

The Listing Rules do not expressly set out any limitation on the nature or level of conditions that may be included in the terms of a bidder's offer. Listing Rule 18.22.8 in fact makes reference to *"any conditions to which the bid is subject"* when outlining the information which should be specified in the offer document to be drawn up and made public by the offeror following the announcement of a decision to launch a bid.

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

The bidder could already have a form of control over the target (as a shareholder or otherwise) at the time the offer is made. However, otherwise there are no specific legal mechanisms to allow the offeror to exercise any control over the target before or during the offer process.

7.3 When does control pass to the bidder?

The bidder can effectively exercise direct control over the target as from the first general meeting immediately following the acquisition of sufficient shares and voting rights to exercise control.

7.4 How can the bidder get 100% control?

The Listing Rules provide for squeeze-out rights and sell-out rights.

Where the offeror holds at least 90% of the capital carrying voting rights and 90% of the voting rights in the target, or where, following acceptance of the bid, the offeror has acquired or has firmly contracted to acquire securities representing at least 90% of the target's capital carrying voting rights and 90% of the voting rights comprised in the bid, the offeror has the right (squeeze-out right) to require the minority shareholders to sell him their securities at a fair price and shall take the same form as the consideration offered in the bid or, alternatively, in cash.

A holder of remaining securities following a bid made to all holders of the target's securities for all of their securities may require the offeror to acquire his securities at a fair price, which shall take the same form as the consideration offered in the bid or, alternatively, in cash (sell-out right).

The squeeze-out and sell-out rights may be exercised within three months at the end of the time allowed for acceptance of the bid.

8 Target Defences

8.1 Does the board of the target have to tell its shareholders if it gets an offer?

The law does not deal specifically with this issue and it is not specified whether the target board should or should not disclose to its shareholders the offer and/or the public information received from the potential bidder, thus leaving this to the discretion of the board.

However, in the period between the board receiving information that a decision has been taken to make a bid until the result of the bid is published or the bid lapses, the shareholders must be informed and their authorisation sought before the board takes any action which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the target.

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

The Listing Rules limit the actions the target company may take when it has received a takeover notice or has reason to believe that a bona fide offer is imminent (see question 6.3).

However, the target board is entitled to seek alternative offers upon its own initiative.

8.3 Is it a fair fight?

At the outset it must be highlighted that prior to the introduction of Chapter 18 of the Listing Rules, the regulation in Malta of takeovers was practically inexistent. Through the inception of minimum guidelines for the conduct of takeover bids and measures seeking to ensure an adequate level of protection for holders of securities in companies which are the subject of a takeover bid, the previously outright balance in favour of the bidder has, at least, been redressed. The squeeze out and sell out mechanisms, coupled with the burdens of disclosure and authorisation requirements, have indeed served to render the position of the bidder less overbearing than it may have previously been perceived to be.

9 Other Useful Facts

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

Since takeovers of smaller and more closely knit companies, which do not have their shares publicly traded on a regulated market, are by far more common in Malta any takeover attempt aimed at obtaining control over the target will primarily depend on soliciting the majority shareholder(s) to sell their shares. Thus, such sale-purchase transaction would generally be treated on an individual basis and not within the scope of a regulated take-over bid.

9.2 What happens if it fails?

In the event that the offer was not successful the offeror is not authorised to make a new offer for the same offeree company during a period of one year from when the bid lapses.

10 Updates

10.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in M&A Law in your country.

Since accession to the European Union in May 2004, and fuelled by the favourable economic and market conditions prevalent for the best part of 2006 and 2007, not least of which the relatively cheap and easy access to credit available on international markets, combined with the attractive corporate law and regulatory environment, Malta has seen the M&A market flourish during 2006 - 2007.

This expansion in M&A activity has been further sustained in 2007 by the consolidation of Malta's favourable tax treatment for foreign companies as vehicles for cross-border acquisitions, through the introduction of new fiscal legislation. This increase has been sustained on two fronts, namely:

(i) the purely local front that has seen (in 2006-2007) the acquisition of Malta's two major telecommunications providers by the Dubai-based group Tecom Investments LZ LLC in the case of Maltacom plc (now GO) and by a major private equity fund, GMT Communications Partners, in the case of Melita Cable plc; and

(ii) the international front, through either (a) the establishment in Malta of foreign-owned holding-companies used as vehicles for the acquisition of businesses in a multiplicity of jurisdictions; or (b) through the acquisition of a Maltese holding company that itself owns business interests in one or more other jurisdictions.

The more aggressive stance on acquisitions taken by private equity funds throughout the last 12 to 18 months, coupled with the increasingly easily available levels of leveraged lending available in the market, has led not only to larger deals in the international markets but also to the consideration of new deals in smaller jurisdictions such as Malta at earnings multiples that were hitherto unknown in the Maltese markets.

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