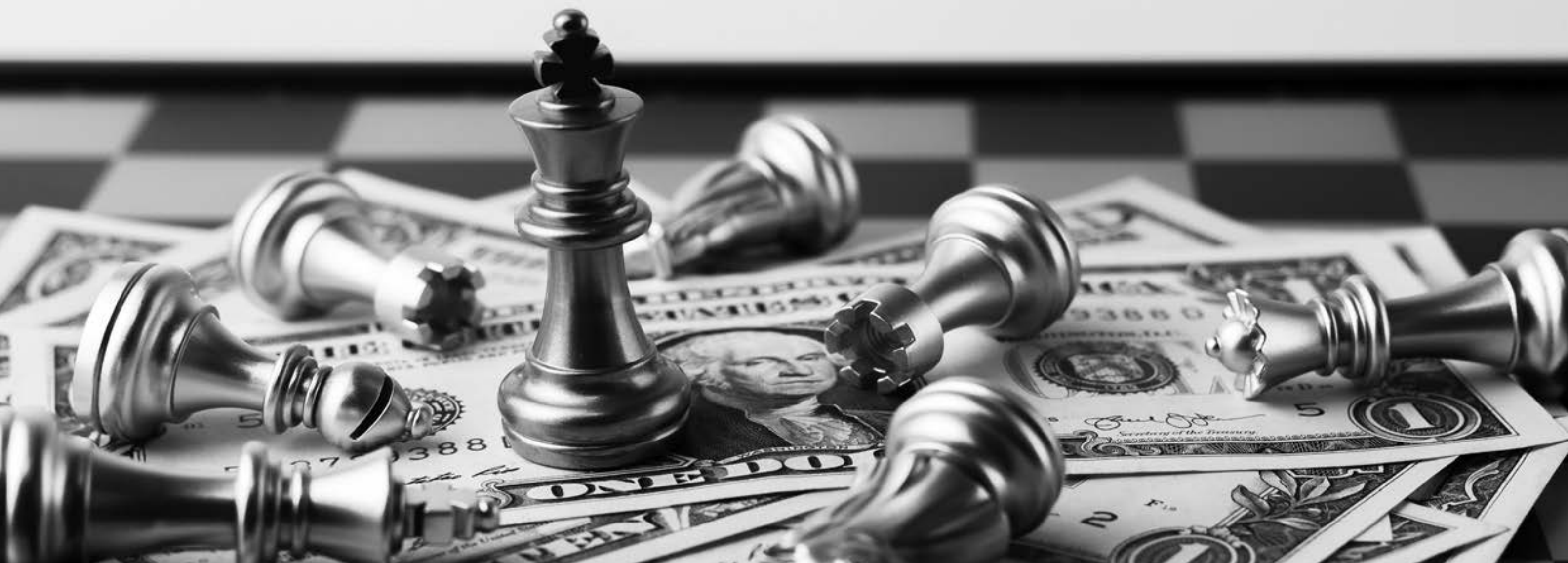

ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

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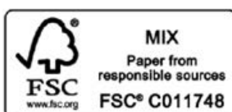

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EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

As in many jurisdictions, there is no single piece of law that regulates M&A activity in Malta. To determine what regulates M&A in Malta, any M&A stakeholder must consider the legal interplay between a number of pieces of legislation, from the centuries-old Civil Code (Chapter 16, Laws of Malta), which regulates the formation and validity of contracts, liability under both tort and contract, and specific civil contracts such as sale, deposit, mandate and donation (amongst other matters), to the Companies Act (Chapter 386, Laws of Malta), to Chapter 11 of the Listing Rules, which applies to takeover bids where all or some securities of the offeree company are admitted to trading on a regulated market in Malta, implementing the EU's Takeover Bids Directive. The legal framework regulating M&A in Malta spans across legislation that has been shaped by numerous influences over decades.

M&A activity is also regulated by other key pieces of legislation, such as the EU Merger Control Regulation (Council Regulation 139/2004) and the Control of Concentrations Regulations (S.L. 379.08, Laws of Malta). Other sector-specific rules may also apply, depending on the industry in which the deal is taking place.

1.2 Are there different rules for different types of company?

The principal piece of legislation which governs the organisation and use of companies is the Companies Act and the subsidiary legislation made under it, which govern both private and public companies. M&A activity concerning public companies whose securities are listed on a regulated market is further subject to the rules set out in Chapter 11 of the Listing Rules. These rules also govern takeovers of companies not incorporated in Malta but having their securities admitted to trading on a regulated market in Malta.

1.3 Are there special rules for foreign buyers?

There are no special rules applicable to foreign buyers.

1.4 Are there any special sector-related rules?

The rules that apply to any M&A transaction are highly dependent on the sector in which the target operates. For instance, one could expect special provisions in the Insurance Business Act, the Investment Services Act, the Lotteries and Other Games Act, or the Banking Act to apply to targets in each respective sector, owing to sector-specific regulation of their business and operations and oversight by the respective regulatory body.

1.5 What are the principal sources of liability?

Although it is, in theory, possible to envision a number of sources of liability in the M&A context, the Maltese market has seen few, if any, instances of litigation in relation to M&A activity. A key source of liability in M&A could result from the civil law on contractual liability, whether for breach of contract or where the drafting is, on the face of it, unclear. Furthermore, M&A participants would do well to be aware of the possibility of pre-contractual liability under Maltese law. It is a long-standing principle of Maltese civil law that negotiations between parties to a contract are to be carried out in good faith, and despite some uncertainties in judicial rulings over the past few decades, a 2016 ruling of the Courts of Appeal explicitly recognised the possibility of an award made under tort law for damages suffered by a party as a result of a breach by the counterparty of its pre-contractual obligations.

Chapter 11 of the Listing Rules additionally provides for instances where the Listing Authority, as the body empowered by the same rules to supervise takeover bids, could impose financial penalties, regulatory sanctions or public censure for failure to comply with the applicable provisions of the Listing Rules. The implementation of the provisions of the Market Abuse Directive (Directive 2014/57/EU) and the Market Abuse Regulation (Regulation (EU) No 596/2014) under the Prevention of Abuse of Financial Markets Act now criminalises intentional insider dealing, market manipulation, and unlawful disclosure of inside information.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The means of acquisition of control of a Maltese target are influenced greatly by whether the target is (a) a private or public company having no shares listed on a regulated market, or (b) a public listed entity.

Where a company has no shares listed on a regulated market, acquisitions take place frequently by means of share or asset acquisitions. The Companies Act also foresees the possibility of control being acquired by means of the court-supervised company reconstruction or amalgamation process, in specific instances.

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Public M&A transactions in Malta must take place by means of mandatory or voluntary bids to acquire a controlling interest in the entity, in either case by making a takeover offer.

2.2 What advisers do the parties need?

In a typical transaction, buyers, sellers and the target company each engage legal, tax and financial advisers. In some transactions, bankers, management consultants, IT consultants and public relations consultants might be engaged. No one transaction is exactly like another, but lawyers, tax advisers and accountants are normally a *sine qua non*.

2.3 How long does it take?

Chapter 11 of the Listing Rules frames the takeover process within a set timetable, which could shed some light on the timetable to closing. For instance, a potential bidder must publish an offer document by no later than 21 days from the date of the announcement of its decision to launch a bid. Depending on the time set out in the offer document for the acceptance of the bid by shareholders, which may range between three and 10 weeks, the offeror is allowed to make revisions to the takeover bid.

Despite the statutory timelines, transaction time could vary greatly depending on regulatory approvals required when a target operates, directly or indirectly, in a regulated environment. A minimum six-week merger control clearance process also needs to be factored into the estimated timetable for completion of the acquisition process where the statutory turnover thresholds for notification are triggered.

2.4 What are the main hurdles?

Where required, regulatory approval and merger control clearance will inevitably impact the timetable and structure of M&As. Acquisitions of shares in a private company will generally need to comply with an offer process implementing shareholder pre-emption rights as laid down in the company's Articles of Association.

Securing shareholder support for the disclosure of information to a *bona fide* offeror seeking to acquire control of a listed entity may constitute a significant milestone in the acquisition process. The Listing Rules provide that where there is an offer for an acquisition or disposal of a substantial shareholding (10% or more of the votes) in a listed entity, a company may furnish in confidence to a *bona fide* offeror such information (including unpublished price-sensitive information) as may be necessary to enable the offeror and its advisers to make, confirm, withdraw or modify the offer, provided that the shareholders in the general meeting approve such disclosure by an ordinary resolution or, where required by the Articles of Association of the company, by an extraordinary resolution.

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

It is a general principle of takeovers in the EU that all shareholders must be treated equally. In practice, this means that rules applicable to takeovers explicitly set out provisions that require bidders to offer equal consideration to each shareholder, and offerors in a mandatory bid must provide an 'equitable' price to holders of securities. The Listing Rules set out mechanisms to determine how the equitable price is set.

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

Takeover bids may be made by means of an offering of either cash or alternative consideration, provided that cash consideration is offered as an alternative in all cases.

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

In the case of a listed entity, it is a fundamental general principle of the Listing Rules concerning takeover bids that all shareholders are to be afforded equivalent treatment. In this spirit, the Listing Rules provide that the purchase price for securities that are the subject of a mandatory bid must be 'equitable' and provide criteria against which the equitable price must be established.

2.8 Are there obligations to purchase other classes of target securities?

There are no obligations to purchase other classes of target securities.

2.9 Are there any limits on agreeing terms with employees?

Limits to agreements on terms with employees can be found across employment legislation, which seek to ensure that employees are afforded appropriate protection and no less favourable terms than those already in place, particularly with respect to redundancies and information obligations. Key instances of employment protections can be found under the Transfer of Business (Protection of Employment) Regulations (S.L. 452.85), and the Employee (Information and Consultation) Regulations (S.L. 452.96).

2.10 What role do employees, pension trustees and other stakeholders play?

Employees have information rights in a non-listed entity merger scenario where there are fewer than 20 employees, but if there are more, they have consultation rights under employment legislation. Employees of a listed entity also have consultation rights under the Listing Rules where a bid is made for the listed company. An offeror making a bid must include in its bid its intentions with respect to employees, and under the Listing Rules, employee representatives (or the employees themselves, where there is no such representative) have the right to consider and provide feedback to the company's board on the effect they think the bid will have on its employees. The Listing Rules do not, however, envisage a direct participation role for employees, pension trustees and stakeholders, other than where they are shareholders in the target entity.

Certain employee rights do not apply to a business that is being transferred as a result of bankruptcy or insolvency proceedings, of which the latter process may be under the supervision of a court-appointed liquidator, or to seamen employed on ships, whose rights are regulated under the Merchant Shipping Act.

2.11 What documentation is needed?

This depends on the type of transaction taking place. It can vary greatly but as a minimum, if control is intended to be acquired from one or more shareholders, share purchase agreements will normally

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be put into place to execute the transaction. On the other hand, if the change in control is expected to take place through a voluntary or mandatory bid to all the shareholders, the following documentation must be prepared:

(a) The draft terms of the merger or acquisition, signed by at least one director and the company secretary of the amalgamating company.

(b) An extraordinary resolution approving the draft terms of the merger and any alterations and additions to the Memorandum and Articles of Association, which must be dated at least one month after the publication of the draft terms of the merger but no later than three months from such date.

(c) The amended Memorandum and Articles of Association.

(d) A detailed written report by the directors on the draft terms of the merger.

(e) A written report by an expert following his examination of the draft terms of the merger, to be presented to the shareholders, which shall specify whether the share exchange ratio is fair and reasonable, and the difficulties which may have been encountered in the special valuation.

(f) The annual accounts and accounting statement.

2.12 Are there any special disclosure requirements?

In the case of a takeover bid regulated by the Listing Rules, the offer document drawn up by the bidder and made public no later than 21 days from announcing his decision to launch a bid is a pivotal disclosure in the acquisition process. The Listing Rules lay down certain minimum information which must be included in the offer document. The offer document must be accompanied by a report on the consideration offered, drawn up by an independent expert.

Similarly, in the case of an amalgamation, under the terms of the Companies Act, the directors of the amalgamating companies are required to prepare terms of the merger which will be publicly available, setting out the legal and economic terms and conditions of the merger.

2.13 What are the key costs?

The principal costs incurred in M&A relate to adviser fees across legal, financial and other professional services engaged to run the bid, offer and transaction. In preparing to launch a bid, an offeror must also consider stamp duty and taxes, commitment fees and other borrowing costs.

2.14 What consents are needed?

There are a number of pivotal consents on which a takeover may depend, but the one common thread is target shareholder approval. Depending on the nature of the deal, regulatory consent and merger control approval may also be required on the change of control.

2.15 What levels of approval or acceptance are needed?

The level of approval and acceptance sought depends on how much control the buyer is looking to achieve. In order to acquire a controlling interest, 50% +1 of all votes is the minimum required threshold. However, a bidder is likely to prefer acquiring as large a controlling stake as possible; an offeror would typically seek to obtain the approval of 90% of each class of shares in order to be able to exercise its squeeze-out rights and thus acquire the remaining shares held by minority dissenting shareholders.

2.16 When does cash consideration need to be committed and available?

At the time of announcement of a takeover bid, a bidder must provide confirmation that the element of cash offered as consideration will be paid to shareholders accepting the cash offer no later than 30 days from the closing of the acceptance period.

3 Friendly or Hostile

3.1 Is there a choice?

Both friendly and hostile takeovers are possible under Maltese law. In a hostile takeover, the target board may not take or permit any action that could result in the offer being frustrated or the shareholders being denied an opportunity to decide on the merits of the offer, and in all cases must convene a meeting of the shareholders of the company prior to taking any such actions.

On the other hand, a bid is 'friendly' when, as a result of negotiation, two interested parties agree that the potential of their two combined businesses offers both the potential for greater synergies and as efficiencies and consequently greater growth and ultimately profits. The result of such discussions normally results in the potential offeror and the major shareholders of the target company formulating a form of memorandum of understanding, on what conditions need to be further discussed between both parties before the offeror can make a firm offer for the securities of the target.

3.2 Are there rules about an approach to the target?

There are no rules to regulate the approach to the target.

3.3 How relevant is the target board?

The target board has a number of obligations and duties throughout the M&A process. However, unlike takeovers in the US, the target board's role is comparatively sidelined under Maltese takeover law. Chiefly, it must advise and give its views to the holders of target securities on the effects of the implementation of the bid on employment, conditions of employment, and the locations of the company's place of business, ensuring that shareholders are adequately advised on whether the offer is fair and reasonable. The board's decision as to whether or not to recommend the bid will necessarily influence target conduct and information that is made available to an offeror. The board of directors is also required to call a general meeting of the company to obtain the shareholder agreement prior to taking any action whatsoever that may frustrate the bid, and furthermore to seek their acceptance and authorisation of the terms of the bid.

Under the Listing Rules, the target board is further obliged to communicate an offer document and other major communications related to the offer to employee representatives, or directly to the employees where there is no such representative.

3.4 Does the choice affect process?

Although the choice between a hostile or friendly takeover does not influence the rules that are applicable to the takeover, one would expect that the decision of the board to recommend a takeover would result in a higher quality of information being provided to a bidder and smooth cooperation by the target.

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4 Information

4.1 What information is available to a buyer?

The quantity and quality of information that becomes available to a buyer is closely tied to the target board's decision to recommend or resist a takeover offer. This means that in a hostile takeover scenario, the only information available to the bidder is the information which is publicly available.

4.2 Is negotiation confidential and is access restricted?

Generally, one would expect to see that takeover bid negotiations are run under tight contractual confidentiality protections and non-disclosure obligations, well ahead of the time when an announcement is made publicly. Maintaining confidentiality in deal negotiations is even more important when considering the potential for market abuse and insider dealing. However, where a target is regulated by the MFSA (Maltese financial services regulator), the target is obliged to inform the MFSA of an intention of any person to acquire such a controlling interest, well ahead of the time when the bidder is required to make a public disclosure and announcement. The same is true for companies licensed by the Malta Gaming Authority.

4.3 When is an announcement required and what will become public?

In the case of a mandatory bid, the bidder is required to inform the Listing Authority of a bid and shall announce his decision to launch a bid within seven days of acquiring a controlling interest. Within 21 days from such an announcement, the bidder is required to draw up and make public an offer document containing the terms and conditions of the offer.

4.4 What if the information is wrong or changes?

The Listing Rules do not afford a bidder specific protection or redress in the event that the target board has acted in bad faith or negligently in disclosing information on the target to the bidder during the time leading up to the effective acquisition.

Once a bid is announced, it is irrevocable and may only be revised or withdrawn in a few limited instances. Revision of a bid is permitted only when it is to (i) increase the consideration, (ii) increase an existing component to the consideration, (iii) add a cash component to the consideration, or (iv) extend the time allowed for the acceptance of a bid but not beyond the maximum period allowed under the Listing Rules (i.e. 10 weeks). A bidder may only withdraw a bid or declare it void (i) where there are competing bids and the bidder decides to withdraw his bid, (ii) where a condition of the bid announced in the offer document is not fulfilled, or (iii) in exceptional circumstances and with the authorisation of the Listing Authority, explaining why the bid cannot be put into effect for reasons beyond the control of the parties to the bid.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Although there are no impediments to acquiring shares outside the takeover offer process, disclosure requirements may be triggered if shares are acquired above certain thresholds (see question 5.3).

5.2 Can derivatives be bought outside the offer process?

See the answer to question 5.1.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Disclosure requirements kick in on acquisitions and disposals of shares of a listed company where a shareholder acquires or disposes shares to which voting rights are attached as a result of which the holding reaches, exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75% and 90%. In such cases, the shareholder is required to notify the company and the Listing Authority. The Listing Rules also impose an obligation on the company itself to immediately inform a shareholder whose shareholding exceeds 5% of the issued share capital of the listed company of his obligation to notify the company and the Listing Authority of any changes in major holdings in terms of the Listing Rules.

In addition, the Listing Rules provide that a company must promptly make a company announcement where the board is advised or becomes aware that a purchaser is being sought for a substantial shareholding (10% or more of the voting rights), or where there is a firm intention or an offer to acquire or dispose of such a substantial shareholding.

5.4 What are the limitations and consequences?

Besides the obligation to comply with disclosure requirements concerning the shareholding thresholds which an acquirer has reached, exceeded or fallen below (set out in question 5.3 above), a person who acquires a controlling interest in a listed company (50% +1 voting rights) is required to inform the Listing Authority and announce his decision to launch a mandatory bid within seven days of acquiring a controlling interest.

6 Deal Protection

6.1 Are break fees available?

There are no rules prohibiting or regulating the use of break fees between target companies and bidders. In default of any such regulation, break fees can be introduced into terms agreed between the parties to regulate negotiation ahead of a deal. Although used sparingly, the increasingly international nature of transactions has resulted in break fees becoming more likely to feature in the market for corporate control in Malta. When offering such break fees, a Maltese target must be careful to observe formal requirements set out in the company's constitution. As a matter of general corporate law, directors of a Maltese company are bound to act in the best interests of the company at all times and are prohibited from fettering their future discretion.

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

The authority to seek a competing offer is vested in the board of the target. There are no mandatory requirements under the Listing Rules or other relevant legislation requiring the board of the target to

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solicit competing offers. The directors of the target do, however, have a general, statutory duty to act in the best interests of the shareholders and to act with the required standard of care, skill and diligence when deciding whether to seek alternative offers or otherwise.

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

In terms of the Listing Rules, once a target has received a takeover notice, or has reason to believe that a *bona fide* offer is imminent, the board of the target may not take or permit any action which could result in an offer being frustrated or the shareholders being denied the opportunity to decide on the merits of the offer.

Any defensive tactics, such as a decision by the board of the target to issue shares or sell the assets, which actions may result in a lasting impediment of the bidder's acquisition of control of the target and its business assets, would only be permissible where one of the conditions stated in question 3.1 subsists.

6.4 What commitments are available to tie up a deal?

Few commitments can be given by a target to a bidder, since the decision as to whether or not to accept the offer relies, ultimately, on shareholder majority approval.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

The rules applicable to takeover bids under the Listing Rules set out a number of explicit deal terms that must be addressed in an offer document; however, they stop short of explicitly limiting deal conditions.

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

Unless a bidder already possesses a controlling interest in the target and is utilising the offer process to enlarge its stake in the target, the bidder has no control over the target during the takeover process.

7.3 When does control pass to the bidder?

Once the takeover offer has reached the necessary thresholds for acceptance by the target shareholder, the bidder can be said to have acquired control at the point when it acquires, directly or indirectly, 50% +1 of the voting rights in the entity. However, the bidder would only be able to exercise his control in the first general meeting of the company, provided that he has acquired sufficient shares and has the necessary voting rights to exercise such control.

7.4 How can the bidder get 100% control?

Under the terms of the Listing Rules, once a bidder has acquired 90% of the shares in a target, the bidder can exercise its squeeze-out rights to acquire shares held by minority shareholders. At the same 90% threshold, minority shareholders have sell-out rights, under which they may require the offeror to buy the remaining shares held by them at a fair price. Both the squeeze-out rights and the sell-out rights may be exercised by the bidder within three months of the end of the time allowed for the acceptance of the bid.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

A board has no obligation to publicise discussions held in relation to potential offers that have not yet been announced, and it retains the right to reject such an offer without ever disclosing it to shareholders.

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

The rules applicable to takeovers under the Listing Rules strive to ensure that no board can carry out any defensive tactics without having first sought the approval of its shareholders, once either an offer has been made for the acquisition of target securities, or the board otherwise has sufficient reason to believe that a *bona fide* offer is imminent. Since shareholders are the ultimate gatekeepers to control of a target, such frustrating action can only otherwise be sought without shareholder consent if it relates to obligations undertaken by the company before it became aware of the offer, or where it has obtained permission from the Listing Authority to do so.

8.3 Is it a fair fight?

The goal envisioned by the rules applicable to takeovers under the Listing Rules is to ensure fairness for shareholders, and for the holders of target securities to remain at the centre of the takeover process at all times. This does mean that other stakeholders, such as management, employees, and the community at large, have a far smaller role in the takeover process, and the Maltese market for corporate control is, as a result, less prone to dramatic defensive measures and aggressive tactics such as poison pills, since shareholder approval must be sought at each step of the way. Although one could regard shareholder primacy in the takeover process as being fundamentally unfair because of the very wide social and economic consequences resulting from takeovers, addressing the 'unfairness' of this approach might be better served by sector-specific rules and policies outside of corporate law.

9 Other Useful Facts

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

Shareholder approval and competition clearance are typically the most important influences on the outcome of an acquisition. Negotiating strategy, thorough legal and financial due diligence, a fair price, timing, market backing and cooperation with regulatory bodies constitute the major pillars of both these keys to takeover success.

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9.2 What happens if it fails?

Where a takeover bid automatically lapses (i.e. at the end of the acceptance period none of the shareholders take up the offer) or the bid has otherwise failed, then the bidder is not authorised to make a new offer for the same target during a period of one year from when the initial bid lapses.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

A number of amendments to Chapter 11 of the Listing Rules relating to Takeover Bids were effected earlier in 2018 by the MFSA. The amendments encompass the role of the MFSA in relation to a takeover bid, and have been effected to transpose the requirements of Article 119 of Directive 2014/59/EU of the European Parliament and of the Council of 15th May 2014, establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012. The amendments provide new guidance on a number of matters that required further clarification, such as the role of the board in hostile takeovers, pre-takeover agreements and the duties and responsibilities of directors when making recommendations in relation to takeover bids.

M&A practice in Malta has remained fairly active throughout 2018, relative to its size.

It has certainly been of interest to M&A practitioners to witness the prominent role taken by the Malta Competition and Consumer Affairs Authority, which launched a Phase II investigation and assessment, under the Control of Concentration Regulations (S.L. 379.08), of the horizontal concerns and serious competition issues that would arise as a result of the proposed merger between telecoms companies. Ultimately, the proposed merger between telecoms companies was withdrawn because of an inability to reconcile the expected competition law concerns that would have arisen from the 3-to-2 merger. This proposed merger should be considered in light of the recent wave of consolidation throughout the telecommunications sector in the EU, and was particularly interesting because of the relative rarity of such largescale takeover bids in the Maltese market.

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