Mergers and Acquisitions Report **2015**

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1. REGULATORY FRAMEWORK

1.1 What legislation and regulatory bodies govern public M&A activity in your jurisdiction?

The Code on Takeovers and Mergers (Code) governs the conduct of public M&A in Hong Kong. It applies to takeovers and mergers affecting: companies and real estate investment trust (Reits) with a primary listing on the Hong Kong Stock Exchange (Exchange); and, public companies in Hong Kong, which will be determined by reference to a number of factors (including the number of Hong Kong shareholders, the extent of share-trading in Hong Kong and other factors including the location of the head office, business and assets, and place of central management).

The Code is administered by the executive director (executive) of the Securities and Futures Commission (SFC).

The Companies Ordinance regulates schemes of arrangement and the compulsory acquisition procedures for companies incorporated in Hong Kong.

1.2 How, by whom, and by what measures, are takeover regulations (or equivalent) enforced?

The Code does not have force of law but the SFC and the Exchange regard compliance as of fundamental importance.

The executive may bring disciplinary proceedings for breach of the Code before the takeovers and mergers panel. The panel can impose sanctions including public censure, public criticism, requiring licensed corporations and financial markets service providers to cease acting for persons in breach and banning advisers from appearing before the executive or panel.

2. STRUCTURAL CONSIDERATIONS

2.1 What are the basic structures for friendly and hostile acquisitions?

There are two principal ways to effect a takeover: (i) a contractual general offer by a bidder for the shares of the target not already held by the bidder; or (ii) a scheme of arrangement (scheme), sanctioned by the court.

2.2 What determines the choice of structure, including in the case of a cross-border deal?

The bidder will choose the structure based on its objectives and a variety of factors, including timing requirements, stamp duty costs, the target's shareholder base and the reaction of the target board. A scheme is implemented by the target and so is not appropriate for hostile acquisitions.

2.3 How quickly can a bidder complete an acquisition? How long is the deal open to competing bids?

The earliest date that an offer can close is 21 days from the posting of the offer document (or 28 days where the target board circular is not posted on the same day). An offer must remain open for not less than 14 days after it becomes unconditional. The acceptance condition must be satisfied within 60 days from the posting of the offer document. In competitive situations, the new bidder's timetable normally applies to both offers.

A scheme is subject to the court timetable and will typically take around eight weeks to complete from the posting of the scheme circular. The executive should be consulted where a modified timetable is required to accommodate the court timetable.

2.4 Are there restrictions on the price offered or its form (cash or shares)?

Purchases of target shares by the bidder during the offer period or a prescribed prior period may set a minimum price for the offer and determine the form of consideration, depending on the timing and extent of the purchases.

2.5 What level of acceptance/ownership and other conditions determine whether the acquisition proceeds and can satisfactorily squeeze out or otherwise eliminate minority shareholders?

All offers (except partial offers) must be conditional on the bidder acquiring more than 50% of the voting rights in the target. A higher percentage may be set for voluntary offers, often at the level necessary to trigger the right to make compulsory acquisitions.

To use compulsory acquisition rights, the Code requires that the bidder achieves acceptances of the offer and makes purchases totalling 90% of the target's shares not already held by the bidder during the four months after the offer document is posted.

A scheme requires approval at a target shareholders' meeting by at least 75% of the votes cast (excluding any votes by the bidder), with not more than 10% of votes cast against.

Legal requirements in the target's jurisdiction of incorporation must also be satisfied.

2.6 Do minority shareholders enjoy protections against the payment of control premiums, other preferential pricing for selected shareholders, and partial acquisitions, for example by mandatory offer requirements, ownership disclosure obligations and a best price/all holders rule?

A fundamental principle of the Code is that all shareholders are treated evenhandedly and similarly. Special deals with favourable conditions which are not extended to all shareholders are not permitted without the executive's consent. See 2.4 for minimum pricing obligations.

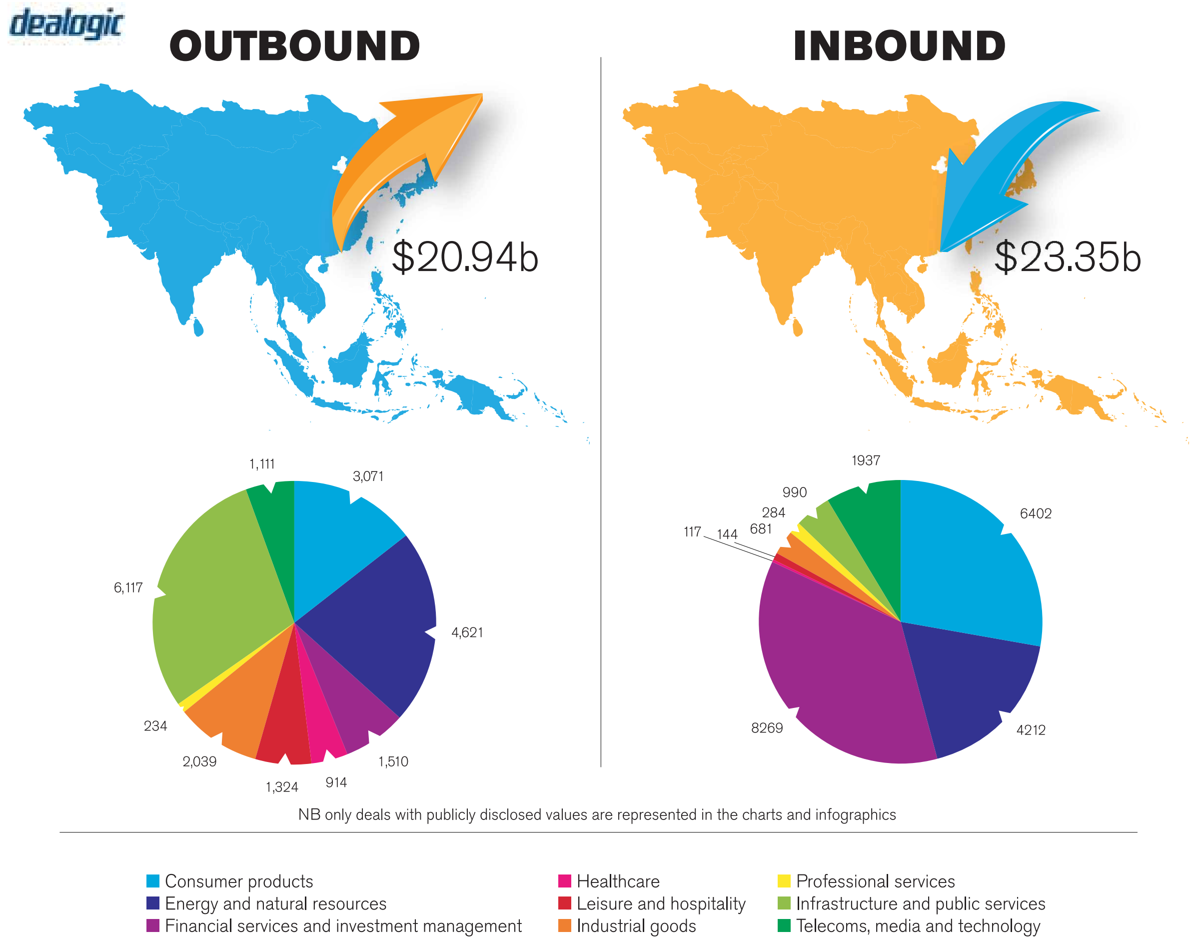
Public disclosures are required for shareholdings of five percent or more, with ongoing disclosures when an interest crosses a whole percentage point above five percent.

A mandatory general offer obligation to acquire all remaining shares is triggered where a bidder: acquires 30% or more of the voting rights in the target; or holds between 30% and 50% (both inclusive) and increases its shareholding by more than two percent from the lowest holding in the preceding 12 months.

2.7 To what extent can buyers make conditional offers, for example subject to financing, absence of material adverse changes or truth of representations? Are bank guarantees or certain funding of the purchase price required?

The only condition permitted for a mandatory offer is the 50% acceptance condition. Voluntary offers may be made subject to other conditions provided the conditions do not depend on judgments by the bidder and their fulfilment is not in the bidder's hands.

The bidder will not be permitted to invoke any conditions (other than the acceptance condition) unless the circumstances are of material significance to the bidder in the context of the offer.



Financing conditions are not permitted. The bidder must have resources available sufficient to satisfy the offer at the time of the announcement of the firm intention to make an offer.

3. TAX CONSIDERATIONS

3.1 What are the basic tax considerations and trade-offs?

Stamp duty is payable on the transfer of shares listed in Hong Kong at a rate of 0.2% on the higher of the market value or the consideration paid.

No stamp duty is payable on a cancellation scheme, as there are no share transfers. Under a cancellation scheme, target shares are cancelled and new shares issued to the bidder.

There is no capital gains tax in Hong Kong on the transfer of shares held as long-term investments. Profits tax may arise on a transfer of shares held on trading accounts by a person carrying on a trade, profession or business in Hong Kong.

3.2 Are there special considerations in cross-border deals?

The tax position in other relevant jurisdictions will need to be addressed in cross-border deals and the position under any relevant double tax treaty

4. ANTI-TAKEOVER DEFENCES

4.1 What are the most important forms of anti-takeover defences and are there any restrictions on their use?

Once the target has reason to believe that a bona fide offer may be imminent, it may not take any action which could effectively frustrate the offer without shareholders' approval. As a result, anti-takeover defences are limited.

4.2 How do targets use anti-takeover defences?

Where an approach is unwelcome, the target board can refuse to cooperate with the bidder, announce its views on the offer and recommend that the shareholders reject the offer. Target boards may also seek shareholder approval to carry out actions that would otherwise be prohibited as a frustrating action.

4.3 Is a target required to provide due diligence information to a potential bidder?

A target is not required to provide due diligence information to a potential bidder, but if it does, it must provide such information, on request, equally and promptly to another bidder or bona fide potential bidder, even if that bidder is less welcome.

4.4 How do bidders overcome anti-takeover defences?

A bidder can make use of due diligence information in the public domain. A bidder may attempt further negotiation with the target to secure a recommendation and may consider raising the offer price to achieve this. The bidder may also publicise the lack of cooperation by the target as a reason for not being able to increase its offer in an attempt to apply pressure to the target board.

4.5 Are there many examples of successful hostile acquisitions?

Hostile bids are uncommon, largely due to the prevalence of controlling stakes in many Hong Kong listed companies.

5. DEAL PROTECTIONS

5.1 What are the main ways for a friendly bidder and target to protect a friendly deal from a hostile interloper?

A bidder may seek irrevocable commitments in respect of the offer from a restricted number of controlling shareholders to secure support. A bidder may also stake build, subject to disclosure requirements and the mandatory general offer threshold.

While rare, a bidder and target may also agree an inducement or break fee, payable by the target upon specified events occurring which prevent the offer proceeding, for instance if the target board recommends a higher competing offer.

5.2 To what extent are deal protections prevented, for example by restrictions on impediments to competing bidders, break fees or lock-up agreements?
The target's directors owe fiduciary duties and should consider the shareholders' interests taken as a whole. This restricts the target from agreeing not to solicit or support an alternative bidder, unless such commitment is subject to a fiduciary out.

Inducement and break fees are subject to safeguards including being below a de minimis threshold (normally up to one percent of the offer value).

6. ANTITRUST/REGULATORY REVIEW

6.1 What are the merger control notification thresholds in your jurisdiction?
The merger control regime only applies to transactions involving carrier licensees under the Telecommunications Ordinance. This regime will be replaced by similar provisions (again only affecting the telecoms industry) under the new Competition Ordinance (CO), which is likely to come into effect in the second half of 2015. Under the CO, there is no requirement to notify the Competition Commission of a merger. As the Commission can independently review transactions, early consultation is, however, encouraged.

6.2 When will transactions falling below those thresholds be investigated?
Not applicable.

6.3 Is a merger control notification filing mandatory or voluntary?
Under the CO, notification is voluntary.

6.4 What are the deadlines for filing, and what are the penalties for not filing?
Under the CO, there are no filing deadlines.

6.5 How long are the merger control review periods?
There are no set merger control review periods under the CO. The CO contains time limits for the Commission to commence an investigation (within 30 days of becoming aware of a merger) and bring proceedings to unwind or stop a merger (within six months of the later of the Commission becoming aware of the merger or the merger's completion).

6.6 At what level does your merger control authority have jurisdiction to review and impose penalties for failure to notify deals that do not have local competition effect?
The merger must have an impact on competition in Hong Kong.

6.7 What other regulatory or related obstacles do bidders face, including national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?
Approvals may be required for targets operating in certain regulated industries, including banks, insurance companies and companies regulated by the Communications Authority. Local approvals may be necessary for companies operating overseas.

7. ANTI-CORRUPTION REGIMES

7.1 What is the applicable anti-corruption legislation in your jurisdiction?
The Prevention of Bribery Ordinance (POBO) is the primary anti-corruption legislation. The POBO prohibits the offer and receipt of bribes by public servants (public sector bribery) and agents in relation to the affairs of their principals without their consent (private sector bribery).

7.2 What are the potential sanctions and how stringently have they been enforced?
Offences under the POBO can give rise to fines ranging from HK$100,000 ($12,900) to HK$1 million and imprisonment terms of between one to 10 years. The Hong Kong courts have advocated the need for deterrent sentences, so immediate custodial sentences can be expected.

8. OTHER MATTERS

8.1 Are there any other material issues in your jurisdiction that might affect a public M&A transaction?
No.

8.2 What are the key recent developments in your jurisdiction?
In 2014, the new Companies Ordinance removed the so-called headcount test for takeovers by way of a scheme.

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Austin Sweeney is based in Hong Kong and is the head of corporate at Herbert Smith Freehills in Asia. His practice extends across a broad range of company and commercial work including corporate finance, disposals, joint ventures, mergers and acquisitions and securities offerings. He has many years' experience working in London, Singapore and Tokyo.

Key matters include advising Sumitomo on its $110 million acquisition of Scomi's machine tooling business in eight jurisdictions across Asia; British American Tobacco on its €2.7 billion ($3 billion) acquisition of Skandinavisk Tobakskompagni's (Scandinavian Tobacco Company's) cigarette business and its $485 million acquisition of PT Bentoel; and BP on the sale of its stake in China Petroleum and Chemical Corporation (Sinopec) for $742 million by way of an accelerated book-built placing.

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Tommy Tong is a partner at the Hong Kong office of Herbert Smith Freehills. He advises on a broad range of corporate and commercial matters, specialising in public and private M&A, private equity and equity capital markets transactions.

Tong has advised numerous international and domestic corporates, financial institutions and private equity funds in relation to mergers and acquisitions, corporate restructuring and regulatory compliance matters. He is fluent in English, Cantonese and Putonghua.

Some of his high-profile cases include advising ICBC (Asia) in connection with its HK$10.8 billion ($1.4 billion) privatisation by ICBC via a scheme of arrangement; China Gas on its HK$2.12 billion conditional voluntary general offer to acquire all issued shares and convertible bonds of Zhongyu Gas; and SAIF Partners, Hony Capital and IDGVC Partners on the HK$2.7 billion management buyout and mandatory takeover offer for Digital China.