PUBLIC M&A

Hong Kong

LEXOLOGY
Getting The Deal Through

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Quick reference guide enabling side-by-side comparison of local insights into public M&A issues worldwide, including types of business combination; principal laws and regulations; cross-border and sector-specific considerations; governing laws; filing and disclosure requirements; duties of directors and controlling shareholders; shareholder approval and appraisal rights; hostile transactions; break-up fees and frustration of additional bidders; government influence; conditional offers; financing; minority squeeze-outs; waiting and notification periods; tax; labour and employee benefits; restructuring, bankruptcy or receivership; anti-bribery, anti-corruption and sanctions issues; and recent trends.

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Hong Kong

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STRUCTURES AND APPLICABLE LAW

Types of transaction

How may publicly listed businesses combine?

In Hong Kong, publicly listed businesses may combine by way of merger and acquisition, or by way of collaboration of businesses or cooperation between two listed companies. According to data published by the Stock Exchange of Hong Kong (HKEx), as at 20 July 2023, there were 2,606 companies whose shares are listed for trading in Hong Kong.

Law stated - 04 August 2023

Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The Code on Takeovers and Mergers (Takeovers Code) issued by the Securities and Futures Commission (SFC), in consultation with the Takeovers Panel established by the SFC under section 8(1) of the Securities and Futures Ordinance (Chapter 571 of the laws of Hong Kong, (the SFO)).

While the Takeovers Code itself does not have the force of law, breach of the Takeovers Code may result in disciplinary sanctions under the financial services licensing regime under the SFO as well as the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the Listing Rules).

In addition to the Takeovers Code, any merger and acquisition or combination of businesses, provided that any one party to the transaction is a listed company, may also be subject to compliance with the Listing Rules.

Law stated - 04 August 2023

Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are normally structured the same way as local transactions, with two exceptions:

- Where the transaction requires prior approval from a local authority. This only applies to a very limited range of industries where foreign ownership is restricted, such as television broadcasting under section 8 of the Broadcasting Ordinance (Chapter 562 of the laws of Hong Kong).
- Where the transaction requires prior approval from a foreign authority, which may (subject to the SFC's approval) be made a condition precedent to the transaction. Please note that the SFC will normally not grant such approval, as stated in the Takeovers Code, meaning such foreign authority approval must be obtained before the definitive sale and purchase agreement is entered into.

Law stated - 04 August 2023

Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes. Change in ownership, both direct and indirect, of licensed entities in a limited range of industries are subject to prior approval by the licensing authorities in Hong Kong. This includes (without limitation) financial services, authorised insurers, banking, television broadcasting, and so on.

Law stated - 04 August 2023

Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Transaction agreements are typically concluded, and usually completed simultaneously or shortly after execution, for the acquisition of controlling shareholding in listed companies.

Transaction agreements involving acquisition of assets by a listed company in consideration of the issue of new shares in the listed company, on the other hand, typically contain a list of conditions precedent that must be fulfilled or waived before the transaction is completed and new shares are issued to the counterparty.

Hong Kong laws usually govern such agreements.

Law stated - 04 August 2023

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

A range of announcements and offer documents are required to be submitted to both the Securities and Futures Commission (SFC) and the Stock Exchange of Hong Kong (HKEx) for pre-vetting. The SFC charges a fee for vetting such documents.

If there is a change in directors of the target company, such change will need to be reported to the Hong Kong Companies Registry within 15 days of the appointment or cessation by way of filing the prescribed forms. In this regard, it should be noted that once a bona fide acquisition offer has been communicated to the board of directors of the listed company, the Code on Takeovers and Mergers (Takeovers Code) prohibits any director of that listed company from resigning until the general offer is closed, save with the consent of the Executive of the SFC.

All transfers of shares of companies incorporated or listed in Hong Kong are subject to Hong Kong stamp duty. The current rate is 0.26 per cent in total, of the highest of (1) the total consideration; (2) the net asset value represented by the transacted shares; or (3) (in the case of listed companies) the aggregate market (ie, quoted) price of the transacted shares.

Law stated - 04 August 2023

Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

The schedules to the Takeovers Code set out the respective disclosure requirements on the offeror company (ie, the

acquirer) as well as the offeree company (ie, the listed company).

As a general guideline, for the offeror, the information disclosures required of the offeror include (without limitation) the corporate structure of the offeror, its ultimate beneficial owners, its business, shareholding in the offeree company, any conditions of the offer, market price of the listed shares and the financial resources utilised by the offeror to fund the acquisition.

The structure used by the offeror to conduct the transaction may affect both the corporate structure and the financial resources parts of the disclosure.

For the offeree company, the information disclosures required include (without limitation) the view of the offeree company's board of directors on the offer price, current shareholding structure, financial information, material contracts and information pertaining to the directors of the offeree company.

Law stated - 04 August 2023

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

A shareholder whose direct or indirect percentage interest in shares of a listed company reaches 5 per cent or above, or who increases/decreases their percentage by passing each 1 per cent interval, is required to submit a disclosure of interest form to HKEx, the information of which will be published online (subject to redaction of certain personal information) and become available in public searches. The timeline for such filing is within three business days of the occurrence of the relevant event.

If a director or chief executive of a listed company is also a direct or indirect shareholder of such listed company, any change in the shareholding of the listed company is required to be disclosed.

The disclosure of interest requirements applies regardless of whether the company is a party to a business combination.

Law stated - 04 August 2023

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Directors of a listed company owe their duties to the listed company and not to any individual shareholder. The board of directors is required by the Code on Takeovers and Mergers to publish in the offeree board circular their recommendation as to whether the remaining shareholders should accept the offeror's general offer for the shares. Any director who is connected to either the vendor or the purchaser of the transaction must abstain from voting on such view. There are various sources of directors' duties, and the Companies Registry has issued A Guide on Directors' Duties .

Law stated - 04 August 2023

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

The sale of listed shares from one shareholder to another is a private matter and does not require approval from the other shareholders. However, if the listed company is issuing new shares as consideration for its acquisition of assets from another person, the acquisition and the issue of new shares are likely to be subject to approval by independent shareholders, by way of voting in an extraordinary general meeting.

There is no concept of 'shareholders' right of appraisal' in Hong Kong law. The committee of independent directors will obtain financial advice, in the form of a written report, from an independent financial adviser licensed by the Securities and Futures Commission to give such advice. They will often refer to the report when making their recommendations to shareholders.

Law stated - 04 August 2023

COMPLETING THE TRANSACTION

Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

Hostile takeovers are uncommon in practice since most listed companies in Hong Kong have a majority shareholder, which makes a hostile takeover almost impossible. In law, a hostile takeover is subject to the same regime as any other transaction.

Law stated - 04 August 2023

Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Break-up fees and reverse break-up fees are allowed but uncommon in Hong Kong. Certain restrictions set out in the Code on Takeovers and Mergers (Takeovers Code) must be observed when they are proposed. This includes that the fee must be de minimis (normally no more than 1 per cent of the offer value), the offeree company board and its financial adviser must confirm to the Executive of the Securities and Futures Commission (SFC) in writing that each of them believes the fee is in the best interests of shareholders, fully disclose such arrangement in the announcement made under Rule 3.5 of the Takeovers Code and in the offer document, and put the relevant documents on display in accordance with Rule 8 of the Takeovers Code, as well as consult the Executive of the SFC at the earliest opportunity whenever such arrangement is proposed.

Under section 275(1) of the Companies Ordinance (Chapter 622 of the laws of Hong Kong (CO)), a Hong Kong company and its subsidiaries are prohibited from giving financial assistance for the purpose of acquiring shares in the company, subject to certain exceptions. Financial assistance has the meaning given under section 274(1) of the CO, which includes, inter alia, gift, guarantee, security, indemnity, release, waiver, or loan. In fact, a company, being the target of an acquisition, may authorise financial assistance in one of three circumstances:

- financial assistance not exceeding 5 per cent of the company's paid-up capital (shareholder approval is not

required) (section 283 of the CO);
- financial assistance with unanimous shareholder approval (section 284 of the CO); and
- financial assistance approved by ordinary resolution (section 285 of the CO).

In each case, every director of the target must make a solvency statement pursuant to section 206 of the CO, and the target must comply with the relevant procedures as set out in sections 283 to 285 of the CO.

Law stated - 04 August 2023

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

The competition law in Hong Kong does not govern mergers of businesses generally.

An exception to the above is the telecommunications industry. The Merger Rule under the Competition Ordinance (Chapter 619 of the laws of Hong Kong) prohibits mergers that substantially lessen competition. According to section 3(2) of the Competition Ordinance, a merger takes place if, inter alia, 'two or more undertakings previously independent of each other cease to be independent of each other, or one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings …'. The Merger Rule generally only applies to cases where the parties involved or the subject of the merger holds or controls an undertaking that holds a carrier licence (within the meaning of the Telecommunications Ordinance (Chapter 106 of the laws of Hong Kong)) (see the Competition Commission's Guideline on the Merger Rule).

Except for corporations in specific industries that requires government approval for change of control, there is no express mechanism of governmental pre-clearance on acquisitions of listed shares.

However, in 2021, the Financial Secretary in Hong Kong presented a petition to the court of first instance to liquidate a Hong Kong-listed company on the ground of public interest under section 879(1) of the CO.

Law stated - 04 August 2023

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

The Takeovers Code does not allow an acquisition of a controlling shareholding in a listed company to be subject to any condition precedent that depends on any judgement or subjective act of the offeror or the listed company. Requirement of approval from other governmental entities may be an exception.

Availability of financing cannot be made conditional, since the financial adviser to the offeror must, at the outset of the transaction, submit to the SFC a letter certifying that the offeror has access to sufficient funding to complete the mandatory general offer under Rule 3.5 of the Takeovers Code.

Law stated - 04 August 2023

Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

There are usually two parts to a financing arrangement for acquisition of the controlling shareholding in a listed company. The first part is the facility for completion of the acquisition of the controlling shareholding portion. The second part is the facility for completing the mandatory general offer to the extent accepted by the remaining shareholders. The facility agreement usually provides such facilities separately.

The sellers typically do not bear any obligation to assist the buyer's financing. The buyer and its financiers will usually have to rely on public information already published by the listed company in their due diligence. This is partly because the insider dealing provisions in the Securities and Futures Ordinance (SFO) will (subject to a number of statutory defences) prohibit the buyers from trading in shares in the listed company, or from entering into the transaction, once the buyers possess inside information (as defined under section 285 of the SFO) of the listed company.

Law stated - 04 August 2023

Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

A controlling shareholder can acquire shares from the remaining shareholders in two ways.

- A voluntary general offer. It will be up to each remaining shareholder whether to accept the general offer or not.
- A scheme of arrangement or capital reorganisation, in which the shares held by the remaining shareholders will be cancelled. The Takeovers Code requires that, save with the consent of the Executive of the SFC, such a scheme be passed by a 75 per cent majority of disinterested shares cast in a general meeting of disinterested shareholders, and the 'against' votes cannot exceed 10 per cent of all disinterested shares. The laws of the jurisdiction of incorporation of the listed company may also impose additional requirements.

Law stated - 04 August 2023

Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

As there is generally no competition law review on mergers and acquisitions and the Takeovers Code prohibits (subject to certain narrow exceptions) the existence of any condition precedent in a transaction to which it applies, an acquisition of controlling interest in a listed company is typically completed simultaneously or shortly after the execution of the binding sale and purchase agreement.

The subsequent mandatory general offer to all remaining shareholders under the Takeovers Code comes with a three-week period in which the shareholders can sell their shareholding to the offeror.

Law stated - 04 August 2023

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

Tax is usually not a major concern in an acquisition of controlling shareholding in a listed company. The stamp duty assessed on the transaction of shares is usually the only relevant tax.

Hong Kong has no tax on interest income, capital gains or dividends. As most listed companies themselves are only engaged in investment holding, they are not expected to incur any tax liability or carry any tax loss by themselves.

The listed company may have subsidiaries that operate in Hong Kong, such as entities that provide administrative services and employ the staff of the listed company. Such entities may have to pay Hong Kong tax for their operations.

Law stated - 04 August 2023

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

A change of controlling shareholding of a public company does not usually involve a change of employer entity for the employees of the listed company or its subsidiaries, meaning there is usually no effect on labour and employee benefits.

However, where some employees hold share options or other forms of convertible securities issued by the listed company, such holders have a right to equal treatment by the offeror. This will mean the general offer will be extended to those option holders to transact such options at the offer price minus the exercise price of the option.

Law stated - 04 August 2023

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

There are several ways through which a target listed company that is already in liquidation can be acquired. Each comes with different considerations.

Each of these ways, however, is subject to an overall concern that most listed companies would have been suspended from trading for some other reason prior to its liquidation (such as failure to publish annual financial statements with unqualified audit opinion, significant regulatory violation by senior management, and insufficient operations), and the Stock Exchange of Hong Kong may delist any listed company that fails to fulfil the corresponding resumption conditions within 18 months of the date of suspension. The acquirer is therefore running against a very tight time frame to salvage the target company's listing status.

Law stated - 04 August 2023

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

In terms of anti-corruption, Hong Kong has followed the English common law system in criminalising commercial bribery; nonetheless, the main piece of legislation is the Prevention of Bribery Ordinance (Chapter 201 of the laws of Hong Kong), which prohibits, among others, an employee or agent of a principal from accepting an advantage without the permission of their principal in consideration of their performance or omission of an act in relation to the principal's affairs. This means if a director of a listed company accepts an advantage from the acquirer (or another person) that affects their recommendation to or approval of the listed company to accept a transaction, both sides of the advantage commit an offence.

This, however, only applies where the listed company proposes to acquire an asset, in this context in consideration of newly issued shares that may lead to a change in control, as the directors will have to approve the transaction and recommend the independent shareholders to vote to approve the transaction.

On the other hand, an acquisition of controlling shareholding does not involve approval from the directors, and the directors will usually follow advice from their independent financial adviser on whether to recommend that shareholders accept the offeror's mandatory general offer.

In terms of sanctions, as Hong Kong law only adopts sanctions imposed by the United Nations that mostly target specific terrorist groups in the Middle East and Africa, the risk of acquiring a Hong Kong company dealing with persons on the United Nations sanctions lists is relatively low.

On the other hand, several People's Republic of China (PRC) companies that are based in Hong Kong are subject to sanctions imposed by the United States and other countries. Most are apparently or believed to be controlled by the PRC government, otherwise generally known as state-owned enterprises, and therefore not up for sale. If there is an opportunity to acquire a controlling stake over such sanctioned companies, the acquirer should consider whether it is prohibited from acquiring such stake by reason of, for example, the nationality of its ultimate beneficial owner. The acquirer should also consider whether banks might terminate the client relationship with it by reason of its exposure to secondary sanctions for dealing with or in a sanctioned entity.

Similarly, acquirers should be aware of the fast-changing ambit of the sanction measures imposed by the United States and other countries on Russian entities. In particular, secondary sanctions might be imposed on any person who provides material support to any person subject to sanctions imposed with respect to the Russian Federation. If the ultimate beneficial owner of a company is a sanctioned entity, acquiring a significant shareholding from that company may be regarded as material support to that entity and might therefore attract secondary sanction penalties.

Law stated - 04 August 2023

UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

There are different sources of data on mergers and acquisitions available in Hong Kong, but each of them differs

significantly based on the samples taken and how ‘mergers and acquisitions’ is defined. In Hong Kong, the Securities and Futures Commission (SFC) annual report for 2022–23 shows that the number of general and partial offer cases under the Code on Takeovers and Mergers (Takeovers Code) received by the SFC saw a decline from 45 cases in 2020–21 to 33 in 2022–23, possibly due to geopolitical uncertainties.

The Stock Exchange of Hong Kong (HKEx) launched a new listing regime in Hong Kong allowing the listing of shell companies known as Special Purpose Acquisition Companies (SPAC) with reputable SPAC promoters in January 2022. As at 20 July 2023, HKEx has received a total of 17 SPAC listing applications, and five SPACs have been listed on HKEx since March 2022. One of the characteristics of a SPAC is that it must go through the merger and acquisition process of another private company with business operations, known as the De-SPAC transaction.

All SPACs must announce the De-SPAC transaction within 24 months of its listing (subject to any extension granted by the HKEx) and complete the De-SPAC transaction within 36 months of the listing date of the SPAC (subject to any extension granted by the HKEx). Although the number of SPAC listings is, as at the time of writing, still in the single digits, as the number of SPAC listing increases, the expected trend is an increase in the number of merger and acquisition deals as the listed SPACs go through the De-SPAC stage. For further details about SPAC, please refer to Chapter 18B of the Listing Rules .

Other than the SFC publishing Practice Note 23 in December 2021 (PN 23, which came into effect on 1 January 2022) on the waiver of the application of Rule 26.1 of the Takeovers Code in relation to a De-SPAC transaction, there have been some proposed amendments to the Takeovers Code, which aim to codify the SFC’s current practice and clarify and streamline certain provisions in the Takeovers Code.

According to PN 23, upon application for the abovementioned waiver, and if the Executive of the SFC considers it appropriate to grant the waiver, a De-SPAC transaction resulting in owners of the De-SPAC target company obtaining 30 per cent of more of the voting rights in the De-SPAC target or successor company will not be subject to the requirement to make a general offer for the remaining shares of the De-SPAC target of successor company, and the Takeovers Code will not apply to the De-SPAC transaction.

However, if the Executive of the SFC does not consider it appropriate to grant the waiver, Rule 26.1 of the Takeovers Code will apply to the De-SPAC transaction and the relevant parties will have to comply with the applicable provisions of the Takeovers Code in respect of the De-SPAC transaction.

Law stated - 04 August 2023

Jurisdictions

Austria	Schindler Attorneys
Bermuda	BeesMont Law Limited
Brazil	Loeser e Hadad Advogados
Bulgaria	Kambourov & Partners, Attorneys at Law
China	HJM Asia Law & Co LLC
Germany	GSK Stockmann
Ghana	Kimathi & Partners Corporate Attorneys
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