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Practical cross-border insights into mergers and acquisitions

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The key legislation governing both public and private M&A in South Africa is the Companies Act, 71 of 2008 (Companies Act) and the Companies Regulations, 2011 promulgated under it, which include certain Takeover Regulations that regulate M&A activity.

The Financial Markets Act, 19 of 2012 (FMA) is important in that it contains various market abuse and insider trading rules that apply in the context of public M&A.

Competition/antitrust rules appear primarily in the Competition Act, 89 of 1998. Mergers that have an economic effect within South Africa are categorised by reference to monetary thresholds (the asset and turnover values attributable to the acquiring firm and target firm respectively in, into or from South Africa) as "small", "intermediate" or "large". Intermediate and large mergers are notifiable to the competition authorities and subject to pre-implementation approval. The merger approval process involves an assessment of (i) whether or not the merger will substantially lessen or prevent competition in the relevant market/s, and (ii) various public interest factors. The public interest assessment considers the potential effect of the proposed transaction on:

- the particular industrial sector;
- employment;
- the ability of small and medium businesses and those controlled by historically disadvantaged persons (HDPs) to enter into, participate in, and expand within the market;
- the ability of national industries to compete in international markets; and
- the promotion of a greater spread of ownership, in particular to increase ownership of HDPs and workers in firms within the market.

Sector-specific legislation may be relevant to M&A in certain sectors, for example in the banking, broadcasting, financial services, mining and telecommunications sectors, and ought to be taken into account by the transacting parties.

Public companies whose shares are listed on the Johannesburg Stock Exchange (JSE) are subject to the JSE Listings Requirements, which contain various rules regulating M&A activity involving JSE-listed companies.

Insofar as regulators are concerned, in addition to the competition authorities, the Takeover Regulation Panel (TRP), a statutory body established by the Companies Act, is tasked with regulating takeovers to (i) ensure the integrity of the marketplace and fairness to shareholders, and (ii) prevent actions by target companies designed to impede, frustrate or defeat an offer, or the making of fair and informed decisions by shareholders. The TRP has the power to initiate or receive complaints, conduct investigations and issue compliance notices. The JSE ensures compliance with the JSE Listings Requirements, and the Financial Sector Conduct Authority (FSCA) regulates market conduct and is responsible for enforcing the FMA.

1.2 Are there different rules for different types of company?

The Companies Act applies more stringent rules in the context of M&A to profit companies designated as "regulated companies", namely:

(i) public companies (which include JSE-listed companies);
(ii) state-owned companies; and
(iii) private companies if 10% of their shares have been transferred (other than among related or inter-related parties) within the two years immediately preceding a proposed transaction.

The takeover regime established under Parts B and C of Chapter 5 of the Companies Act and the Takeover Regulations will apply to a "regulated company" when it carries out a so-called "affected transaction", which is a fundamental transaction such as a tender offer (general, mandatory or partial), statutory merger, scheme of arrangement, or a disposal of all or a greater part of a company's assets or undertaking. Given the significance of "affected transactions" to a company and its shareholders, the Companies Act makes them subject to the application of the takeover rules and regulatory oversight by the TRP.

JSE-listed companies are also subject to various rules in the JSE Listings Requirements, which regulate, among other things, corporate actions and M&A transactions. The JSE Listings Requirements may require shareholder or JSE approval (e.g. a category 1 transaction requires approval of shareholders by way of an ordinary resolution).

1.3 Are there special rules for foreign buyers?

As a general rule, there are no special rules for foreign buyers. The Protection of Investment Act, 22 of 2015 requires that "foreign investors and their investments must not be treated less favourably than South African investors in like circumstances". The reference to "like circumstances" requires an overall examination of the merits of a foreign investment, including the sector, the aim of any measure relating to foreign investments, the particular foreign investor or foreign investment, and the effect on stakeholders, employment and the environment.

South Africa does not have a dedicated foreign investment approval process. The Competition Amendment Act, 18 of 2018 has introduced a national security review, which requires the President to appoint a committee to consider whether a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of South Africa. If it would, the proposed merger may be prohibited on national security grounds. As to what constitutes a national security interest, the President must identify and publish in the *Government Gazette* a list of national security interests. It remains to be seen how the national security review will be implemented.

The South African Reserve Bank (SARB) imposes exchange controls on South African residents in terms of the Exchange Control Regulations, issued under the Currency and Exchanges Act, 1933, the purpose of which includes regulating inflows and outflows of capital from South Africa. While foreign buyers are not subject to exchange control rules, they may be impacted indirectly because acquisitions of South African assets and certain transactions with a South African exchange control resident may require exchange control approval. South African residents (including target companies) are not permitted to export capital from South Africa except as provided for in the relevant exchange control rules. Generally speaking, no South African resident is entitled to enter into any transaction in terms of which capital (funds or otherwise) or any right to capital is directly or indirectly exported from South Africa without the prior approval of the Financial Surveillance Department of the SARB or a registered bank in its capacity as an "authorised dealer".

While nearly all business sectors are open to foreign investment, certain industry-specific legislation (e.g. in broadcasting) precludes foreign buyers from holding interests in excess of prescribed thresholds either at all or without prior approval of the relevant Minister.

1.4 Are there any special sector-related rules?

Yes, specific sector-related rules apply in the aviation, broadcasting, banking, insurance, mining, private security, and telecommunications sectors, which may impact on M&A in those sectors, e.g. through the imposition of minimum equity requirements for ownership by HDPs or the limitation of foreign ownership in the sector.

The Broad-Based Black Economic Empowerment Act, 53 of 2003 is legislation through which Broad-Based Black Economic Empowerment (B-BBEE), the South African Government's policy aimed at decreasing race-based income inequalities and increasing the participation of HDPs in the South African economy, is promoted and measured. Generic codes and various sector-specific codes (e.g. agriculture, financial services, ICT, tourism) of good practice published under the B-BBEE Act detail the manner in which B-BBEE must be measured. A firm or group's contribution to B-BBEE is measured with reference to various elements of the relevant scorecard, against targets for ownership, management control, skills development, enterprise and supplier development (including preferential procurement), and socio-economic development, to arrive at the B-BBEE score of a company. The overall score translates to a rating, Level 1 being the highest and Level 8 the lowest. While it is not mandatory to comply with B-BBEE or achieve a certain rating, the better a company's B-BBEE rating the better its ability to compete for public and private sector business. In some sectors, a competitive B-BBEE rating is a commercial imperative. Target firms will often have continuing contractual obligations relating to B-BBEE, and the impact of any proposed M&A on a target firm's B-BBEE is an important consideration for a potential buyer and regulators.

1.5 What are the principal sources of liability?

The principal sources of liability in South Africa are statutory rules, contractual liability, and delictual (tort) liability. The content of these sources of legal liability is informed by various pieces of legislation (for example, breaches of insider trading rules under the FMA or gun-jumping under the Competition Act), negotiated contracts, and established common law rules.

Successor liability risk is a factor and can be mitigated and managed to some extent through thoughtful transaction structuring, careful due diligence, clear drafting with regard to assumed and excluded liabilities, warranties and indemnities, and potentially by warranty and indemnity insurance.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The four most significant means of acquisition are:

(i) statutory mergers, whereby two companies merge or amalgamate through a process under the Companies Act;

(ii) schemes of arrangement, whereby the board of the target proposes a scheme for the acquisition, consolidation, splitting, buy back, and/or exchange of securities to shareholders who may then approve it by way of special resolution (75% of those present and entitled to vote);

(iii) tender offers, whereby the offeror makes an offer to the target company's shareholders to acquire their shares for some consideration. This may be a general offer, for all the target's shares, partial offer, or some but not all of the target's shares, or a mandatory offer, whereby an offeror's interest in the target company crosses a 35% control threshold obliging it to make an offer for the remainder of the target's shares; and

(iv) a sale of all or the greater part of the assets or undertaking of a target company.

By their nature, statutory mergers and schemes of arrangement cannot be achieved without board support and sufficient shareholder support.

It is possible to combine these different alternatives into a single offer, e.g. a scheme with a standby tender offer.

2.2 What advisers do the parties need?

Parties to an M&A transaction will generally appoint legal and financial advisers, and sometimes strategic communications and/or management consultants. The independent board of a target company is required to obtain advice from an independent expert to enable it to form an opinion on an offer and communicate that to shareholders. Auditors may be required to prepare *pro forma* accounts or assist with financial disclosures. Where competition analysis is required, economists may be engaged. For some transactions, parties may also require sector-specific technical experts, for example in the mining, telecommunications, and real estate sectors.

2.3 How long does it take?

The time that it takes to complete a transaction will vary from case to case and depend on the specific exigencies of that transaction: the transaction structure and complexity; whether it is recommended (friendly) or unrecommended (hostile); regulatory approvals; the shareholder approvals required; the exercise of appraisal rights by dissenting shareholders; and the ability of third parties to intervene in the regulatory approval process.

The Takeover Regulations contain a regulatory timetable, which is triggered by the delivery of a firm intention letter to the board of a target company. The board of the target has primary responsibility for publishing a firm intention announcement immediately after receipt of the firm intention letter. Thereafter, an offer circular must be posted to shareholders within 20 business days, and any response circular posted by the independent board of the target within a further 20 business days of the posting of the offer circular. Once posted, the offer opens and must remain open for at least 30 business days.

Despite the regulatory timetable, timing will often be driven by regulatory approvals, in particular the competition approval process, which takes 60 business days for an intermediate merger and four to six months (possibly longer) for a large merger.

2.4 What are the main hurdles?

Hurdles will vary from transaction to transaction. Depending on the structure of the transaction, a potential hurdle is the level of shareholder support necessary for an offer. It is important to gauge the preliminary views of key shareholders on the merits of an offer. Regulatory approvals may present another, particularly in multi-jurisdiction cross-border transactions. The competition approval process can be particularly difficult to navigate if competition issues and/or public interest issues arise and third-party stakeholders intervene. Additionally, the process of obtaining sector-specific approvals and consents can sometimes be difficult and uncertain.

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

There is a fair amount of flexibility with regard to deal terms and price, subject to the requirements that all holders of the same class of shares are afforded equivalent treatment, and all holders of voting rights are afforded equitable treatment. It is possible to build in a commercial conditions precedent (not for mandatory offers, which are limited to regulatory conditions), to offer elections to shareholders, to revise offers, and to increase the offer consideration, all subject to regulatory oversight by the TRP having regard to the applicable takeover rules and principles.

The Takeover Regulations contain a minimum bid price rule, which requires (save where the TRP permits otherwise) an offer price to be identical or, where appropriate, similar to the highest price paid by the offeror or any concert parties within the six months preceding the offer.

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

Where cash is offered, the offeror is obliged to deliver a cash confirmation to the TRP in the form of an irrevocable and unconditional bank guarantee, or a confirmation that sufficient cash is held in escrow for the cash component of the offer consideration. The cash confirmation is provided for the sole purpose of fully satisfying the cash offer commitments and must be exercisable by the TRP if the offeror fails to pay the cash consideration to offeree shareholders when required.

Where securities are offered as consideration, enhanced disclosures relating to the securities are triggered to allow shareholders to properly consider and assess the merits of the offer consideration. Cross-border share-for-share transactions are far more complex and would require an offshore bidder to have an inward secondary listing on the JSE in order to offer its securities as consideration to South African-based shareholders of the target company.

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

As a general rule, yes, in that all holders of the same class of shares must be afforded equivalent treatment, and all holders of voting rights must be afforded equitable treatment. Holders of different classes of securities with voting rights, or that are convertible to instruments with voting rights, must be given a comparable offer (see question 2.8 below).

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

Yes, if a company has more than one class of issued securities, and an offeror makes an offer that would result in that offeror holding more than 35% of the voting rights of the target company, then the offeror is obliged to make a comparable offer to acquire securities of each other class of securities issued by the target company, provided the securities have voting rights attached to them or are convertible to instruments with voting rights.

2.9 Are there any limits on agreeing terms with employees?

Insofar as employees (including executive directors) are also shareholders, the abovementioned rules requiring equivalent and equitable treatment would apply.

The impact of a potential transaction on employment is a public interest factor that the competition authorities, and the Minister of Trade, Industry and Competition, will take into account in assessing a merger. While not agreeing terms with employees directly, it is not uncommon for acquirers to undertake, as a condition to obtaining merger approval, not to retrench any employees for a period of time post-completion.

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

There are no specific requirements to obtain approvals from employees, pensions trustees and other stakeholders. However, these groups can exert some influence on a proposed transaction by the exercise of certain rights under the Companies Act or intervening (where permissible) in regulatory approval processes, e.g. the public interest assessment during the competition approval process. The Companies Act gives employee representatives, trade unions, and others who can demonstrate a recognised interest in a matter, the right to bring a derivative action to protect the target company's interests. It is generally advisable for a bidder and a target company's board to develop a well-considered stakeholder engagement strategy that encompasses engagement with all relevant stakeholders.

2.11 What documentation is needed?

The main documentation is typically: a non-disclosure agreement; an implementation agreement in a friendly scenario;

irrevocable undertakings or letters of support signed by significant shareholders in the target; a cash confirmation in a form approved by the TRP; a firm intention letter, which starts the clock on the prescribed regulatory timetable; a firm intention announcement, which is published on the JSE Stock Exchange News Service (SENS), and details the terms of the offer and other prescribed information; and an offeror's offer circular and the target company's response circular (in friendly scenarios the parties may publish a combined circular), each of which must set out information prescribed by the Takeover Regulations. Announcements must also be published on the SENS on the happening of certain events as follows: posting of the circular; amendment of the offer; and finalisation of the offer, and so on.

Transactions of a particular type (e.g. statutory merger) or classification (e.g. transactions categorised as category 1 transactions or reverse takeovers under the JSE Listings Requirements) will require documentation that conforms to specific content requirements.

Transaction documents and announcements relating to an offer may not be published without the prior approval of the TRP.

2.12 Are there any special disclosure requirements?

Yes, the content and process of disclosure is regulated by the Takeover Regulations and JSE Listings Requirement, where applicable. In addition to the terms and conditions of an offer, the firm intention announcement and/or circular must disclose, among other things:

- the identity of any concert parties of the offeror;
- details of the cash confirmation (if any) provided;
- details of any beneficial interests in the target company held or controlled directly or indirectly by the offeror;
- details of any concert parties;
- details of persons who have given an irrevocable commitment to accept or vote in favour of the offer;
- details of any agreements between the offeror or its concert parties with the target company, or with its directors or target company shareholders within the 12 months preceding the offer; and
- details of all dealings in securities of the target company in the six months leading up to the offer by the offeror and those who gave irrevocable undertakings to the offeror.

The response circular must disclose directors' beneficial interests in the target.

Any dealings in securities by the offeror during the offer period are subject to particular rules aimed at precluding special dealings, and must be disclosed to the TRP and published on the SENS. Additionally, the Companies Act requires any person who has acquired or disposed of a beneficial interest in securities of a regulated company, such that that person's beneficial interest in the target crosses (upwards or downwards) by 5%, 10%, or a further whole multiple of 5% threshold, to disclose the acquisition or disposal to the target company within three business days, which then publishes an SENS announcement of that fact.

2.13 What are the key costs?

The key costs are: advisory fees payable to various advisors; statutory fees payable to the TRP for documentary reviews and approvals, or TRP rulings; independent expert's fees; merger filing fees payable to the Competition Commission on a statutory scale; fees payable to the JSE for documentary reviews; and costs associated with the printing, posting and publication of circulars and announcements in the South African press.

2.14 What consents are needed?

This will vary from transaction to transaction; however, typical consents or approvals are shareholder approvals and regulatory approvals, be it competition approval and/or sector-specific approval from a particular regulator (e.g. in the broadcasting, mining, oil & gas, telecommunications sectors). As noted above, exchange control approval may be required from the Financial Surveillance Department of the SARB or an authorised dealer (a bank). Transactions that involve changes of control may trigger contract counterparty consent requirements.

2.15 What levels of approval or acceptance are needed?

An offeror may, save in the case of a mandatory offer, include a minimum acceptance condition (e.g. that at least x% of offeree shareholders accept the offer) as a condition precedent to the offer being implemented or becoming operative.

If required, shareholder approvals may take the form of either an ordinary resolution or a special resolution, the former requiring more than 50% approval, and the latter at least 75% approval, of the votes exercised on a particular resolution. Where appropriate, the offeror and its concert parties or related parties are excluded from voting on a particular resolution to approve a proposed transaction.

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

The cash confirmation – either an irrevocable guarantee by a South African bank or an irrevocable unconditional confirmation from a third party to the effect that sufficient cash is held in escrow in favour of the relevant shareholders for the sole purpose of fully satisfying the cash offer commitments – must be delivered to and approved by the TRP prior to the offer being announced. The firm intention announcement must specify details of the cash confirmation. The cash confirmation must be available throughout the offer period.

3 Friendly or Hostile

3.1 Is there a choice?

Yes, although schemes of arrangement and statutory mergers require the cooperation of the target and its board. A tender offer need not have the board's approval and may be made directly to the target's shareholders.

3.2 Are there rules about an approach to the target?

Yes. An approach with a view to an offer being made may be made only to the board of the target company. The identity of the ultimate offeror must be disclosed to the board. A board that has been approached may require reasonable evidence that the offeror is, or will be, in a position to implement the offer in full. Confidentiality rules apply to any negotiations between an offeror and an independent board, and confidentiality must be observed before a cautionary announcement or firm intention announcement is published.

3.3 How relevant is the target board?

The target board is certainly relevant; without its support, a scheme or statutory merger is not an option. On receipt of a firm intention letter, the target board must satisfy itself that an offeror can perform in terms of the proposed offer. It is also required to constitute an independent board to consider and opine on the merits of the offer, and communicate that to shareholders.

The target board is generally expected to adopt a neutral stance during an offer period and may not take any action that could have the effect of frustrating a *bona fide* offer or denying shareholders the opportunity to decide on its merits. However, there is nonetheless some scope for the target board to carry out defensive actions through, among other things, deploying technical defences, rallying key stakeholders against a bid that is perceived as hostile, and making regulatory approval processes difficult for the bidder.

3.4 Does the choice affect process?

Yes. As mentioned above, schemes or statutory mergers are not available in a hostile bid scenario. The hostile bidder must adopt a tender offer and will not be able to carry out preliminary due diligence (beyond publicly available information) or coordinate its offer with the cooperation of the target and its advisors. In a friendly scenario, the parties are able to prepare joint circulars and announcements.

4 Information

4.1 What information is available to a buyer?

An offeror would, in the ordinary course, have access to all publicly accessible information on the target. A target is not obliged to allow a bidder a right to conduct due diligence. However, if the target does share information with a bidder, whether by due diligence or otherwise, the Takeover Regulations require that the target must, on request, make that same information available to another *bona fide* potential offeror, notwithstanding the fact that the third party may be a "less welcome" bidder.

Any information sharing between competitors must be shared in accordance with appropriate "clean team" and information sharing protocols.

4.2 Is negotiation confidential and is access restricted?

Yes. The Takeover Regulations require that negotiations between an offeror and the target board must be kept confidential. Access to confidential negotiations and information is restricted; the parties should take careful steps to ensure compliance with rules applicable to the disclosure and sharing of "inside information" and "price sensitive information" under the FMA and JSE Listings Requirements, respectively.

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

If confidentiality cannot be maintained or there has been a leak of price sensitive information, or there is a reasonable suspicion that a leak has occurred, that information must immediately be disclosed in a cautionary announcement.

If no prior cautionary announcement is published, either the delivery of a firm intention letter to the target board or the crossing of the 35% mandatory offer threshold triggers a requirement to publish a firm intention announcement. This firm intention announcement must contain, among other things: the identity of the offeror and its concert parties; details of the cash confirmation (if any); the salient terms and conditions of the offer; the consideration offered; the class of securities affected; the estimated posting date for the circular; details of any beneficial interests held by the offeror and its concert parties; and details of any irrevocable undertakings given to the offeror.

4.4 What if the information is wrong or changes?

If information that underpins the bidder's assumptions is wrong or changes, that is often dealt with through contractual protections either negotiated with the bidder or in the terms of the offer itself.

Under the Takeover Regulations, in order for any incorrect statement made in relation to an offer not to become enforceable or binding, the statement must be repudiated by all reasonable means by the person who made it.

The FMA requires a person who has directly or indirectly made or published in respect of listed securities, or past or future performance of a listed company, a statement that is false or misleading or deceptive regarding any material fact, must, without delay, publish a full and frank correction with regard to such statement.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Yes. Generally, shares may be bought outside the offer process subject to insider trading rules and applicable disclosure and transparency rules (described at question 5.3 below). If shares are bought outside the offer process but during the offer period or when one is reasonably in contemplation, then the buyer may not buy shares if there are favourable terms and conditions attached to the acquisition that are not being extended to all other holders of the relevant shares. In this regard, there is a distinction drawn between "allowable dealings" and "prohibited dealings" during an offer period.

5.2 Can derivatives be bought outside the offer process?

Yes, but this is subject to the anti-price manipulation and insider trading rules of the FMA. Additionally, instruments that are convertible to securities may be subject to disclosure obligations if they are convertible to instruments with voting rights.

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

The Companies Act contains an "anti-creep provision", which requires persons who acquire or dispose of a beneficial interest in securities, such that they hold or no longer hold 5%, or any further multiple of 5%, of the voting rights attaching to a particular class of securities, to notify the target company within three business days of the acquisition. This applies irrespective of whether the acquisition or disposal was made directly, indirectly, individually or in concert with any other person, and options and other interests in securities must be taken into account. The target then publishes details of the relevant disclosure on the SENS to inform shareholders and the market.

Any allowable dealings during the offer period by an offeror or its concert parties must be disclosed to the TRP when effected, and the person who made the disclosure to the TRP must publish an announcement on the SENS of the dealings disclosed.

5.4 What are the limitations and consequences?

If, prior to the offer period, the offeror (and its related or inter-related or concert parties) acquires a beneficial interest in voting rights in the securities of the target company, such that its beneficial interest amounts to 35% or more of relevant target company securities, the offeror will be obliged to make a mandatory offer to the remainder of the target's shareholders on the same terms as the acquisition that took it to the 35% threshold.

If shares are acquired during an offer period, the limitations with regard to "prohibited dealings" described at question 5.1 above apply.

6 Deal Protection

6.1 Are break fees available?

Yes. The payment of break fees is generally permitted by the TRP, provided that such payment does not exceed an amount that is equal to 1% of the total transaction value.

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

The target may agree not to shop the company or its assets, subject to the directors' fiduciary duties, which would require them not to fetter their discretion and to engage with unsolicited bidders even if they had granted exclusivity or agreed to a "no-shop" provision. Moreover, the Takeover Regulations require a target to share information with a less welcome but *bona fide* bidder on the same basis as it did to the preferred bidder.

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

Yes, although this is always subject to the board's fiduciary duties, the terms of the Memorandum of Incorporation of the company, and any shareholder approvals that may be required. In the context of an offer, this is permitted provided it does not amount to frustrating action (described below) that has not been approved by shareholders and the TRP.

6.4 What commitments are available to tie up a deal?

Offerors are entitled to approach key shareholders of the target to seek irrevocable undertakings or letters of support in respect of a proposed offer. The TRP has published a guideline permitting an approach to the top-five shareholders who each hold 5% or more of the target, subject to compliance with applicable confidentiality obligations.

In friendly transactions, it may be possible to obtain board recommendations in favour of the transaction upfront and include them in a joint firm intention announcement and combined offer circular.

7 Bidder Protection

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

A bidder may include commercial deal conditions in its offer, provided that a condition's fulfilment or otherwise may not: (i) depend solely on the subjective judgment of the directors of the offeror; nor (ii) be within control of the directors of the offeror. Common commercial conditions relate to minimum acceptance thresholds and material adverse changes (MACs), although the latter are viewed with caution by the TRP. It is common for regulatory approvals to be included as deal conditions to an offer.

Only regulatory approvals may be invoked as conditions for a mandatory offer and no commercial conditions (e.g. MACs) are permitted.

The TRP will review conditions prior to permitting their publication in an announcement or circular. Additionally, the invocation of conditions, and the waiver of conditions, is subject to regulatory oversight by the TRP.

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

A target may provide limited interim period undertakings to a bidder to carry on business in the ordinary course, not to declare any dividends, and so on, but these undertakings should not amount to giving the bidder control of the target during the process. South African competition laws prohibit pre-implementation (so-called "gun-jumping") by the parties before the requisite competition approval has been obtained.

It can also to some extent rely on the no frustrating action rule under the Companies Act, to enforce restrictions against actions that are designed to or could have the effect of frustrating the offer. It can do this, for example, by requesting the TRP to enforce the rule by issuing a compliance notice to the target.

7.3 When does control pass to the bidder?

The prescribed percentage of "control" is 35%, and the bidder is deemed to have acquired control under the takeover rules when its shareholding reaches that prescribed control threshold. A bidder involved in stake building must take care not to trigger a mandatory offer by reaching this control threshold.

For competition/antitrust purposes, "control" passes when the bidder is able to control a majority of the votes of the target, or is able to appoint a majority of the target's board.

Otherwise, control, generally speaking, passes upon final implementation of relevant transaction, which occurs in accordance with terms of the offer and prescribed Takeover Regulation and JSE timetables (if applicable). Implementation of a TRP-regulated transaction may not occur until the TRP has issued a compliance certificate to the offeror.

7.4 How can the bidder get 100% control?

An offeror can acquire 100% control of a target by way of: (i) a scheme pursuant to which it acquires all of the remaining shares of the target company; (ii) a statutory merger of the target with a wholly owned subsidiary; or (iii) if it is able to, exercising a right to "squeeze out" the remaining shareholders in terms of the Companies Act.

In terms of the "squeeze-out provision", if, within four months of an offer it has been accepted by 90% of the offeree shareholders of the class to whom the offer was made (excluding shares held by the offeror), the offeror may give notice to the remaining shareholders to acquire their shares on the same terms as the offer. A similar provision applies if, as a result of an offer, the offeror and its related or inter-related parties holds at least 90% of the securities of the class for which the offer was made.

8 Target Defences

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

The Companies Act contains a "no frustrating action" rule that requires the board of the target to refrain from taking any action *vis-à-vis* the company that is directed at frustrating an offer, or that could effectively result in a *bona fide* offer being frustrated or shareholders being denied an opportunity to decide on its merits. This provision expressly precludes, among other things: (i) the issue of shares or options in respect of unissued securities; (ii) the sale, acquisition or disposal of assets of a material amount, except in the ordinary course of business; (iii) entry into contracts outside the ordinary course of business; and (iv) distributions abnormal as to timing and amount, without the prior approval of the TRP and shareholders, or in terms of a pre-existing obligation entered into prior to the offer or its being reasonably in contemplation.

That said, there is some scope for the board to raise legal/technical objections to a bid and/or to make the regulatory process difficult for the bidder.

8.2 Is it a fair fight?

The takeover regime is established with a view to ensuring that it is a fair fight, if indeed there is a fight. The disclosure and transparency rules, the equivalent and equal treatment rules, and the no frustrating action rule, among others, make for a somewhat level playing field.

Additionally, the TRP, as an independent regulator, is mandated to regulate offers and "affected transactions" to:

(i) ensure the integrity of the marketplace and fairness of shareholders of regulated companies;

(ii) ensure the provision of (a) necessary information to shareholders to the extent required to facilitate the making of fair and informed decisions, and (b) adequate time for regulated companies and shareholders to obtain and provide advice with respect to offers; and

(iii) prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by shareholders.

9 Other Useful Facts

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

The commercial terms of an offer, particularly with regard to price, probably have the most influence on the success or otherwise of a transaction. The deal structure and its complexity is another key influence: those that can be implemented quickly have better prospects of succeeding. Transactions that raise competition and/or public interest concerns are inherently more difficult to execute, with the competition approval process requiring careful management.

Whether a transaction is friendly or hostile is another driver, with the latter being considerably more difficult to implement successfully.

Beyond these factors, careful preparation by the bidder and its advisors, with regard to all aspects of the transaction, is a key driver of success.

9.2 What happens if it fails?

Under the Companies Act, if an offer fails or is withdrawn, the offeror or its concert parties, or any subsequent concert party, is precluded for a period of 12 months from making an offer or triggering a mandatory offer in respect of the target company. Other consequences (e.g. reputational, activist campaigns) may follow that require careful management.

10 Updates

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

The national security review process has been mentioned at question 1.3 above, and was introduced by the Competition Amendment Act, 2018. This legislation has also elevated the importance of the public interest review in that it is possible that the competition authorities may approve an anti-competitive merger on the basis that it can be justified on substantial public interest grounds. The competition authorities must first determine, with reference to various factors, whether a proposed merger is likely to substantially prevent or lessen competition. If they find that the merger is likely to substantially prevent or lessen competition, they must then determine whether the merger: (i) is likely to result in any technological efficiency or other pro-competitive gain that will offset the adverse effects to competition, and would not likely be obtained if the merger is prevented; and (ii) can be justified on substantial public interest grounds (described above at question 1.1 above).

We are also noticing an increase in shareholder activism and other activist-like interventions, including M&A-related activism, in South Africa. This is consistent with global trends and a function of a regulatory and corporate governance framework in South Africa that enables shareholder and activist interventions.

We anticipate that the financial sector's embrace of ESG and sustainability will both drive M&A activity and have an impact on how M&A activity is carried out.

Ezra Davids is chairman and senior partner of Bowmans, and specialises in M&A, capital markets, and securities law. Ezra is a member of the governing Council of the University of Cape Town. He sits on the board of trustees of the Legal Resources Trust (a non-profit human rights organisation using the law as an instrument of justice); is a director of Freedom Under Law (a non-profit organisation dedicated to the promotion of the rule of law in Southern Africa); and is a patron of the Student Sponsorship Programme (a non-profit organisation that enables academically talented, low-income students to excel in South Africa's best high schools). He is also the former chairman of the Recent Developments in M&A Subcommittee of the Corporate and M&A Committee of the International Bar Association and is a regular contributor to international M&A and ECM publications. Ezra was recently named by the New York-based Global M&A Network as one of the Top 50 Global M&A Dealmakers, and as South African Lawyer of the Year at the *Chambers* Africa Awards 2022. Ezra is the first practising African lawyer to be featured on the cover of *The American Lawyer*.

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Ryan Kitcat is a partner in the corporate/M&A practice area at Bowmans. Ryan specialises in public and private M&A and general corporate and commercial law. He has advised JSE-listed and multinational clients on a variety of national and cross-border mandates. He has worked in particular in the energy & natural resources, education, mining, hospitality, private security and telecommunications sectors. His expertise extends to B-BBEE transactions, corporate reorganisations, corporate governance, shareholder activism and takeovers. In 2018, Ryan spent time in the London office of Freshfields Bruckhaus Deringer on a *StrongerTogether* secondment. In 2019, Ryan completed the course Impact Investing in Africa through the University of Cape Town Graduate School of Business.

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