

Takeover Law: A Practical Overview

Angelos Onisiforou
Senior Associate

May 2019



Mergers and Acquisitions

The primary source of legislation relating to public M&A transactions in the Republic of Cyprus is the Law to Make Provision for Public Takeover Bids for the Acquisition of Securities of Companies and Related Matters, Law 41(I)/2009 (“**Takeover Law**”).

The competent authority responsible for the supervision and application of the provisions of the Takeover Law is the Cyprus Securities and Exchange Commission (**CySEC**).

CySEC also retains the authority to issue directives for supplementing and/or clarifying any provisions of the Takeover Law. To the present date, CySEC has issued four directives, which complement the provisions of the Takeover Law.

In addition to the Takeover Law and the directives, the array of the legislative arsenal in relation to M&A transactions comprises of the following legislative instruments:

- Companies Laws of Cyprus, Cap. 113 as amended (“**Companies Law**”).
- Cyprus Securities and Stock Exchange Law, Law 14(I) of 1993 as amended.
- Market Abuse Law, Law 102(I)2016.
- Transparency Requirements in relation to information about issuers whose securities are admitted to trading on a regulated market Law, Law 190(I) of 2007 as amended.

M&A transactions are clearly on the rise in the Republic of Cyprus the last few years. This increased activity is clearly reflective of the vast changes that the international landscape is experiencing in relatively short time intervals both from a business as well as from a legal/regulatory perspective.

Does the Takeover Law apply in my respective case scenario?

As stated in the introduction of this analysis, the regulatory body responsible for the implementation of the Takeover Law is CySEC. Accordingly, CySEC is empowered and entrusted with the authority of supervising the implementation of any takeover bid whereby, the company’s registered office is in the Republic of Cyprus and its securities are admitted to trading on a regulated market in the Republic of Cyprus.

For companies registered outside the Republic of Cyprus, CySEC retains the authority to oversee a takeover bid if any of the following requirements apply:

- the securities of the target company are admitted to trading on a regulated market only in the Republic of Cyprus; or
- the securities of the target company have been admitted to trading first in a regulated market in the Republic of Cyprus and subsequently on a regulated market of another member state, other than where the target company has its registered office; or
- the securities of the target company have been simultaneously admitted to trading on a regulated market in the Republic of Cyprus and on a regulated market in another member state, other than the one where the target company has its registered office, and the target company has determined that it will be under the supervision of CySEC for the bid and has notified CySEC on the first day of trading and has published that fact immediately.

In case where CySEC retains authority then, all matters concerning the consideration price of the bid as well as all matters concerning the procedure of making the bid, the notification procedure and the content of the offer document, are regulated in accordance with the Takeover Law.

Furthermore, matters such as the notification of the target's company personnel, general matters of corporate law as well as general corporate governance matters fall under the law and authority of the member state which the target company has its registered office.

A potential bidder must, prior to taking any action in an M&A transaction, seek and obtain legal guidance to the question posed above as it will determine the manner that the transaction will unfold. As the present analysis will try to highlight, M&A transactions are widely considered as transactions involving great risks and dangers both for the target company as well as for the bidder. A prudent bidder must always make sure that he has collected as much as intelligence possible in order to demystify all shadowy aspects of a prospective transaction and take an informed decision. The aphorism "knowledge is power" applies to the fullest extent possible in this type of transactions and as the reader appreciates, it is the gathering of all relevant information that will most certainly place the bidder in a better and more advantageous position in an M&A transaction rather than any other "tool" of such transaction.

Are there any alternative methods of acquisition of a public going concern?

The Republic of Cyprus is proud for having developed through the years a solid yet modern and flexible legislative framework. A potential buyer can also acquire the control of a public company via any of the following alternative methods:

- pursuant to sections 201A to 201AA of the Companies Law regarding the Merger and Division of Public Companies transposing the Third Directive 78/855/EEC the Sixth Council Directive 82/891/EEC as amended.
- pursuant to a scheme of arrangement under sections 198-201 of the Companies Law.
- directly from the shareholders of an unlisted public company.

It is certainly advisable for any party wishing to be engaged in an M&A transaction to carefully explore and consider all methods outlined above prior to proceeding with any definite decision on how to proceed with a prospective transaction.

Is therefore, a checklist before initiating the process of a takeover bid, necessary?

No, not really.

Every M&A transaction is unique and bears its own distinctive characteristics. From an empirical point of view however, the following will always place the bidder in a better position to carry forward his aspirations:

- Prepare a structure plan for the proposed transaction;
- Arrange and/or secure the financing of the proposed transaction; and
- Perform legal and economic "due diligence" exercises on the target company.

All items listed above are of equal importance, but perhaps the most important being, the eligibility of a potential bidder to obtain the requisite financing for the proposed transaction and successfully pull through the takeover bid.

Are there any conditions upon which the information is provided?

Information provided by the target company to any potential bidder must be given promptly regardless of whether the bidder is, or not, welcome by the target company and a subsequent (or less welcome bidder) must specify the objects it requires information. He is not entitled to just request in vague and general terms all information that the target company has previously supplied to its competitor.

Also, the information provided to any potential bidder is subject to the following:

- the confidentiality of the information passed;
- that the information should not be used and passed so that it will result to the solicitation of third parties;
- the obligation to use the information passed solely in connection with the bid or a potential bid.

Lastly, target companies must treat all potential bidders the same.

Chronology of Events from a regulatory perspective of a Takeover Bid

The process commences by the bidder making an announcement of his decision to make a takeover bid or by an announcement of a firm decision to make a takeover bid (as the case may be).

It is important to note at this point, that the bidder must only announce his decision to make a takeover bid only when he has reason to believe that his decision to proceed with the takeover bid will succeed.

The announcement is made immediately when the bidder has firm intention to make the bid or upon an acquisition of securities which give rise to an obligation to make a bid (as described below).

The announcement of a firm intention to make a bid must include the following information:

- the terms of the bid in high level form;
- the identity of the bidder and the target company;
- the percentage of securities of the target company already held by the bidder or any person acting in concert with the bidder;
- any irrevocable commitments or letters of intent to accept the bid by shareholders of the target company secured by the bidder (if any), and
- the conditions precedent upon which the takeover bid is subject to.

Within 3 working days from the announcement, the bidder must:

- call a meeting of the shareholders to approve the issuing of new securities offered as consideration;

- submit all necessary applications to obtain the relevant administrative permits from all relevant authorities;
- commence the relevant legal and economic due diligence; and
- generally make any possible effort to secure that all the above will be adhered to.

The bidder then, has 12 days from the announcement of his intention to make a bid, to prepare and submit the offer document to CySEC.

Once the offer document is submitted to CySEC, CySEC considers and approves its contents:

- within 8 working days, in case that the bid will be satisfied with cash consideration, or
- within 12 working days in case the consideration includes the issue of securities.

If extra information is requested from the bidder, it must be submitted within the next 5 working days and CySEC issues its decision within 3 working days from the submission of the extra information. In case that no response is received, then the bidder can safely assume that CySEC has approved the offer document and its contents.

When approval is obtained for the publication of the offer document within the above-described timeframe, the bidder proceeds with a simultaneous announcement and in any case within 7 days from the announcement of the document approval to the following:

- to the regulated market in the Republic of Cyprus where the securities are listed, and the regulated market will proceed with such announcement on its internet site;
- to CySEC;
- to the internet site of the person making the announcement (if such person maintains an internet site);
- if the announcement is made by the bidder, to the representatives of its employees or where there are no representatives to the employees themselves, and the board of the target company;
- if the announcement is made by the target company, to the representatives of their employees, or where there are no representatives to the employees themselves and the board of the bidder.
- publishes as soon as possible in at least two daily newspapers of pan-Cyprian circulation, the approval of the offer document and also mentions the address where holders of securities may receive a free copy
- sends by post a copy of the offer document to the holders of securities subject to the bid.

The time limit for the acceptance of the bid is set in the offer document and may not be less than 30 days and more than 55 days from the date the offer document was posted to the recipients or was listed on the internet site of the bidder. This period may be extended by a period of 14 days if the bidder wishes to amend the offer. This right can be exercised only up to two weeks before the end of the public offer period.

Can the announcement be revoked?

The first point to note is that the Takeover Law differentiates between the announcement for the intention to make a bid and for a firm intention to make a bid.

The Takeover Law allows for an announcement for the intention to make a bid which is made public to be revoked in four instances:

- Where:
 - the consideration offered to the recipients of the bid includes the exchange of new securities of the bidder; and
 - for the issue or allotment of these securities the approval of the general meeting of the shareholders of the bidder is necessary; and
 - the general meeting of the shareholders of the bidder refuses to approve the issue or allotment of these new securities.
- in case the bidder does not obtain the necessary administrative permit or approval to acquire the securities subject to the bid and in particular any necessary approval according to the competition law.
- In case any other precondition mentioned in the announcement of intention to make a bid is not met.
- In case the bidder decides that a precondition, the satisfaction of which is subject to his discretion is not met.
- in any other case that the bid cannot be materialised and also receives the approval of CySEC.

In case of an announcement of a firm intention to make a bid, the bidder is not allowed to revoke or withdraw it save in extraordinary cases and with the relevant approval of CySEC.

Are there any principles upon which the above-described process is premised?

Yes, the Takeover Law prescribes that every takeover bid is governed by the following principles:

- all holders of securities of the target company of the same class must be afforded equal treatment and in case where a person acquires control of a company then the other holders of securities must be protected;
- the holders of securities of the holder company must be allowed to have sufficient time and information to enable them to reach an informed decision in relation to the takeover bid;
- if the board of the target company advises the holders of securities then, it must give its views on the effect that the takeover bid will have on the company's employment and location of business;
- the board of the target company must act in the best interests of the company as a whole and must allow the holders of securities to decide on the merits of the takeover bid and not act in any way that will frustrate the successful outcome of the takeover bid;

- false markets must not be created in the securities of the target company in a way that the rise and fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted;
- before the announcement of the takeover bid the bidder must ensure that he will fulfil in full any cash consideration offered and secure the approval of the general meeting of the shareholders for the issuing or allotment of securities if such is offered;
- the target company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid of securities; and
- where the capital of the target company is comprised of different classes of shares then separate bids must be made for each class of shares or securities.

Is there a distinction between a friendly and a hostile takeover bid?

Yes, generally speaking a friendly takeover bid is one recommended by the board of directors of the target company whereas, a hostile takeover bid is one that the board of directors of the target company opposes.

What are the defensive measures that the board can implement in a hostile takeover bid?

The first point to note at this point is that the board can only oppose a hostile takeover bid if the shareholders' approval is obtained towards that effect. The defensive measures can include a number of actions such the buyback of the company's shares.

When a takeover bid is considered successful?

A takeover bid for the acquisition of the total of the target company securities is considered successful, if the acceptances added to the percentage already held by the bidder (or persons acting in concert with him) would in aggregate carry fifty per cent (50%) or more of the voting rights of the target company.

What if the takeover bid is not successful?

If the takeover bid is not successful then the bidder is not entitled to accept any smaller percentage of acceptance and any securities acquired by the bidder following the acquisition of securities, cease to confer the bidder any voting rights.

The submission of a partial takeover bid is not allowed without the prior approval of the Commission. Also for the submission of a partial takeover bid certain thresholds (as detailed within the Takeover Law) need to be adhered to before such approval is granted.

Are there any mandatory provisions for a takeover bid?

Yes, where a person because of his own acquisition (or of the acquisition by persons acting in concert with him) holds securities of a company, which added to any existing holdings of those securities of his holdings (or of the holdings of the persons acting in concert with him), directly or indirectly give him a percentage of 30% or more of the existing voting rights in that company at the date of acquisition, such a person is required to make a bid at the earliest opportunity to all the holders of those securities for their holdings at an equitable price.

The same applies in case where the bidder already holds a percentage equal or greater than 30% but below 50% of the voting rights of the company and intends to increase his shareholding.

How the 30% or 50% holding mentioned above is calculated?

To calculate the percentages mentioned above, the following percentages are counted together with the voting rights held by the bidder:

- voting rights held by other persons on behalf of the bidder;
- voting rights held by a controlled undertaking of the bidder;
- voting rights held by any person acting in concert with the bidder;
- voting rights attached to securities held by the bidder, where they have been pledged.

In addition to the above, the following voting rights are counted with the voting rights of the bidder:

- securities of the bidder with such rights as basically the right to exercise voting rights of the said securities;
- securities of the bidder which have a right to acquire on their own initiative following an agreement;
- securities deposited with the bidder, if in the absence of specific directions by the holders, they have a right to exercise at their absolute discretion the voting rights attached to those securities.

Voting rights suspended by the law however, are not counted in the above percentages.

Is there a definition for the term equitable price?

Yes, the Takeover Law provides that in every bid, the consideration must be equal at least to the highest price paid by the bidder (or by the persons acting in concert with him), during the last 12 months prior to the announcement of bid.

Are there any market squeeze-out provisions in the Takeover Law?

Yes, in case that the bidder makes a bid to all holders of securities of the target company for the total of their holding then he is able to require all the holders of the remaining securities to sell to the bidder all their securities in the following situations:

- where the bidder holds securities in the target company representing not less than 90% of the capital carrying voting rights and not less than 90% of the voting rights in the target company;
- where the bidder holds or has irrevocably agreed to acquire, following the acceptance of a takeover bid, securities in the target company representing not less than 90% of the capital carrying voting rights and not less than 90% of the voting rights included in the takeover bid.

The consideration for the acquisition of securities of the target company shall take the same form and shall be at least equivalent to the consideration of the takeover bid. In each case, a cash alternative shall be provided at the recipient's choice.

How a squeeze-out right is exercised?

A market squeeze out is exercised following an application to CySEC which must be communicated by the bidder to the target company. The application must include the amount and the form of consideration to be paid.

In addition, a confirmation by one or more institutions must be included together with the application confirming where the funds will be deposited (for the payment of the remaining holders of securities) and that they will remain available until the completion of the procedure.

CySEC will examine the application and upon confirmation of the 90% threshold described above, it will issue a decision creating an obligation to the bidder to:

- notify in writing the holders of securities of the target company which will be affected;
- to pay the said holders the total amount of the consideration offered; and
- to take all necessary actions to transfer the securities in its name.

This decision will be issued and communicated to the bidder who will then have an obligation to abide its terms and communicate its terms to the target company.

Do the remaining holders have any right to dispute the squeeze-out procedure?

In a sense yes, the holders of the securities are allowed a 6 months' time limit to dispute the amount of consideration paid by the bidder. The time limit commences from the date that the offer is communicated to the target company.