# CHAPTER 11

## Takeover Bids

This Chapter applies in relation to takeover Bids when all or some of the Securities of the Offeree Company are Admitted to Trading on a Regulated Market.

*Introduction*

11.1 This Chapter applies in relation to takeover Bids when all or some of the Securities of the offeree Company are Admitted to Trading on a Regulated Market in Malta.

11.1.1 The objective of this chapter is to implement the relevant provisions of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, other than article 10 of the Directive which is transposed in Chapter 5.

11.1.2 In the event that any of these Capital Markets Rules are in conflict with the provisions of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, the Directive shall prevail.

11.1.3 In order to give effect to Article 4(5)(ii) of Directive 2004/25/EC, the Authority may dispense with, vary or not require compliance with the terms of any particular Capital Markets Rule in this Chapter, provided that the General Principles set out in Article 3(1) of Directive 2004/25/EC are respected and that where this discretion is exercised a statement explaining the Authority's decision shall be included in the Offer Document.

11.2 The provisions of this Chapter shall not apply to takeover Bids:

11.2.1 for Securities issued by companies, the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the Units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies. Action taken by such Companies to ensure that the stock exchange value of their Units does not vary significantly from their net asset value shall be regarded as equivalent to such repurchase or redemption;

11.2.2 for Securities issued by the central banks of the Member States or States.

11.2A The requirement to make a Mandatory Bid in terms of Capital Markets Rule 11.8 shall not apply in the case of use of resolution tools, powers and mechanisms provided for in Title IV of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012 or in Title V of Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132.

11.3 In this Chapter, unless the context otherwise requires, the following expressions have the meaning hereby assigned to them:

'Person(s) Acting In Concert' means any natural or legal person who cooperates with the Offeror or the Offeree Company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring Control of the Offeree Company or at frustrating the successful outcome of a Bid. Subsidiary Undertakings, Controlled Undertakings, Parent Companies or any other Group Company of any person cooperating with the Offeror or the Offeree Company shall be deemed to be Person(s) Acting In Concert with that other person and with each other.

'Announce' means publish or make 'available to the public'.

'Control' or 'Controlling Interest' means the holding by a person or the holding by Persons Acting In Concert with him which, when added to any existing holdings of those Securities of the person and/or to holdings of those Securities of Persons Acting In Concert with him, directly or indirectly give him fifty percent plus one of the voting rights of a Company.

'Mandatory Bid' shall mean a Bid made in terms of Capital Markets Rule 11.8.

'Multiple-Vote Securities' means Securities included in a distinct and separate class and carrying more than one vote each.

'Offeree Company' means a Company, the Securities of which are the subject of a Bid.

'Offeror' means any natural or legal person making a Bid.

'Parties To The Bid' means the Offeror, the board of directors if the Offeror is a Company, the Offeree Company, holders of Securities of the Offeree Company and the board of directors of the Offeree Company, and Persons Acting In Concert with such parties.

'Securities' mean transferable Securities carrying voting rights in a Company.

'Takeover Bid' or 'Bid' means a public offer, other than by the Offeree Company itself, made to the holders of the Securities of a Company to acquire all or some of those Securities, whether mandatory or voluntary, which follows or has, as its objective, the acquisition or Control of the Offeree Company.

"Target Company" means an Issuer of Securities for which the Offeror is obliged to make or has made a takeover Bid.

"Voluntary Bid" means a Bid made to all the holders of Securities of a Company for all their holdings when the person making such a Bid does not have a Controlling Interest in the Company.

11.4 The MFSA shall be the authority competent to supervise a Bid where:

11.4.1 the offeree Company is an Issuer whose Securities are Admitted to Trading in Malta and which has its registered office in Malta; or

11.4.2 the Offeree Company is registered in another Member State or State but has its Securities admitted to trading solely on a Regulated Market in Malta:

Provided that if Securities of the Offeree Company are admitted to trading on Regulated Markets in more than one Member State or EEA State, including Malta, the MFSA shall be the authority competent to supervise the Bid if the Securities of the Offeree Company were first admitted to trading on a Regulated Market in Malta.

11.5 The MFSA shall supervise the Bid if the Securities of the Offeree Company were first admitted to trading on Regulated Markets in more than one Member State or EEA State simultaneously, including Malta, and the Offeree Company has determined that the MFSA shall be the authority competent to supervise the Bid and has notified the MFSA accordingly on the first day of trading:

Provided that where, on the coming into force of this Chapter, the Securities of an Offeree Company were already Admitted to Trading on a Regulated Market in Malta and on the Regulated Market of another Member State or EEA State simultaneously, the MFSA together with the regulatory authority of the other Member State or EEA State shall, within four weeks of the coming into force of this Chapter, determine which of the authorities shall supervise the Bid. Otherwise, the Offeree Company shall determine which of the authorities shall supervise the Bid on the first day of trading following the four week period referred to herein.

11.6 Where the MFSA has been designated as the authority competent to supervise the Bid, such a decision shall be made public.

11.7 In the cases referred to in Capital Markets Rule 11.4.2, 11.5 and 11.6 above:

11.7.1 matters relating to the consideration offered in the case of a Bid and procedures applicable to the Bid shall be regulated by the laws of the Member State or EEA State of the regulatory authority supervising the Bid: and

11.7.2 matters relating to the information to be provided to the employees of the Offeree Company and any issues relating to the percentage of voting rights required to confer Control as well as any defensive action taken to frustrate a Bid shall be regulated by the laws of the Member State or EEA State where the Offeree Company is registered.

*Mandatory Bid*

11.8 Where a person acquires a Controlling Interest as a result of his own acquisition or the acquisition by Persons Acting In Concert with him, such a person shall make a Mandatory Bid as a means of protecting the minority Shareholders of that Company. Such a Mandatory Bid shall be notified by the Offeror Company to the Authority and announced by the Offeror Company to the public as specified in Capital Markets Rule 11.15. Such Mandatory Bid shall be made in the manner specified in Capital Markets Rule 11.19, to all the holders of Securities in that Company for all their holdings at the equitable price as determined in accordance with the provisions of Capital Markets Rule 11.39:

Provided that where Control has been acquired following a Voluntary Bid made to all the holders of Securities for all their holdings, the obligation to launch a Mandatory Bid shall not apply.

11.9 To calculate the threshold required to acquire a Controlling Interest, the following shall, *inter alia*, be included and added to the voting rights held by the Offeror:

11.9.1 voting rights held by Persons acting in their own name but on behalf of the Offeror;

11.9.2 voting rights held by persons acquired and Controlled directly by the Offeror or through intermediaries;

11.9.3 voting rights attached to Securities held by the Offeror which are lodged by way of security, except where the holder of the security Controls the voting rights and declares his intention of exercising them, in which case they shall be regarded as his voting rights.

11.10 Where acquisition of Control takes place as a result of acquisition of holdings by Persons Acting In Concert, the obligation to make a Bid shall lie with the person having the highest percentage of voting rights.

11.11 The obligation to make a Bid to all the holders of Securities shall not apply to those Controlling holdings already in existence on 19th June 2006.

11.12 Anything contained in Chapter 11 of the Capital Markets Rules shall be without prejudice to any rules and regulations applicable to a company which is authorised, licensed or otherwise supervised in terms of the Banking Act (Cap. 371 of the laws of Malta), the Financial Institutions Act (Cap. 376 of the laws of Malta), the Investment Services Act (Cap. 370 of the laws of Malta), the Insurance Business Act Cap. 403 of the laws of Malta) and the Insurance Intermediaries Act (Cap. 487 of the laws of Malta), the Trusts and Trustees Act (Cap. 331 of the laws of Malta), as each may be amended from time to time, or any other law, rule or regulation which would require regulatory consent prior to the

acquisition or disposal of its equity shares in a company where those securities are listed on a Regulated Market.

11.13 *Omissis*

11.14 *Omissis*

*Obligation to announce*

11.15 An Offeror shall inform the MFSA of a Bid and shall announce his decision to launch the Bid within seven days of acquiring a Controlling Interest.

11.16 The Bid must be announced only after the Offeror ensures that he can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.

11.17 By way of consideration the Offeror may offer Securities, cash or a combination of both:

Provided that a cash consideration must be offered as an alternative in all cases.

The Offeror must provide confirmation that the element of cash offered as consideration will be paid to shareholders accepting the cash offer not later than 30 days from closing of the acceptance period.

11.18 As soon as the Bid shall have been announced, the board of Directors of the Offeree Company and the Offeror shall inform the representatives of their respective employees or, where there are no such representatives, the employees themselves.

*Offer Document*

11.19 An Offeror shall draw up and make public, not later than twenty one calendar days from announcing his decision to launch a Bid, an offer document containing the information necessary to enable the holders of the Offeree Company's Securities to reach a properly informed decision on the Bid, which offer document shall be communicated to the MFSA prior to it being made available to the public.

11.20 When the offer document is published, the board of Directors of the Offeree Company and of the Offeror shall communicate the offer document to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

*Exemptions concerning Mandatory Bids*

11.21 The MFSA may grant exemptions from the obligation to make a Mandatory Bid on the basis of a written application in the following circumstances:

11.21.1 Control of the Target Company was obtained as a result of reduction of the Offeree Company's share capital;

11.21.2 Control of the Target Company was acquired as a result of a merger or division;

11.21.3 Control of the Target Company was obtained through the acquisition of Securities with the intention to sell within a short term;

11.21.4 Control has been obtained by an existing shareholder acquiring Securities following an increase in capital as a result of executing his right of pre-emption and not through the purchase of Securities acquired from other persons;

11.21.5 Control was obtained following a transmission of Securities '*causa mortis'* as a result of which the person's number of voting rights in the Target Company increased.

*Details of offer document*

11.22 The offer document shall specify at least the following information:

11.22.1 the terms of the Bid;

11.22.2 the identity of the Offeror and, where the Offeror is a Company, the status, name and registered office of that Company;

11.22.3 the Securities or, where appropriate, the Class or Classes of Securities for which the Bid is made;

11.22.4 the consideration offered for each security or Class of Securities and, in the case of a Mandatory Bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid;

11.22.5 the compensation offered for the rights which might be removed as a result of the "breakthrough rule" laid down in Capital Markets Rules 11.51 to 11.56 , with particulars of the way in which that compensation is to be paid and the method employed in determining it;

11.22.6 the maximum and minimum percentages or quantities of Securities which the Offeror undertakes to acquire;

11.22.7 details of any existing holdings of the Offeror, and of Persons Acting In Concert with him, in the Offeree Company;

11.22.8 all the conditions to which the Bid is subject;

11.22.9 the Offeror's intentions with regard to the future business of the Offeree Company and, in so far as it is affected by the Bid, the Offeror Company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the Offeror's strategic plans for the two Companies and the likely repercussions on employment and the locations of the companies' places of business;

11.22.10 the time allowed for acceptance of the Bid;

11.22.11 where the consideration offered by the Offeror includes Securities of any kind, information concerning those Securities;

11.22.12 information concerning the financing for the Bid;

11.22.13 the identity of Persons Acting In Concert with the Offeror or with the Offeree Company and, in the case of companies, their status, names, registered offices and relationships with the Offeror and, where possible, with the Offeree Company;

11.22.14 the national law which will govern contracts concluded between the Offeror and the holders of the Offeree Company's Securities as a result of the Bid and the competent courts to settle any disputes.

11.23 A report on the consideration offered, drawn up by one or more experts who are independent of the Offeror or Offeree Company, shall be appended to the offer document. The expert's report should include an evaluation of the consideration being offered with this explained against the background of the offer being made.

The information provided should include, but not necessarily be limited to, whether the Bid price can be defined as 'an equitable price' or a 'fair price', as applicable, in terms of the

Capital Markets Rules and where securities are being offered as part of the consideration, the market performance and liquidity of the securities being offered. More detailed guidance on the requirements of an Independent Expert's Report is given in Guidance Note 2 at the end of Chapter 11.

11.24 The expert's report must confirm that the Offeror has sufficient resources to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer.

11.25 The MFSA may request that the parties to a Bid shall provide the Authority with all the information in their possession concerning the Bid at any time on request.

*Sufficient time and information for acceptance*

11.26 The holders of the Securities of an Offeree Company must have sufficient time and information to enable them to reach a properly informed decision on the Bid.

11.27 The time allowed for the acceptance of a Bid shall be determined in the offer document and shall be not less than three weeks nor more than ten weeks from when the offer document is made available to the public.

*The opinion of the board of Directors of the Offeree Company on the Bid*

11.28 The board of Directors of the Offeree Company must advise and give its views to the holders of Securities on the effects of implementation of the Bid on employment, conditions of employment and the locations of the Company's places of business.

11.29 In this respect, the board of Directors of the Offeree Company shall draw up and make available to the public a document setting out its opinion of the Bid and the reasons on which it is based, including its views on the effects of implementation of the Bid on all the Company's interests and specifically employment, and on the Offeror's strategic plans for the Offeree Company and their likely repercussions on employment and the locations of the Company's places of business as set out in the offer document in accordance with Capital Markets Rule 11.22.9.

11.30 The board of Directors of the Offeree Company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves.

11.31 Where the board of Directors of the Offeree Company receives in good time a separate opinion from the representatives of its employees on the effects of the Bid on employment, that opinion shall be appended to the document.

*Board of Directors to call general meeting*

11.32 During the period referred to in Capital Markets Rule 11.34 below, the board of Directors of the Offeree Company shall obtain the prior authorisation of the Shareholders in general meeting given for this purpose before taking any action, which may result in the frustration of the Bid and in particular before issuing any shares which may result in a lasting impediment to the Offeror's acquiring Control of the Offeree Company.

11.33 Notice of the meeting convened for the approval of the action referred to above must contain, or be accompanied by, full particulars of the proposed action and a statement explaining the reasons for and significance of such action.

11.34 Such authorisation shall be mandatory at least from the time the board of Directors of the Offeree Company receives the information that a decision has been taken to make a Bid until the result of the Bid is published or the Bid lapses:

Provided that seeking alternative Bids does not require such authorisation.

11.35 In the case of decisions taken before the beginning of the period referred to in Capital Markets Rule 11.34 above and not yet partly or fully implemented, the Shareholders in general meeting shall approve or confirm any decision which does not form part of the normal course of the Company's business and the implementation of which may result in the frustration of the Bid.

11.36 For the purpose of obtaining the prior authorisation, approval or confirmation of the Shareholders referred to in Capital Markets Rules 11.32 and 11.35 a general meeting can be convened at shorter notice than that stipulated in the Memorandum or Articles of Association provided that the meeting does not take place within two weeks of notification.

*Defensive tactics*

11.37 If a Target Company has received a takeover notice or has reason to believe that a bona fide offer is imminent, the board of Directors of the Company must not take or permit any action, in relation to the affairs of the Target Company that could effectively result in:

11.37.1 an offer being frustrated; or

11.37.2 the holders of Securities of the Target Company being denied an opportunity to decide on the merits of an offer:

Provided that the board of Directors of a Target Company may take or permit the kind of action referred to above if:

11.37.3 the action has been approved by an ordinary resolution of the Target Company; or

11.37.4 the action is taken or permitted under a contractual obligation entered into by the Target Company, or in the implementation of proposals approved by the board of Directors of the Target Company, and the obligations were entered into, or the proposals were approved, before the Target Company received the takeover notice or became aware that the offer was imminent; or

11.37.5 if Capital Markets Rules 11.37.3 and 11.37.4 above do not apply, the action is taken or permitted for reasons unrelated to the offer with the prior approval of the MFSA.

Provided that the notice of the meeting containing the proposed resolution for the approval of the action referred to in Capital Markets Rule 11.37.3 above must contain, or be accompanied by:

11.37.6 full particulars of the proposed action; and

11.37.7 the reasons for it; and

11.37.8 a statement explaining the significance of the resolution under these rules.

*Equitable price*

11.38 The purchase price for Securities that are the object of a Mandatory Bid must be equitable.

11.39 The equitable price to be paid for Securities is the highest price determined by the following criteria, calculated from the date of the announcement of the Bid:

11.39.1 the price offered for the security should not be below the weighted average price of the Security or the Security transactions made on a Regulated Market during the previous six (6) months;

11.39.2 the price offered for the Security should not be below the highest price paid for the Security by the Offeror or Persons Acting In Concert with the Offeror during the previous six (6) months;

11.39.3 the price offered for the Security should not be below the weighted average price paid for the Security by the Offeror or Persons Acting In Concert with the Offeror during the previous six (6) months;

11.39.4 the price of the Security should not be lower than ten percent (10%) below the weighted average price of the Security within the previous ten trading days.

11.40 If, after the Bid has been announced and before the offer closes for acceptance, the Offeror or any person Acting In Concert with him purchases Securities that are priced higher than the offer price, the Offeror shall increase his offer so that it is not less than the highest price paid for the Securities acquired.

*Squeeze-out rights*

11.41 Following a Bid made to all the holders of the Offeree Company's Securities for all of their Securities, Capital Markets Rules 11.42 to 11.45 shall apply.

11.42 Where the Offeror holds Securities representing not less than ninety percent (90%) of the capital carrying voting rights and ninety per cent (90%) of the voting rights in the Offeree Company, or where, following acceptance of the Bid, the Offeror has acquired or has firmly contracted to acquire Securities representing not less than ninety percent of the Offeree Company's capital carrying voting rights and ninety per cent (90%) of the voting rights comprised in the Bid, the Offeror has the right to require all the holders of the remaining Securities to sell him those Securities at a fair price for cash.

The cash consideration payable for any Securities to be acquired under this Capital Markets Rule shall be transferred to an account of an appointed trustee with a credit institution within 30 days of the announcement of the result ascertaining the ninety per cent (90%) acceptances where it shall be held for this purpose until such time as payment is made.

11.43 Following a Voluntary Bid, the consideration offered in the Bid shall be presumed fair where, through acceptance of the Bid, the Offeror has acquired Securities representing not less than ninety percent of the Offeree Company's capital carrying voting rights. Following a Mandatory Bid, the consideration offered shall be presumed to be fair.

11.44 To calculate the threshold referred to in Capital Markets Rule 11.42, the voting rights indicated in Capital Markets Rules 11.9.1 to 11.9.3 shall be included and added to the voting rights of the Offeror.

11.44.1 Where the Securities of the Offeree Company are divided into different Classes, the Offeror shall exercise the right of squeeze-out only in the Class in which the threshold laid down in Capital Markets Rule 11.42 has been reached.

11.45 If the Offeror wishes to exercise the right of squeeze-out following a successful Bid, a statement to this effect must be included in the offer document.

11.45.1 An Offeror, after having successfully acquired, or having firmly contracted to acquire, Securities representing not less than ninety percent of the Offeree Company's capital carrying voting rights, shall at the time of making the results of the takeover public in terms of Capital Markets Rule 11.75, confirm whether it will be exercising its squeeze-out rights.

11.45.2 The Offeror shall exercise the right of squeeze-out within three months at the end of the time allowed for acceptance of the Bid.

*Sell-out rights*

11.46 Following a Bid made to all the holders of the Offeree Company's Securities for all of their Securities, Capital Markets Rules 11.47 to 11.49 shall apply.

11.47 Where following a Bid the Offeror has not confirmed that it will be exercising its right of squeeze-out in terms of Capital Markets Rules 11.45 holders of remaining Securities may require the Offeror to buy their Securities from them at a fair price under the same circumstances as provided for in Capital Markets Rule 11.42.

11.48 *Omissis*

11.49 Capital Markets Rules 11.43 to 11.45 shall apply *mutatis mutandis*.

*Opting in and Opting out*

11.50 By decision taken in General Meeting, the holders of Securities of an Offeree Company registered in Malta and whose Securities are admitted to trading in Malta may:

11.50.1 where the restrictions laid down in Capital Markets Rules 11.51 to 11.56 below do not exist, the holders of the Securities may opt to apply any or all of the restrictions (an "opting-in resolution"); or

11.50.2 where the restrictions laid down in Capital Markets Rules 11.51 to 11.56 below exist, the holders of the Securities may opt not to apply any or all of the restrictions (an "opting-out resolution").

11.50.3 An opting-in resolution or an opting-out resolution must specify the date from which it is to have effect (the "effective date")

11.50.4 The effective date of an opting-in resolution may not be earlier than the date on which the resolution is passed and the effective date of an opting-out resolution may not be earlier than the first anniversary of the date on which the opting-in resolution was registered with the Registrar.

11.50.5 An opting-in or opting-out resolution can only be taken after prior written authorisation has been sought and obtained from the MFSA:

Provided that if the Securities of the Offeree Company are admitted to trading on Regulated Markets in other Member States or EEA States, or the Offeree Company has requested such admission, the relevant regulatory authority of that Member State or EEA State must be notified of the decision taken in accordance with Capital Markets Rule 11.50.

11.51 Any restrictions on the transfers of Securities provided for in the articles of association of the Offeree Company shall not apply vis-à-vis the Offeror during the time allowed for acceptance of the Bid laid down in Capital Markets Rule 11.27.

11.52 Any restrictions on the transfer of Securities provided for in contractual agreements between the Offeree Company and holders of its Securities, or in contractual agreements between holders of the Offeree Company's Securities entered into after the coming into force of this Chapter, shall not apply vis-à-vis the Offeror during the time allowed for acceptance of the Bid laid down in Capital Markets Rule 11.27.

11.53 Restrictions on voting rights provided for in the articles of association of the Offeree Company shall not have effect at the general meeting of the holders of the Securities which decides on any defensive measures in accordance with Capital Markets Rule 11.37.

11.54 Restrictions on voting rights provided for in contractual agreements between the Offeree Company and holders of its Securities, or in contractual agreements between holders of the Offeree Company's Securities entered into after the coming into force of this Chapter, shall not have effect at the general meeting of the holders of the Securities which decides on any defensive measures in accordance with Capital Markets Rule 11.37.

11.55 Multiple-vote Securities shall carry only one vote each at the general meeting of the holders of the Securities which decides on any defensive measures in accordance with Capital Markets Rule 11.37.

11.56 Where, following a Bid, the Offeror holds 75% or more of the capital carrying voting rights, no restrictions on the transfer of Securities or on voting rights referred to in Capital Markets Rules 11.51 and 11.52 nor any extraordinary rights of the holders of Securities concerning the appointment or removal of board members provided for in the articles of association of the Offeree Company shall apply; multiple-vote Securities shall carry only one vote each at the first general meeting of the holders of Securities following closure of the Bid, called by the Offeror in order to amend the articles of association or to remove or appoint board members.
To that end, the Offeror shall have the right to convene a general meeting of the holders of Securities at short notice, provided that the meeting does not take place within two weeks of notification.

11.57 Where rights are removed on the basis of any one of Capital Markets Rules 11.51 to 11.56, equitable compensation shall be provided for any loss suffered.

11.57.1 The amount of equitable compensation to be granted to the person who suffers loss as a result of any act or omission that would, but for the provisions of Capital Markets Rules 11.51 to 11.56, be a breach of agreement, shall be determined by the Offeror in the offer document as required by Capital Markets Rule 11.22.5.

11.57.2 Where the holder of the rights removed on the basis of any one of Capital Markets Rules 11.51 to 11.56 feels that the compensation offered by the Offeror in accordance with Capital Markets Rule 11.57.2 above is insufficient, such person may apply to the court for the court to determine the amount of compensation it considers just and equitable against any person who would, but for Capital Markets Rules 11.51 to 11.57, be liable to the holder of such rights for committing or inducing the breach.

11.58 Capital Markets Rules 11.53 to 11.56 shall not apply to Securities where the restrictions on voting rights are compensated for by specific pecuniary advantages.

11.59 Capital Markets Rules 11.50 to 11.58 shall not apply when the Government of Malta holds Securities conferring special rights in the Offeree Company.

*Competing Bids*

11.60 Any person may, during the acceptance period, launch a Bid to compete with the initial Bid made by the Offeror. Such Bids are called competing Bids.

11.60.1 Where competing Bids are made for the Securities of the Offeree Company, the provisions of this Chapter shall apply to each such Bid.

11.61 A person shall announce his decision to launch a competing Bid and must inform the MFSA of the Bid.

11.62 The person making a competing Bid shall, not later than twenty one calendar days from announcing his decision to Bid, draw up an offer document as provided for in Capital Markets Rule 11.22.

11.63 The holders of Securities of the Offeree Company shall have the right to choose between the initial Bid and any competing Bid.

11.64 Where there are competing Bids and the initial Offeror does not withdraw his Bid, the period for acceptance of the initial Bid shall be extended automatically to the time allowed for acceptance of the competing Bid as provided for in the offer document:

Provided that the time allowed for the acceptance period of the competing Bid shall be not less than four weeks from when the offer document of the competing Bid was made available to the public;

Provided further that the time allowed for the acceptance period of the initial Bid and the competing Bid together must not exceed ten weeks from when the offer document of the initial offer was made available to the public.

11.65 The extension of the acceptance period shall be communicated to the MFSA and made public.

*Revision of a Bid*

11.66 An Offeror may revise a Bid only in the following circumstances:

11.66.1 to increase the consideration;

11.66.2 to increase an existing component to the consideration;

11.66.3 to add a cash component to the consideration;

11.66.4 to extend the time allowed for the acceptance of a Bid but not beyond the maximum period of ten weeks as provided in Capital Markets Rule 11.27

11.67 The Offeror may revise the terms of the Bid at any time not later than fourteen calendar days before the end of the period allowed for acceptance of a Bid.

11.68 The Offeror shall communicate to the MFSA his intention to revise the Bid prior to the revised Bid being made public.

11.69 Notwithstanding the provision of Capital Markets Rule 11.27, where a Bid has been revised, the time allowed for the acceptance of the revised Bid shall be automatically extended by fourteen days:

Provided that the extension does not go beyond the maximum period of ten weeks as provided in Capital Markets Rule 11.27.

11.70 On announcing his intention to revise a Bid, the Offeror shall without delay draw up and make public a supplementary document setting out the amendments to the offer document, which revised document shall be communicated to the MFSA prior to it being made public.

11.71 Where the revision of a Bid increases the consideration offered, the Offeror must provide the increased consideration to each person whose Securities are taken up, whether or not the person accepted the offer before or after the revision was made.

11.72 The conditions of the revised Bid shall also stipulate that Shareholders who have made an offer to the Offeror have the right to withdraw their acceptances or offers.

*Lapsing of a Bid*

11.73 The takeover Bid automatically lapses if, at the end of the acceptance period, none of the holders of Securities of the Offeree Company have taken up the offer. In the event that the offer was not successful the Offeror is not authorised to make a new offer for the same Offeree Company during a period of one year from when the Bid lapses.

11.74 The Offeror and the Offeree Company shall without delay inform the MFSA and announce the lapsing of the Bid.

*Disclosure of the results of Bids*

11.75 The Offeror and the Offeree Company shall inform the MFSA and make public the necessary, relevant and complete results of the takeover by not later than ten calendar days from the closing of the acceptance period.

11.76 The Announcement about the results shall contain at least the following information:

11.76.1 the absolute number of Securities of every kind of Securities acquired by the Offeror during the acceptance period;

11.76.2 the ratios of the different Classes and types of Securities that were included in the takeover Bid;

11.76.3 separate calculations for the participation and voting rights acquired by the Offeror and Persons Acting In Concert.

*Irrevocability of Bids*

11.77 When a Bid has been announced in accordance with Capital Markets Rule 11.15, it may be withdrawn or declared void only in the following circumstances:

11.77.1 where there are competing Bids and the Offeror decides to withdraw his Bid as provided for in Capital Markets Rule 11.64;

11.77.2 where a condition of the Bid announced in the offer document in accordance with Capital Markets Rule 11.22.8 is not fulfilled;

11.77.3 in exceptional circumstances and with the authorisation of the MFSA, explaining why the Bid cannot be put into effect for reasons beyond the Control of the parties to the Bid.

11.78 The Offeror shall without delay announce the decision to withdraw the Bid.

## GUIDANCE NOTES TO CHAPTER 11

These Guidance Notes are not intended to be a substitute for any Capital Markets Rule, or part of the Capital Markets Rules. They have been drawn up to provide guidance on particular aspects of the Capital Markets Rules in Chapter 11.

### Guidance Note 1 to Chapter 11 of the Capital Markets Rules – VOLUNTARY AND MANDATORY BIDS

The provisions of Chapter 11 of the Capital Markets Rules apply to both Voluntary and Mandatory Bids, but with only a specific set of the Capital Markets Rules relating to Mandatory Bids.

While the meaning of a Voluntary Bid defined in the Capital Markets Rules is that of 'a bid made to all the holders of Securities of a Company for all their holdings when a person making such a bid does not have a Controlling Interest in the Company' (LR 11.3), a Mandatory Bid on the other hand is triggered by the acquisition of a 'Controlling Interest', (50% plus 1 share). An exception to the rule arises in circumstances where Control has been acquired following a Voluntary Bid made to the holders of Securities for all their holdings (LR 11.8). Capital Markets Rules 11.21.1 – 11.21.5 set out a number of circumstances under which exemptions from the rule to make a Mandatory Bid would apply and can therefore be applied for.

The aim of the Mandatory Bid rule is to protect minority shareholders against holders of a Controlling Interest extracting private benefits from the Offeree Company by preventing any holders of Securities from being able to obtain control over the Offeree Company and start extracting private benefits without first offering the minority holders of Securities an exit opportunity at an equitable price. A Mandatory Bid thus prevents the offeror from obtaining control by acquiring Securities from the market without paying an Equitable Price (Capital Markets Rule 11.39) to all holders of Securities. The Mandatory Bid rule additionally prevents an Offeror obtaining 'creeping' control by acquiring Securities without extending the offer to all holders of Securities equally.

**Consideration Offered for a Bid**

While the consideration offered for a Voluntary Bid may be freely determined by the Offeror, and while this normally would be related to the price at which the Offeree Company security has been traded at, consideration for Securities purchased under a Mandatory Bid must be 'equitable' and determined by the criteria set out in Capital Markets Rule 11.39.

Consideration offered by the Offeror may be in Securities, cash, or a combination of both. The Capital Markets Rules mandate that cash consideration must offered as an alternative in all cases (Capital Markets Rule 11.17).
Capital Markets Rule 11.23 mandates that a report on the consideration offered is drawn up by one or more experts who are independent of the Offeror or the Offeree Company. The expert's report is to contain an evaluation of the consideration being offered in the Bid. The Capital Markets Rule covers the consideration offered for both a Voluntary Bid and a Mandatory Bid and, as such, any analysis of consideration offered will, out of necessity, compare the consideration being offered to the market price of the Security subject of the Bid. Guidance Note 2 provides guidelines as to what an Independent Expert's Report should encompass.

**Squeeze-out and Sell-out rights**

An Offeror may invoke his squeeze-out rights (Capital Markets Rules 11.41-45) where following a Bid made to all holders of the Offeree Company's Securities for all their Securities, the Offeror has acquired Securities representing not less than ninety per cent in the Offeree Company and at which point the Offeror has announced that he will be exercising the right to require all the holders of the remaining Securities to sell these to him for cash. If the Offeror wishes to exercise the right of squeeze-out he must do so within three months at the end of time allowed for acceptance of the bid.

A holder of remaining Securities may invoke his sell-out rights (Capital Markets Rules 46-11.48) following a bid where an Offeror has announced that he has acquired Securities representing not less than ninety per cent in the Offeree Company, but has not announced that that he will be exercising his squeeze-out rights (either in the offer document or upon announcement of attainment of such level of acceptances). The Offeror shall be required to buy these Securities at the fair price for cash.

Capital Markets Rule 11.43 states that 'the consideration offered in the Bid shall be presumed as fair where, through acceptance of the Bid, the Offeror has acquired Securities representing not less than ninety percent of the Offeree Company's capital carrying voting rights'.

Squeeze-out and sell-out rights are seen as a protection measure available to residual shareholders and which may be invoked subsequent to both a Voluntary and a Mandatory Bid.

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**Guidance Note 2 to Chapter 11 of the Capital Markets Rules – GUIDANCE ON THE INDEPENDENT EXPERT'S REPORT (LR 11.23)**

Capital Markets Rule 11.23 requires that a report be drawn up by an independent expert on the consideration offered in the event of a takeover bid being made that is regulated by Chapter 11 of the Capital Markets Rules. Holders of Securities should decide on the merits of a Bid on the basis of the information provided in the offer document, the opinion of the Offeree Company's board of directors in the document setting out their opinion on the Bid, the report prepared by the independent expert and advice sought from an authorised financial advisor

**Contents of the Independent Experts Report**

The report of the independent expert should contain information which is useful to holders of Securities in the Offeree Company in making an informed decision as to the merits of the Bid in light of the consideration offered. In order to make a holistic analysis of the consideration being offered, the concepts of being 'fair' or 'reasonable' should be analysed as two distinct criteria.

**Valuation**

The independent expert should evaluate how the consideration compares to the market value of the Securities that are the subject of the Bid. If the consideration is equal to or higher than the market value of the securities of the Offeree then the take-over offer could be considered as a 'fair' offer.

Where the consideration offered is less than the market price an independent experts report is required to comment on this, and compare the consideration offered to the 'equitable' price determined in terms of LR11.39. The type of report depends on whether the bid is a Mandatory or Voluntary Bid, as follows:

- Where the Bid is a Mandatory Bid, the Capital Markets Rules provide that the consideration offered must be 'equitable' and the independent expert should confirm whether this is the case.
- Where the Bid is a Voluntary Bid, the expert should consider whether the offer is 'reasonable' or not. The independent expert should take into consideration matters other than the market valuation of the securities that are the subject of the Bid. Generally a takeover offer would be considered 'fair', and as such 'reasonable', if the expert's evaluation determines that the consideration offered is equal or greater than the value of the Securities being acquired. The experts should clearly explain the possible reasons for the differences between their assessment of value and the market value of the Securities bid for. This could include the expert's own valuation being in line with the offer price in spite of this being lower than the market value.

**Exemptions from mandatory offer obligations under Capital Markets Rule 11.21**

The independent expert should explain why an exemption may have been given from the obligation not to make a Mandatory Bid and the effect of the exemption being granted to the Offeror in the circumstances listed in Capital Markets Rules 11.21.1-11.21.5.

**Consideration other than cash**

If the Offeror is offering listed or non-listed securities as consideration for the Offeree Company's Securities, the independent expert should examine the value of that consideration and compare it to the valuation of the Offeree Company's Securities.

Such a comparison should be based on the value of the securities being offered as consideration by the Offeror and the fact that the Offeror will be obtaining or increasing control of the Offeree Company. The effect of a share exchange offer should be explained to holders of Securities in the Offeree Company as should be the resultant position of accepting the consideration.

In the event that the Securities being offered as consideration are listed or traded on a Regulated Market and the independent expert uses the market price of such securities as a measure of the value of the consideration offered, the independent expert must also give information on:

- The depth of the market for those securities;
- The volatility of the market price the last six months; and
- The effect of the takeover on the price of such securities.

The methodology or methodologies used should be clearly explained and the sources of data that the independent expert uses in its analysis disclosed in the report.

**Company Directors and Dealings in an Offeree Company's Securities**

The Independent expert's Report should include information on the individual Directors' shareholdings in both the Offeree and Offeror Company and whether any dealings in Securities have taken place by Directors, the Offeror or Persons Acting in Concert with the Offeror during the six months preceding the Bid, and how this may have affected or influenced the consideration offered.

The expert should include information on any disclosure that may have been made on commitments to Directors of the Offeree Company by the Offeror prior to making the Bid public and whether they have endorsed, or made recommendations on, the Bid.

**Conditional Irrevocable Undertakings**

An Offeror would normally seek to conclude conditional irrevocable undertakings with key shareholders of the Offeree Company, and from any of the Offeree's board of directors who hold shares in it, to accept the offer if certain pre-determined conditions are met.

Irrevocable undertakings will usually provide for the shareholder, or director, to accept the offer within a certain time period of it being made once certain conditions are met and to refrain from doing anything which might frustrate the Bid.

Where the presence of such undertakings has been announced, the independent expert should indicate the names of these key holders and the percentage holding that each holds, this for the other shareholders to be able to assess the probable outcome of the offer being made.

**Assumptions made by the Independent Expert**

Where an independent expert's valuations have been based on assumptions, these should be explained in a manner which enables the holders of the Securities in the Offeree Company to understand the information contained in the report.

The independent expert should explain the methodology and principal assumptions underlying their valuation that could include generic statements broadly explaining these assumptions without the requirement to include extensive detail on company specific commercial information. Assumptions relating to specific present or future macro-economic conditions (e.g. inflation rates, exchange rates, commodity prices) that may be relevant to the consideration being offered should be backed up with references to the sources from which that information was drawn.

Where changes in any of the key macro assumptions are likely to materially impact the valuation (e.g. changes in the exchange rate or interest rate assumptions), the independent expert should consider including a sensitivity analysis which sets out the impact of such changes.

**Reasonable basis for relying on information**

The independent expert should explain the analysis undertaken and should make reference to the source of the information it has used in arriving at its conclusions. The independent expert should ensure that material information quoted or used in the analysis is not irrelevant or misleading.

Where the independent expert intends to rely on the work of another expert, the independent expert should be comfortable with the level of expertise, experience and credibility of the expert, evaluate the relevance of the methodologies and key assumptions adopted by the expert and where possible, review the reasonableness of the results derived by that expert.

**Forecasts of financial information**

The independent expert may rely on financial information provided in the Company's Annual Reports or projections published by the Offeree Company, such as those included in the Financial Analysis Summary report required in terms of the Listing Policies of the MFSA dated 05 March 2013, as may be updated from time to time. However, the independent expert should satisfy himself of the reasonableness of any forecast financial information used and ensure that adequate disclosure is made in relation to the limitations of the financial forecasts used.

**Disclaimers**

The independent expert should include a paragraph stating the purpose of the Report and the terms under which it was prepared and should make a declaration as to the expert's independence from the parties it has drawn on for its compilation.

A statement should be included which limits the purpose of the report as being that required in terms of Capital Markets Rule 11.23, namely 'on the consideration offered' by the Offeree and, as such, to assist holders of Securities in the Offeree Company in forming their own opinion as to whether to accept the terms being offered or not. The statement should also include a statement that the report does not represent a recommendation to accept or refuse the offer and that it does not contain any assessment of the consequences that could arise from accepting or refusing the offer.

Disclaimers as to the accuracy of the information, including on the reliance on forecasts of future profits, cash flows or the financial position may be included in the report but the expert would all the same be expected carry out reasonableness checks on any such information that has been used in compiling the report provided that the source of the information is quoted and that the source is generally considered reliable. As for example, 'The assessment made and information contained in this report is based on information available at the time of our work and can be subject to changes. In rendering this assessment, the independent expert has not performed an audit or a due diligence of the parties concerned nor has it sought to verify the information provided by the contributors or the sources which however it considers generally reliable'.

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**Guidance Note 3 to Chapter 11 of the Capital Markets Rules – OBLIGATION TO ANNOUNCE UNDER CHAPTER 11 OF THE CAPITAL MARKETS RULES**

An announcement to make a Bid will, in all circumstances, be communicated to the Offeree Company's board, even if this is announced to the board at the same time as a public announcement is made.

Where a friendly Bid is concerned, discussions will have taken place over a period of time and once the conditions listed in Capital Markets Rule 11.16 can be fulfilled, a public announcement would then be made. Capital Markets Rule 11.15 places an obligation on any person who gains control of a company to inform the MFSA within seven days of acquiring control. In the case of a hostile Bid, however, any pre-bid conditions, including those of Capital Markets Rule 11.16 will have been tackled without the Offeree Company's board having even been consulted and a public announcement will, in most circumstances, be made at the same time as the announcement to the Board.

Prior to the announcement of an offer or possible offer, all persons privy to confidential information, and particularly price-sensitive information, concerning the offer or possible offer must treat that information as confidential and may only pass it to another person if it is necessary to do so and if that person is made aware of the need for secrecy. All such persons must conduct themselves so as to minimise the chances of any leak of information.

The requirement for a public announcement will be triggered immediately should the Offeree Company's share price be subject to undue price movements due to rumour or possible speculation, the suspicion of a leak in confidential information or where it is desirable to make an announcement in order to prevent possible market abuse. It is the potential offeror who is, in the first place, responsible for making such an announcement.

An announcement of a Bid by the Offeror triggers a period of twenty-one calendar days mentioned in Capital Markets Rule 11.19 during which he must prepare an offer document to be made available to both the MFSA and the public.

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**Guidance Note 4 to Chapter 11 of the Capital Markets Rules – TAKEOVER BIDS - RESPONSIBILITIES OF COMPANY DIRECTORS**

The provisions relating to directors in Article 136A of the Companies Act (Cap. 386 of the laws of Malta) should be borne in mind when Directors make recommendations in relation to takeover Bids, in particular that a director of a company is bound to act honestly and in good faith in the best interests of the company and that it is the directors of a company who shall promote the well-being of the company they represent. Directors must, as fiduciaries, take into account the collective interests of their shareholders prior to and during any Bid process.

Shareholders of a company are entitled to look to directors for information and guidance in order to help them decide whether or not to accept a Bid, especially where a share exchange offer is made as part of the compensation package, or where competing bids are involved in the takeover process. Directors must be able to justify the reasons when and why recommendations are made to accept the lower of competing Bids.

Directors should ensure that sufficient information and advice is contained in the offer document to enable shareholders to reach an informed decision and avoid giving misleading advice which could prevent shareholders from making an uninhibited choice. In this context while most Bids involve a friendly approach to takeovers where the Offeror is involved in negotiations prior to a takeover, Offeree Company directors have an important role to play where a hostile Bid is concerned.

Directors of the Offeree Company should give careful consideration to any decisions they intend taking before entering into any commitment with an offeror (or anyone else) which would restrict their freedom to advise their shareholders in the future. Such commitments may give rise to conflicts of interest or result in a breach of a directors' fiduciary duties.

The importance of Capital Markets Rule 11.23 and the mandating that a report on the consideration offered is drawn up by one or more experts who are independent of the Offeror or Offeree Company becomes clear in this context. Guidance Note 2 to Chapter 11 sets out what can be expected of such a report.

Capital Markets Rule 11.24 requires that the independent expert assesses and confirms 'that the Offeror has sufficient resources to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer'. This is normally seen as being in the best interests of both the shareholders and the Directors of both the Offeror and Offeree companies. Directors of an Offeree Company are obliged to circulate their views on the offer and make known to the shareholders the substance of advice given by any independent expert.

Capital Markets Rules 11.28 to 11.31 cover important aspects of the responsibilities of the directors of a company that has become the subject of a Bid and provide an understanding of the obligations of the Board of Directors of an Offeree Company in relation to the advice and views they are required to give to Offeree Shareholders as well as to the company's employees upon the announcement of a Bid.

An Offeree company that receives notice of a takeover, or the Board of that Company has reason to believe that an offer is imminent may not permit any action to be taken that may frustrate a Bid, unless their Shareholders have given approval to do so as provided for in Capital Markets Rule 11.37

Capital Markets Rules 11.32 to 11.36 provide guidance on procedures that have to be followed by the Board of Directors of an Offeree Company when calling a general meeting for the purpose of obtaining authorisation of their Shareholders prior taking any action which may result in a lasting impediment to the Offeror acquiring control of the Offeree Company.

Directors should bear in mind the provisions of Article 136A of the Companies Act prior to, during and after the bid process. This states that 'directors shall be obliged to exercise the degree of care, diligence and skill which would be exercised by a reasonably diligent person having both the knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are

carried out by or entrusted to that director in relation to the company'. The Act further adds that a director shall:

(b) not make secret or personal profits from their position without the consent of the company, nor make personal gain from confidential company information;
(c) ensure that their personal interests do not conflict with the interests of the company;
(d) not use any property, information or opportunity of the company for their own or anyone else's benefit, nor obtain benefit in any other way in connection with the exercise of their powers, except with the consent of the company in general meeting or except as permitted by the company's memorandum or articles of association;
(e) exercise the powers they have for the purposes for which the powers were conferred and shall not misuse such powers.

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## Guidance Note 5 to Chapter 11 of the Capital Markets Rules – TAKEOVER BIDS – PRE-TAKEOVER AGREEMENTS

Most Bids are of consequence to the parties involved and the disclosure that a deal is in the offing can have unexpected effects on a company's operations, be these disruptions in trading, loss of confidence by the suppliers or customer base of either party or even a negative reaction by employees. Disclosing sensitive non-public information may impact a listed company's trading and as a result its value and ultimately the disclosure could prejudice the Bid itself.

Any discussions related to a prospective Bid may require the disclosure of inside information, and as such be subject to the provisions of the Market Abuse Regulation (EU) No 596/2014 including the provisions relating to Market Soundings in Article 11 of the Regulation.

### Non-Disclosure Agreements

Parties considering making a Bid under the Capital Markets Rules, more often than not, begin discussions with negotiation of a confidentiality or non-disclosure agreement (NDA). This would restrict one or more parties from disclosing the fact that discussions are taking place as well as the terms and conditions of any potential deal and information about one or both parties' businesses. The fact that information may be discussed or disclosed under the terms of a confidential agreement or any other agreement made between the parties should not in itself cause the information to cease to qualify as 'inside information'.

### Memorandum of Understanding

At some stage during discussions between the potential acquirer and the (major) shareholders of a Offeree company, consideration will be given to the formulation of an agreement (or memorandum of understanding) setting out the conditions that need to be fulfilled before the Offeror commits to making an offer to all Shareholders of the Offeree Company for up to 100% of its shares.

This agreement would normally set out the terms agreed in anticpation of the Offer, agreement to the structure of the transaction, which may include the commitment of the board of directors of the Offeree Company to recommend the acquisition, representations and warranties and covenants restricting the material change in the operation of the business of the Offeree Company until the end of the Offer and the Offeree Company on such matters as the successful completion of a due diligence exercise, restrictions on the ability of the Offeree Company to solicit competing proposals and possibly agreement to a termination fee should the acquisition not be completed should a third party make a competing offer. The agreement may not under any circumstances contain clauses which imply that a transfer of shares has been agreed to or has taken place, nor may it not contain details of the proposed Bid, including details of any consideration that may be offered.

A condition for an Offer to be considered 'unconditional' may include that a level of acceptances is received for the Bid to be considered 'unconditional', implying that should this condition not be fulfilled the Offeror may consider the Offer as lapsed and return to shareholders any shares which may have been tendered in acceptance of the offer. The offer would be declared "unconditional" only after all the conditions have been met.

### Equal Treatment of Shareholders

The provisions of Article 3 (General Principles) of Directive 2004/25/EC on Takeover Bids make it clear that all shareholders of an Offeree Company must be afforded equal treatment and that as a rule information disclosed to any single or group of shareholders must be made available to all shareholders. Particular attention is drawn to the first three Principles of Article 3 which relate to all the holders of Securities in Offeree Companies, and as such, include those who are not signatories to any pre-takeover agreement that may be signed between the Major Shareholders of an Offeree company and a Prospective Offeror.

The parties to a Bid are reminded of the provisions of Capital Markets Rule 11.25 under which the MFSA may requests for the filing of a copy of any confidential agreements made between the parties. Capital Markets Rule 11.25 reads 'The MFSA may request that the parties to a Bid shall provide the Authority with all the information in their possession concerning the Bid at any time on request.'

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**Guidance Note 6 to Chapter 11 of the Capital Markets Rules – TAKEOVER BIDS – DEFENSIVE TACTICS AND THE BREAK THROUGH RULES**

A Bid could be termed as 'friendly' when following discussions two interested parties' agree that the potential of their two combined businesses offers both the potential for greater synergies and as efficiencies and consequently greater growth and ultimately profits. The result of such discussions normally results in the potential Offeror and the major shareholders of the Offeree Company formulating a form of memorandum of understanding, on what conditions need to be further discussed between both parties before the Offeror can make a firm offer for the securities of the Offeree Company.

A Bid is considered 'hostile, the other hand, when an offer is rejected by the Offeree Company's board and where the Offeror continues to pursue it. In a hostile Bid an Offeror could make the offer directly to the Offeree Company's shareholders after having announced its firm intention to make an offer.

**Non Frustration Rule**

The Takeover Directive 2004/25/EC, in Article 9(3), provides that it is the general meeting of a Company that shall 'approve and confirm' any decisions which do not form part of the normal course of a company's business and the implementation of which may result in the frustration of a Bid. Capital Markets Rule 11.37 entitled '*Defensive tactics*' transcribes the provisions of the Directive Article 9(3).

Defensive tactics may take many different forms and may, for example, include the Board entering into a material transaction which is not part of the Offeree Company's normal course of business, effect a transaction which may materially affect the financial position of the company, as for example through a buy-back of shares or the undertaking of any action which is designed to influence the holding of a future shareholder. Such actions may of course be agreed with the Offeror as part of the Bid conditions.

Capital Markets Rule 11.37 does not rule out the board of directors of a Offeree Company taking action which may result in an offer being frustrated if the action is approved by an ordinary resolution of the Offeree Company; if the action was taken or permitted under a contractual obligation entered into before the Offeree Company became aware that the offer was imminent; or if the action is taken or permitted for reasons unrelated to the offer with the approval of the MFSA. This would possibly include pre-emptive action which directors may take in the absence of an Offer but which is all the same designed to protect against a possible future change of control ('poison-pill').

Article 9(3) makes it clear that decisions on the control and ownership of a company should be the preserve of the shareholders. Accordingly, directors of an Offeree Company should proceed with caution when considering action that has the potential to frustrate an offer and obtain independent legal and financial advice on such actions.

**Breakthrough**

Article 11 of Directive 2004/25/EC sets out the provisions relating to 'Breakthrough', provisions which apply to any Bid which has been made public. The provisions of Article 11 are transcribed in Capital Markets Rules 11.50 -11.56 headed *'Opting in and Opting Out'.* Holders of Securities of in an Offeree Company may, at a General Meeting following the announcement of a Bid, choose to either apply the restrictions on transfers of Securities provided for in Capital Markets Rules 11.51 – 11.54 (*opting-in resolution)* or to opt out of these *(opting–out resolution).* Additionally, Capital Markets Rules 11.55 and 11.56, and their possible effect on Securities holders voting rights, need to be taken into consideration when considering any decisions that need to be taken in this regard at a General Meeting.

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