India
Takeover Guide

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INTRODUCTION

Takeovers and substantial acquisitions of public traded companies in India are governed by the Securities and Exchange Board of India (SEBI) (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the 'Takeover Regulations'). Formulated to protect minority shareholder rights, the Takeover Regulations stipulate key aspects of the takeover regime such as the obligation and triggers to make a mandatory tender offer, the minimum price for such a tender offer, its timelines and mechanics, and various related matters.

In this guide, we provide a general overview of key concepts and processes involved in the takeover of public traded companies in India.

ACQUIRER AND PACS

Any person or legal entity (the 'Acquirer') intending to directly or indirectly acquire a substantial stake in or control over a public traded company is obligated to inform the public shareholders (of the public traded company) about its intention and offer them an opportunity to exit their holding in the public traded company if they so desire.

The obligation to make such an offer, that is, a mandatory tender offer, rests jointly upon the Acquirer and any persons who may be acting in concert with the Acquirer ('PACs'). PACs are persons who, with a common objective, directly or indirectly, cooperate for the acquisition of shares in or control over the public traded company. For the purpose of this guide and general ease of reference, all references to the Acquirer include reference to PACs.

TRIGGERS AND TYPES OF TENDER OFFERS

Triggers and the size of a mandatory tender offer

An Acquirer can trigger a mandatory tender offer in the follow circumstances:

1. Acquisition of the initial 25 per cent: acquisition of shares or voting rights that would entitle the Acquirer to exercise 25 per cent or more voting rights in the public traded company.

2. Acquisition of a subsequent five per cent: if an Acquirer already holds more than 25 per cent (but less than 75 per cent, on account of a minimum public float), then any acquisition of more than five per cent of shares or voting rights in a single Indian financial year (March–April) ('Creeping Acquisition').

3. Acquisition of control: acquisition of 'control' of a public traded company, regardless of whether there has been any acquisition of shares or voting rights of the company.

   Under the Takeover Regulations, the concept of 'control' is quite broad and includes the right to: (1) appoint the majority of directors; or (2) control management or policy decisions by way of a shareholding, management rights, a shareholders' agreement or any other manner. SEBI previously suggested introducing 'bright line' tests to determine the rights that would amount to 'control', but ultimately rejected this proposal in favour of a more subjective approach (ie, the existing definition of control under the Takeover Regulations). At present, SEBI considers such rights on a case-to-case basis and in the context of the entire transaction. Typically, participative rights

that infringe on the operation or management functions of a public traded company (eg, right to nominate key managerial personnel (KMP) and approve business plans) are likely to be viewed as control; however, protective rights that are intended only to safeguard an investment (eg, veto rights on limited items like change of business and amendment to charter documents) are unlikely to be viewed as control. Ultimately, an assessment of the acquisition of control (through a contract) is factual and depends on the overall bouquet of rights.

4. Indirect acquisition: the Takeover Regulations apply the 'chain principle', whereby an obligation to make the tender offer may be triggered by virtue of: (i) any acquisition that leads to an 'indirect' acquisition of 25 per cent or more shares or voting rights in a public traded company; (ii) a Creeping Acquisition; or (iii) the 'indirect' acquisition of control over the public traded company.

   Further, where the public traded company comprises 80 per cent or more of the proportionate net asset value, sales turnover or market capitalisation of the business being acquired (as per the latest audited balance sheet), then such an 'indirect' acquisition is deemed to be a 'direct' acquisition (particularly from the perspective of timing, pricing and other compliances relating to the tender offer). It is relevant to note that the timing of triggering an indirect tender offer and certain offer formalities may vary.

5. Acquisition beyond 75 per cent: an Acquirer is prohibited from making a Creeping Acquisition if, pursuant to such an acquisition, the aggregate shareholding of the Acquirer would exceed 75 per cent voting rights in the public traded company. This condition does not apply to an acquisition under a resolution plan approved by the national company law tribunal under India's insolvency code.

6. Size of the tender offer: an Acquirer is required to make an offer to acquire at least 26 per cent of total shares of the public traded company held by its public shareholders. However, an Acquirer may, at its discretion, choose to increase the size (beyond 26 per cent) of the tender offer.

It is important to note that, under the Takeover Regulations, an agreement to acquire is treated on a par with the actual acquisition of shares, voting rights or control over the public traded company, and accordingly, the execution of an acquisition agreement (and not the actual acquisition itself) triggers the obligation to make a mandatory tender offer.

Voluntary tender offer

An Acquirer holding more than a 25 per cent stake but less than a 75 per cent stake may make a voluntary tender offer to public shareholders, subject to its aggregate post-offer shareholding not exceeding 75 per cent. This option is not available to any person that: (1) has acquired shares without the requirement to make a tender offer within 52 weeks prior to making the voluntary tender offer; or (2) is a wilful defaulter or fugitive economic offender under Indian laws. A voluntary tender offer must be made for the acquisition of at least ten per cent of voting rights. Once the voluntary offer is complete, the Acquirer will not be permitted to acquire any further shares for six months from the date of completion, except through another voluntary offer.

Competing offer

Once an Acquirer issues a public announcement of a mandatory tender offer, the Takeover Regulations permit any other person to make a competing tender offer by issuing its own public announcement within a specified period.

A competing tender offer has to be made for the number of shares that, taken together with the shares held by the second Acquirer, is equal to the holding of the first Acquirer (calculated as an aggregate of: (1) its pre-offer holding; (2) shares proposed to be acquired under the underlying agreement; and (3) shares proposed to be acquired under the mandatory tender offer made by the first Acquirer).

Once a competing offer has been made, the two competing offers are treated on a par and the public traded company has to provide equal levels of information to each competing Acquirer.

Conditional offer

An Acquirer may make a tender offer conditional on a minimum level of acceptance. However, such conditionality is permitted only if the Acquirer also agrees to walk away from the underlying transaction (that triggered the tender offer) if the minimum level of acceptance is not achieved. For instance, if an acquisition agreement of a 30 per cent stake in a public traded company triggers a tender offer for a 26 per cent stake, then the Acquirer is permitted to stipulate that it shall complete the tender offer only if a minimum of 21 per cent (of 26 per cent) is tendered. If the minimum tender is not achieved, the Acquirer has the option to abandon the tender offer and the underlying transaction. Such structures may be helpful in cases in which the Acquirer intends to hold a minimum stake (eg, 51 per cent) or not proceed with the deal at all.

Combined tender offer and take private

The Takeover Regulations have recently been amended to provide greater flexibility in implementing a combined tender-cum-take-private deal. In brief, a takeover deal triggering a tender offer can now be structured in a manner where the Acquirer specifies upfront the tender offer price and an indicative take private price. The indicative take private price needs to include a suitable premium and cannot be less than book value. If the response to the tender offer leads to the satisfaction of the take private threshold (ie, 90 per cent of the total shares of the public traded company), the shareholders are paid the indicative take private price (ie, take private succeeds) and if it does not, then the shareholders are paid the tender offer price (ie, take private fails). In the event that the take private threshold is not met, but the Acquirer acquires more than 75 per cent, a period of 12 months is available to the Acquirer to re-attempt (at its discretion) the take private deal. If the take private deal fails again, the Acquirer is required to bring down its shareholding to 75 per cent within a further period of 12 months.

Importantly, this new combined process: (1) does not entail a reverse book building process to be followed for the take private leg; (2) allows the Acquirer to offer a differing price for the take private on the one hand and the tender offer on the other; and (3) does away with any interest costs being levied on account of any gap between the tender offer and take private deal.

An Acquirer may make a combined tender-cum-take-private offer subject to the following:

1. The intention to take private must be disclosed upfront at the time of issuing the public announcement.

2. The Acquirer should not hold more than 25 per cent shares or voting rights in the public traded company.

3. The Acquirer should not have been a promoter or person in control of the public traded company or directly or indirectly associated with the promoter or any person in control of the public traded company.

4. The Acquirer shall not acquire joint control of the public traded company with its existing promoters or persons in control of the public traded company.

EXEMPTIONS

General exemptions

The requirement to make a tender offer is not absolute and provides several exemptions. The intention behind this is to protect parties from onerous obligations of making tender offers in the case of, for example, *inter se* transfers among immediate relatives, controlling shareholders, court-approved processes and inheritance. Such exemptions are available subject to certain predefined conditions and compliance requirements.

Specific exemptions

Where a transaction does not qualify for a general exemption, SEBI has been empowered to grant exemptions to specific transactions on a case-by-case basis. To this end, an Acquirer must submit an application with SEBI in a prescribed format setting out the grounds for the exemption request and details of the proposed transaction.

OFFER CONSIDERATION

Offer price

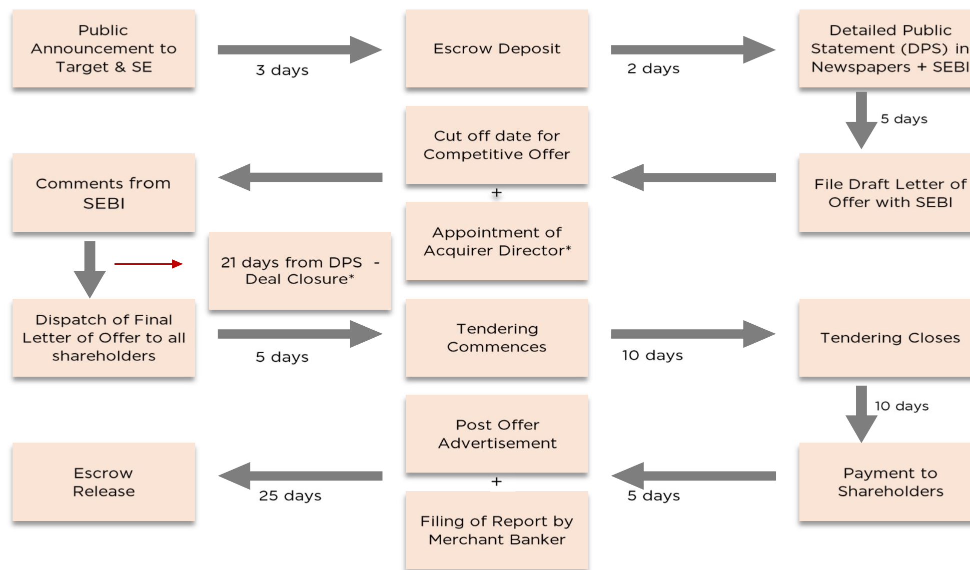
A tender offer is made at a regulatory minimum price or, at the discretion of the Acquirer, any price higher (but not lower) than the minimum price. The minimum price is determined based on various factors, including the nature of the underlying transaction (direct or indirect acquisition) and categorisation of shares of the public traded company (ie, frequently or infrequently traded). Typically, in the case of frequently traded shares (based on the traded turnover of the stock), the minimum tender price is linked to the higher of the historic volume weighted average market price of the stock and the negotiated acquisition price for the underlying transaction. In the case of infrequently traded shares, the minimum price is linked to the higher of the value determined as per a valuation report (based on specific metrics) and the negotiated acquisition price for the underlying transaction.

Mode of payment

The offer price may be paid in: (1) cash; (2) certain listed securities of the Acquirer; or (3) a combination of both. The most preferred mode of payment in tender offers is cash.

MANDATORY TENDER OFFER PROCESS

The key steps, obligations and other aspects involved in a mandatory tender offer process are discussed below, as a summarised diagrammatic representation followed by a more detailed explanation.[1]



Appointment of a merchant banker

The Acquirer must appoint a SEBI-registered merchant banker prior to launching the tender offer. The merchant banker is required to ensure that the Acquirer has firm financial arrangements to fulfil its obligations under the tender offer. Typically, an Acquirer would formulate the deal with its legal and investment advisers, and appoint the merchant banker.

Public announcement

Typically, a public announcement of the mandatory tender offer is to be made on the date of entering into the acquisition agreement. In the case of an indirect acquisition or change in control, the public announcement is to be made within four working days from the earlier of the date on which the primary acquisition is contracted and the date on which the intention or the decision to make the primary acquisition is announced in the public domain. The public announcement is made on stock exchanges, with a copy being shared with SEBI and the public traded company.

Escrow account

[1] This section does not discuss the specific provisions applicable in the case of a competing tender offer.

An escrow account is opened to secure the payment of the tender offer consideration. It can be funded by the Acquirer with: (1) cash; (2) a bank guarantee; and (3) freely traded securities. The upfront amount to be deposited in escrow is based on the offer size and is calculated in the following manner: (1) for the total consideration payable in the tender offer (assuming full acceptance) of up to INR 5bn, 25 per cent; and (2) for the balance consideration, ten per cent. If the escrow consists of a bank guarantee or deposit of approved securities, an additional cash deposit of at least one per cent of the total tender offer consideration is to be deposited. For offers subject to a minimum level of acceptance (ie, conditional offers), the Acquirer is required to deposit cash escrow of 100 per cent of the tender offer consideration in respect of the minimum level of acceptance or 50 per cent of the tender offer consideration, whichever is higher.

Detailed public statement (DPS)

A DPS is published within five working days of the public announcement. The DPS contains specified information (including details of the underlying transaction and tender offer) to enable shareholders to make an informed decision regarding the tender offer and is published in local newspapers, with copies to SEBI, the public traded company and stock exchanges.

Draft letter of offer (DLOF) and letter of offer (LOF)

A LOF containing additional details in relation to the tender offer background and process is issued to shareholders of the public traded company. Before issuing the LOF, the Acquirer is required to submit a DLOF through its merchant banker with SEBI for comments within five days of issuing the DPS.

Once SEBI offers its observations on the DLOF, the Acquirer prepares the final LOF, incorporating any changes suggested by SEBI. The LOF is then sent to the shareholders of the public traded company. Copies of the DLOF and LOF are also shared with the public traded company and stock exchanges.

Tendering process

1. Prior advertisement: The Acquirer shall issue an advertisement in the prescribed form, one working day before the commencement of the tendering period, announcing the schedule of activities and other details related to the tender offer. This advertisement must be published in all the newspapers in which the DPS was published and, simultaneously, also sent to SEBI, stock exchanges and the public traded company.

2. Tendering period: The tender offer remains open for a period of ten working days. The tendering period should open no later than 12 working days from the date of receipt of SEBI comments on the DLOF; however, SEBI may grant relaxation from commencing the tender within such a time in the case of non-receipt of any statutory approvals. In such a case, the Acquirer may be required to pay interest to tendering shareholders for the delay.

3. Payment of the tender offer consideration: For the payment of consideration (payable in cash), the Acquirer is required to open a special account and deposit the amount, which together with 90 per cent of the amount deposited in the escrow account would make up the entire consideration payable to the shareholders whose shares are accepted in the tender offer. The payment must be completed within ten working days of the expiry of the tendering period.

4. No withdrawal of shares: Shareholders who have tendered shares in acceptance of the tender offer are not entitled to withdraw their shares during the tendering period.

5. No sale: The Acquirer is not permitted to sell any shares of the public traded company during the tender offer period.

6. Post-offer advertisement: Upon completion of the tender offer, the Acquirer is required to issue a post-offer advertisement in a prescribed form within five working days after the offer period, giving details of the offer (aggregate number of shares tendered, date of payment of consideration, etc). The advertisement is to be published in all the newspapers in which the DPS was published and, simultaneously, sent to SEBI, stock exchanges and the public traded company.

Withdrawal

A mandatory tender offer may be withdrawn in very limited circumstances. These are:

1. refusal of statutory approvals;
2. death of the sole Acquirer (if a natural person);
3. any condition stipulated in the agreement for the acquisition attracting the obligation to make the tender offer is not met for reasons outside the reasonable control of the Acquirer, and such an agreement is rescinded; and
4. such circumstances as the SEBI considers that merit withdrawal.

There have been very few instances of the withdrawal of tender offers. These withdrawals have usually been in cases in which statutory approval required to proceed with the tender offer has been finally refused. However, so far, there do not appear to be any instances where the withdrawal of an offer was permitted for the non-satisfaction of any contractual obligations.

Public traded company obligations

1. Recommendation of the independent directors: As part of the tender offer process, the board of directors of the public traded company is required to constitute an independent directors committee (IDC). The IDC provides its reasoned recommendations on the tender offer that is published in the same newspapers as the DPS prior to the commencement of the tendering period.

2. Stand-still obligations: After the issuance of the public announcement, the public traded company and its subsidiaries are restricted from undertaking certain actions, except with the approval of its shareholders. These stand-still obligations, among others, include undertaking any material borrowing, alienating material assets and changing the capital structure.

Minimum public shareholding

If after the completion of a mandatory tender offer, the Acquirer’s shareholding exceeds 75 per cent, the Acquirer must reduce its holding to 75 per cent within 12 months.

COMPLETION OF THE UNDERLYING TRANSACTION

Generally, the underlying transaction that triggers a mandatory tender offer cannot be completed prior to the expiry of the offer period (ie, prior to the completion of payment to shareholders who have tendered shares in the tender offer); instead it should be completed within 26 weeks from the expiry of the offer period. However, early completion is permitted under certain circumstances. For instance, the underlying transaction can be completed anytime post expiry of 21 working days from the date of the DPS if the Acquirer deposits the entire tender offer consideration in escrow in cash. Additionally, the underlying transaction may also be undertaken through the stock exchange settlement process, provided the acquired shares are temporarily kept in share escrow and no voting rights are exercised on them. The early closure of underlying transactions through the aforesaid escrow mechanisms is commonly adopted by investors.

DISCLOSURES

Acquisition of substantial shares

Any Acquirer must disclose the acquisition of any shares or voting rights taken together with shares or voting rights, if any, held by the Acquirer (and PACs) that bring its shareholding in the public traded company to five per cent or more, and must be made within two working days from such an acquisition.

Change in shareholding

Where any Acquirer already holds five per cent or more in a public traded company, such a person must disclose any change in shareholding (pursuant to an acquisition or disposal) exceeding two per cent, and such a disclosure must be made within two working days from such an acquisition (or disposal).

Encumbrance-related disclosures

Encumbrance is defined very broadly and includes pledge, lien, non-disposal undertaking, any other covenant and agreement in the nature of an encumbrance. Disclosures specified in paragraphs 8.1 and 8.2 are also applicable for encumbrance-related transactions. For the purpose of this disclosure, shares taken by way of encumbrance are treated as an acquisition and the release of such an encumbrance is treated as a disposal.

Promoter’s encumbrance

The promoter of a public traded company must disclose the details of shares encumbered (ie, creation of encumbrance), invocation of such encumbrance and release of such encumbrance, and this should be done within seven working days of creating the encumbrance. If the promoter encumbrance exceeds specified thresholds, then the reasons for the encumbrance also need to be disclosed within two working days. Starting 1 April 2022, such disclosure may not be required if the encumbrance is undertaken/recorded in the depository system.

Continual disclosures

The following categories of persons must disclose their aggregate shareholding in a public traded company as of 31 March each year: (1) any person (and its PAC) holding 25 per cent or more; and (2) a promoter and promoter group. Such disclosure is required to be made within seven working days from 31 March each year.

Timing and modalities

1. All the disclosures mentioned above need to be made in the prescribed format to the public traded company and stock exchanges.

2. The disclosures mentioned above must be of the aggregate shareholding of any person/acquirer/promoter and its PAC.

3. The disclosures are equally applicable to convertible securities as if such convertible securities were shares.

CONSEQUENCES OF A BREACH

A breach of obligations in connection with takeovers would typically attract penal consequences. The quantum of the penalty may vary depending on the nature of the breach. SEBI generally has wide-ranging discretionary powers in matters relating to securities markets and usually assesses each case individually.