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Corporate briefing

Takeovers of Swedish listed companies by Chinese bidders

Takeovers of Swedish listed companies are comparatively straightforward. There are no governmental restrictions on foreign ownership and there is a level playing field between domestic and foreign bidders.

Unlike in the UK, but similar to some Asian and European stock markets, the Swedish market is characterised by large controlling shareholders such as the Wallenberg Foundations, Industrivarden and Kinnevik. It has historically been the norm to secure the support of the target board and large shareholders before making a bid. However, there have been several high profile unsolicited or hostile takeovers in the past few years where the bidders have managed to secure sufficient approval after the launch of the bids.

The regulatory system in Sweden, which is overseen by the Swedish Securities Council (Securities Council) and the Swedish Financial Supervisory Authority (SFSA), is intended to be neutral on the merits of any bid and seeks to create a level and transparent playing field on which the takeover can be conducted. Further, the target board is not permitted to take action to frustrate a takeover (such as issuing additional shares or limiting the power of shareholders to change the board).

The takeover regulations in Sweden (notably the Takeover Act and the Takeover Rules) contemplate that the acquisition may require official authorisations and/or regulatory clearances and acknowledge that such requirements may significantly prolong the timetable of the bid. Although there are currently no direct precedents, the regulatory regime is likely to be conducive to Chinese bidders which will need consent from home regulators.

Sweden has several world class export companies with much of its production and sales abroad. As a consequence, Swedish listed companies tend to make attractive targets for overseas companies looking for international expansion with a foothold in Europe.

This briefing reviews the main issues facing Chinese bidders wishing to make a bid for a Swedish listed company.

Key points for Chinese bidders

Bid timetable and structure

Generally, a takeover can be completed within approximately three months provided the obtaining of regulatory clearances does not cause a delay (see "Regulatory clearances" below).

The formal bid timetable starts once the bidder has announced the bid by way of a press release (the bid announcement). The bid announcement can only be released if the bidder has made preparations which demonstrate that it is capable of implementing the bid, including that it has sufficient financial resources.

Within four weeks of making the bid announcement, the bidder must submit a bid document to the SFSA. The acceptance period will start shortly thereafter when the approved bid document has been made available to the shareholders.

The acceptance period must not be less than three weeks and not more than ten weeks but can be extended if the bidder has reserved the right to do so. The total acceptance period is, however, limited to:

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- three months; or
- nine months if the bid is conditional on official authorisations/regulatory clearances being obtained.

If a bidder is able to obtain more than 90 per cent of the shares, it can force the remaining minority shareholders to sell and thereby acquire 100 per cent in a statutory squeeze-out procedure. Although not required, it is common to include a 90 per cent acceptance condition.

There is no equivalent of the common law concept of "scheme of arrangement" and legal merger is only an alternative where share consideration is offered by the bidder.

Financing of the bid
As part of the preparations for a bid, the bidder must have secured sufficient financial resources to be able to implement it. A takeover bid may be financed by debt and may to a limited extent be made conditional on the provision of such funds. The "certain funds" concept in Hong Kong and the UK has not been fully implemented and there is no obligation on the bidder's financial advisers or other third party to give a so-called "cash confirmation".

Conditions to the offer
Bidders are allowed to make their bids subject to objective conditions, such as competition law or certain other types of regulatory approvals which are required to consummate the transaction (see "Regulatory clearances" below). The main requirements under the Takeover Rules are that conditions may be determined objectively and they may not be drafted such that the bidder has a decisive influence over their satisfaction. Further, the bidder must endeavour to satisfy the conditions. A set of more or less standard conditions has been developed on the Swedish market.

It is customary to make the bid conditional on all necessary approvals from public authorities or other regulatory bodies. The wording of the conditions is typically widely drafted. The Securities Council has not published any decision on whether regulatory approvals required by the bidder for outbound investment, such as the NDRC and SAFE approvals required by Chinese companies, are acceptable for inclusion as objective conditions (the UK Takeover Panel has been reluctant to approve such conditions). However, complex bids depending on large numbers of governmental approvals have been launched in the past and there is no precedent suggesting that they would not be approved. In practice, the issue is likely to turn on whether the specific approval is sufficiently objective and whether it can be influenced by the bidder. It may be key to provide the opinion of PRC legal experts and to describe the PRC approval process in clear and unambiguous terms to the Securities Council and the shareholders of the target.

Regulatory clearances
Unlike the US (which has its Committee on Foreign Investment) and Australia (which has its Foreign Investment Review Board), Sweden does not have regulatory clearance requirements for foreign ownership which have to be routinely considered in connection with takeovers by foreign bidders and is one of the most open jurisdictions for foreign takeovers.

Competition law clearances may be required depending on the business carried out by the bidder and the target in particular jurisdictions. If EU thresholds are triggered, mandatory filings are required. In straightforward cases, clearances can be obtained in Phase 1 within two months. If a Phase 2 investigation is triggered, an additional five to seven months may be required. Even if EU filings are not required, local (national) competition clearances may be required.

Disclosure of information on the bidder
In cash bids, the Takeover Rules require fairly limited disclosure of the bidder. In addition to an introduction to the bidder and its particulars (e.g. identity, legal form and address details), and the bidder's shareholding in the target company, the bidder must disclose an outline of its ownership structure. The description will look up into the bidder's parent group or to consortium members to give a fair picture of the ownership. In addition, detailed information needs to be provided on any external financing for the bid (such as bank loans) irrespective of whether the bid is conditional on financing (see "Financing of the bid" above).

Responsibility for bid documentation and regulatory compliance
The Takeover Act requires the bidder to enter into an agreement with the stock exchange operating the regulated market where the target is listed. By

entering into this agreement, the bidder is obliged to act in accordance with the Takeover Rules. This agreement can be executed by a special purpose vehicle. Unlike Hong Kong or the UK, there is no requirement for any director or officer of the bidder to take legal responsibility for the contents of the takeover documentation.

Dealings in shares and concert party issues
The Takeover Rules have a definition of "closely related persons". Dealings in shares by a concert party can have significant consequences for any takeover bid (e.g. the bidder may be required to increase its bid to match the highest price paid by a closely related person). Chinese bidders will need to be alert to this in order to establish with the help of their advisers who their closely related persons are deemed to be for these purposes and to ensure that inadvertent dealings by closely related persons do not take place at a sensitive time.

Warranty protection
In a takeover bid, there is normally no contractual counterparty to give warranties in respect of the target business and there is no sale and purchase contract. The target shareholders will simply tender their shares to the bid by returning a form of acceptance. In any event, there is no point in getting warranties from the target company since any claim the bidder might have for breach of warranty will be from a company which will be its own subsidiary once completion has taken place. Sometimes, there may be a single substantial and controlling shareholder which may give warranties but that is unusual in a Swedish takeover context.

As a practical matter, the bidder relies upon any due diligence carried out with the target's consent and on the fact that a Swedish listed company is required under the listing rules and securities laws to make full disclosure of all information that is material to the company's business and the value of its shares.

Parties involved in a takeover
The bidder will need to appoint the following advisers:

- an investment bank for financial advice on the bid;
- lawyers to advise on legal aspects of the takeover and prepare takeover documentation;
- if there are local regulatory clearances, additional local lawyers may be required;
- a lending bank; and
- public relations advisers to assist in communications with the media and target shareholders.

The target will also appoint similar advisers and the target will generally pay these fees before the takeover is completed (so the bidder effectively picks up the target company's costs as well).

The takeover will be regulated by the Securities Council and the SFSA which are the relevant regulators.

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Costs of a takeover
Costs can vary considerably in a takeover depending on factors such as:

- co-operation of the target in due diligence and the amount of due diligence required;
- whether the bid is hostile or recommended;
- whether the bid becomes contested (i.e. if a competing bid is announced by a third party bidder);
- how the bid is financed (i.e. whether bank debt is required or it is a share transaction); and
- whether anti-trust or other regulatory filings are required.

Generally, investment banks will charge a success fee based on a percentage of the transaction value. The percentage varies according to the size of the transaction. In smaller transactions, the investment bank may have a minimum fee which is applied regardless of the percentage (e.g. SEK10m (US$1.5m)).

Lawyers specialising in takeover work generally charge on a time cost basis.

Generally, takeovers are expensive due to the complications involved. Also, much of the legal cost is front-loaded because by the time the bid document is made available, the bulk of the documentary work has been done.

Foreign bidders
There have been several successful high profile takeover bids for Swedish listed companies in the last few years, for example:

- US toolmaker Stanley Black & Decker's US$1.2bn acquisition of Niscayah AB in 2011;
- Swiss skin cream maker Galderma SA's US$1.1bn acquisition of Q-Med AB in 2010; and
- Borse Dubai and The NASDAQ Stock Market, Inc.'s US$4.9bn acquisition of OMX AB in 2008.

Chinese bidders

General
Chinese investment into Sweden has accelerated in the past few years. Leading Chinese telecom provider Huawei, for example, has established a significant presence in Sweden operating an R&D centre and has been awarded a major contract to build the next generation of the mobile phone net, while Chinese car producer Geely recently acquired Volvo Cars. However, there has so far been no Chinese takeover bid governed by the Swedish Takeover Rules.

Bid by Sinopec for a dual-listed company
Tanganyika Oil Company Ltd. (Tanganyika) was a Canadian company in the natural resources sector with dual listings on the Toronto Stock Exchange and on the Swedish NASDAQ OMX exchange and with a large Swedish shareholder base. In October 2010, Sinopec International Petroleum Exploration and Production Corporation (Sinopec), through a Canadian wholly-owned subsidiary, made a successful bid for Tanganyika. The bid was governed by Canadian takeover regulations and the Swedish rules were not applicable. The bid was conditional on PRC regulatory approvals from MOFCOM, SASAC and SAFE.

Conclusions

The Swedish Takeover Rules and other laws and regulations provide an open and level playing field for bidders of all nationalities and are not particularly complex. Hostile bids are possible, although the vast majority are recommended or end up as recommended. As a general rule, a bidder prepared to pay cash consideration which meets the expectations of the shareholder base will be successful even if the target company's management is initially hostile.

Ashurst's cross-border M&A experience

Ashurst's cross-border M&A team is currently advising HSBC and RBC Capital Markets in relation to the £2.4bn recommended cash bid for Northumbrian Water Group plc. The bid is being made by UK Water (2011) Limited, whose ultimate shareholders are a consortium comprising Cheung Kong Infrastructure Holdings Limited, Cheung Kong Holdings Limited, and Li Ka Shing Foundation Limited. HSBC and RBC Capital Markets are acting as joint financial advisers to the consortium.

Ashurst also recently advised on Nordic Capital's successful takeover cash bid for Munters AB (publ), a company previously listed on the NASDAQ OMX Exchange Stockholm. Nordic Capital's bid followed a bid by competing bidder Alfa Laval which was withdrawn following a series of competing offers.

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