Structuring takeovers under the new CMA

By László Nanyista, Judit Vadász and Albert Birkner of Cerha Hempel Spiegelfeld Hlawati describe the provisions of the CMA implementing the Takeover Directive

The rules relating to takeovers, which were first introduced in Hungary in 1998 by the then applicable Securities Act, are now set out in the Hungarian Capital Markets Act (Act CXX of 2001) (the CMA). The Hungarian takeover rules apply to all public companies and not just to listed companies. The most recent amendment to the CMA has greatly altered the takeover rules and their working mechanism, which will now be largely influenced by the Financial Supervision's practice established on the basis of the new provisions.

The CMA was drafted in compliance with the then applicable EU takeover legislation. Accordingly, the principles of the CMA have always been harmonized with the principles of the Takeover Directive.

Under the CMA, as a general rule, to acquire a controlling interest in a Hungarian public stock company (the target) in excess of the statutory thresholds (33% or 25%), a mandatory public takeover offer, as approved by the Financial Supervision, must be made in advance. The CMA contains certain exceptions from the general rule, providing for cases when the public takeover offer may be made subsequent to the acquiring party reporting the acquisition of controlling interest to the Financial Supervision. Under the CMA, it is also possible to make a public takeover offer if the influence to be acquired does not exceed the statutory thresholds (a voluntary offer).

Acquisition of influence

An acquisition of influence is deemed to occur when voting rights are acquired (that can be exercised in the decision-making process of the general meeting of the target) by exercising a purchase or repurchase option for voting shares, performing a forward purchase or exercising voting rights through the right of use or usufruct. Influence can also be acquired by means not qualifying as an outright bid by the acquiring party (for example, inheritance and legal succession), by way of a resolution of the target affecting the voting rights of the shareholders or changing the voting powers. Influence can also be acquired through the recovery of voting rights or as a result of the conduct of persons acting in concert. *Persons acting in concert* are defined as legal or natural persons or organizations without legal capacity that act in concert with the offeror or the target on the basis of an agreement to acquire influence in the target or to hinder the success of a takeover offer. The members of a group of companies are always deemed to act in concert.

Reporting and publication of acquisition of influence

An acquisition of influence equalling or exceeding 5% must be reported to the Financial Supervision and the board of directors of the target within two calendar days of its occurrence. Meanwhile, the acquiring party must arrange for the publication of the acquisition. All subsequent acquisitions of influence are subject to the same obligations in 5% stages, that is, on reaching or exceeding 10%, 15% and so on up to 50%. Above 50%, the reporting and publication requirements apply only when the 75%, 80%, 85% and 90% thresholds are reached. Above 90%, all subsequent acquisitions of influence are subject to the outlined obligations in 1% stages. These obligations also apply if influence is decreased.

The publication should be made in a national daily newspaper or on the websites of the target and the trading agent, or of the stock exchange where the target's shares are traded, or of the Financial Supervision.

If the acquiring party fails to perform its reporting and publication obligations, it may not exercise its voting rights in the target.

Conditions

Pending acquisitions of influence are also subject to the reporting and publication obligations. Even if, pursuant to an agreement, influence is acquired at a later date or depends on the fulfilment of certain conditions precedent, the reporting and publication obligations must be complied with on the date of the agreement. In this reporting and publication the date of, or the conditions precedent to, the future acquisition must be disclosed. These special rules on pending acquisitions do not release the acquiring party from the obligation to report and publish the actual acquisition.

Mandatory offer

Controlling interest, applicable thresholds

The CMA, as a general rule, requires that in order to acquire influence in a public company of more than 33% (a controlling interest), a mandatory public takeover offer, as approved by the Financial Supervision, must be made to all shareholders and for all voting shares of the target. The CMA reduces to 25% the 33% threshold if no other shareholder holds influence in the target representing more than 10% of the voting rights.

Under the CMA, to acquire a controlling interest in a Hungarian public stock company in excess of the statutory thresholds, a mandatory public takeover offer must be made in advance

Timeframe

Pursuant to this general rule, the mandatory offer must be made before the acquisition of controlling interest, meaning that the offer must be made in order to exceed the statutory threshold for controlling interest. However, the CMA sets out certain exceptions from the general rule, providing for cases when the

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mandatory offer must be made within 15 days *subsequent* to reporting the acquisition of controlling interest to the Financial Supervision. Such cases include if acquisition of controlling interest occurs:

- by means not qualifying as an outright bid submitted by the acquiring party;
- as a result of the exercise of a purchase option or a repurchase option, or the performance of a forward purchase agreement;
- in the course of a procedure conducted by a state-owned asset holding company as prescribed by law; or
- as a result of the conduct of persons acting in concert (for example, the conclusion of a shareholders agreement).

Offer price

The compulsory contents to be included in the mandatory offer are set out by the CMA. The mandatory offer must include information on the offer price, including the consideration offered for the shares expressed in a monetary value, the composition of the consideration (the proportion of cash consideration and consideration being in the form of securities and, if consideration is in the form of securities, the offered securities' particulars), the method of calculating the amount of the consideration and the method of performance of the consideration. As the CMA applies in the case both of Hungarian listed and non-listed public companies, the CMA sets out rules regarding the calculation of the minimum offer price in both cases.

The minimum offer price for a target company whose shares are admitted to trading on a regulated market must be the highest of (x) the weighted trading average stock exchange price for the 180 days (provided that there have been at least 36 stock exchange transactions during that period) preceding the submission of the mandatory offer to the Financial Supervision for approval (reference period); or (y) the highest purchase price paid by the offeror or its affiliates for the shares of the target during the reference period; or (z) the weighted trading average stock exchange price for the 360 days preceding the submission of the mandatory offer to the Financial Supervision for approval; or (xx) in the case of the exercise of an option or a repurchase right by the offeror or its affiliates during the reference period, the aggregate of the strike price and the option fee; or (yy) in the case of an agreement concluded by the offeror or its affiliates during the reference period for an option or a repurchase right, the aggregate of the strike price and the option fee included in the agreement; or (zz) the consideration paid by the offeror or its affiliates for the concerted exercise of voting rights on the basis of an agreement concluded by the offeror or its affiliates during the reference period.

The minimum offer price in the case of a target company the shares of which are not admitted to trading on a regulated market must be the highest of the above prices. In this case, however, the basis for the calculation is the weighted trading average over-the-counter (OTC) price, based on the over-the-counter reports made to the Financial Supervision and published in the official gazette, for the above-mentioned reference periods.

Form of consideration

The offer may provide for a cash offer, as well as a consideration in Hungarian government securities or government securities issued by other OECD member states, or a bank guarantee issued by a credit institution seated in Hungary or in another OECD member state.

The offeror must be in a position to provide funds for the total amount of the consideration in cash, because the accepting shareholders may always request that the offer price be paid in cash.

Procedural deadlines

The Financial Supervision must decide on the approval or the rejection of the mandatory offer within 15 calendar days from its filing. The mandatory offer submitted for approval must be published in accordance with the publication rules relating to acquisitions of influence. If the offer is not appropriate for approval, the Financial Supervision may require the completion or the amendment of the offer or the submission of additional documents. The offeror must comply with this request within five calendar days and the Financial Supervision must decide on the amended offer within five calendar

days. The Financial Supervision may not refuse to approve the mandatory offer if the offer's contents and annexes comply with the provisions of the CMA. If the Financial Supervision fails to decide on the offer within the statutory deadlines, the offer is to be deemed as approved.

After its approval, the offer must be published in a national daily newspaper or on the website of the target and the trading agent, or of the stock exchange where the target's shares are traded, or of the Financial Supervision. The acceptance period must be at least 30 calendar days and no more than 65. The first day of the acceptance period may not be earlier than the second day and may not be later than the fifth day after the publication of the approved offer. The acceptance period may be extended by 15 calendar days upon the offeror's request, subject to the Financial Supervision's approval.

The offer may only be amended with respect to the offer price before the completion of the acceptance period, provided that the amended offer includes an offer price that is higher than the initial price. The increased price will apply to all accepting shareholders, including shareholders that accepted the offer before the increase.

A counter offer may be made and approved by the Financial Supervision if the offer price included in the counter offer is at least 5% higher than the offer price of the initial offer. A counter offer must be submitted at least 15 calendar days before the closing date for the mandatory offer's acceptance period. The provisions relating to mandatory offers apply, with certain exceptions, to counter offers as well.

The offeror must pay the purchase price for the accepting shareholders within five working days from the completion of the acceptance period, unless a merger clearance procedure is still pending. In this case, the five-day deadline must be calculated from the date the merger clearance is granted.

The offeror must report the result of the offer procedure to the Financial Supervision within two calendar days of the acceptance period closing and must also arrange for the result to be published. Similarly, the offeror must notify the Financial Supervision of the payment or non-payment of the purchase price (and the reasons for the non- or partial payment) within two calendar days from the expiry of the payment deadline.

Squeeze-out and sell-out rights

The squeeze-out of minority shareholders is possible under Hungarian takeover rules by exercising a statutory call option right under the following conditions: (x) the offeror has included its intention of exercising its call option right in its request for approval submitted to the Financial Supervision; and (y) the offeror has acquired at least 90% of the voting rights in the target within three months after the completion of the successful mandatory or voluntary offer; and (z) the offeror certifies that it has enough funds to cover the consideration payable for the shares subject to the squeeze-out call option. The squeeze-out call option right may be exercised within three months after the completion of the successful mandatory or voluntary offer. The purchase price of the remaining shares must be deposited in a deposit account upon reporting the exercise of the squeeze-out call option to the Financial Supervision. The price for the remaining shares of the target must be the higher of the offer price included in the takeover offer or the equity per share value indicated in the last audited annual report of the target. If the shareholders of the target fail to hand over their shares to the acquiring party, the target invalidates those shares and replaces them by issuing new shares. The new shares will be made available to the offeror.

The provisions of the CMA focus on acquisitions of controlling interest in public companies by way of mandatory offers. Little regulation is provided for voluntary offers

The minority (non-accepting) shareholders may exercise their sell-out right in the form of a statutory put option right in different circumstances than those in which the offeror may exercise its statutory call option right. A such put option right may be exercised within 90 days after the acquisition of controlling interest is reported to the Financial Supervision provided that the offeror has at least 90% controlling interest in the target upon the completion of the takeover offer. The price payable for the shares must be calculated according to the rules applicable to squeeze-out call option rights.

Voluntary offers

The provisions of the CMA focus on acquisitions of controlling interest in public companies by way of mandatory offers. Little regulation is provided for voluntary offers. The rules applicable to mandatory offers also apply in the case of voluntary offers, with a few exceptions. Voluntary offers can be made for part of the voting shares of the target - if the number of shares offered for sale exceeds the number of shares indicated in the takeover offer, the offered shares must be transferred in the proportion of their nominal value. Counter offers may not be made against a voluntary offer and no voluntary offer may be made in the period between the publication of the mandatory offer submitted to the Financial Authority for approval and the last day of the acceptance period.

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