

# Public mergers and acquisitions in British Virgin Islands: overview

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## M&A ACTIVITY

### 1. What is the current status of the M&A market in your jurisdiction?

The flexible corporate legislative framework in the British Virgin Islands (BVI) makes the BVI an attractive jurisdiction for incorporating public companies. As a result, BVI companies can list on the world's largest stock exchanges including LSE, NYSE, NASDAQ, AIM, HKSE, ISE and TSX.

BVI companies continue to be involved in a number of significant M&A deals including the following recent transactions:

- The acquisition of a BVI company, UTi Worldwide Inc., by DSV via a statutory merger for USD1.35 billion.
- The acquisition of a controlling stake in BVI company, Mail.Ru Group (listed on the LSE) by MegaFon for USD740 million.
- The statutory merger of China Metro-Rural Holdings Limited, a BVI company listed on the NYSE, with an indirect wholly owned subsidiary.
- The acquisition by Unilever N.V. of assets and shares of the personal and home care brands of Quala Inc's eight BVI subsidiaries.
- In the authors' experience, due to the number of active BVI companies which are used in so many different jurisdictions and industries, there is always a considerable amount of M&A work involving BVI companies.

### 2. What are the main means of obtaining control of a public company?

The most common methods are set out below. It should be noted that BVI companies can contract out of certain statutory provisions in their memorandum and articles of association (articles). Therefore, the terms of a BVI company's memorandum and articles can significantly influence how public M&A transactions are structured.

#### Statutory merger

This is governed by the BVI Business Companies Act 2004. A BVI company can merge with one or more companies under this statutory process. The merger will result in one surviving BVI company. The BVI company can merge with companies incorporated inside or outside the BVI (provided this is permitted under the relevant foreign law).

#### Statutory consolidation

This is similar to a statutory merger (*see above, Statutory merger*). However, the statutory consolidation results in two or more constituent companies consolidating into a new BVI company.

#### Scheme of arrangement

An arrangement is approved by 75% of the votes of shareholders of a BVI company and sanctioned by the BVI High Court (the Court). Once approved by the Court, the scheme of arrangement is binding on all shareholders of the BVI company. This is a useful mechanism for takeovers and reverse takeovers due to the lower threshold required compared to forced minority shareholder redemption (*see Question 20*).

#### Plan of arrangement

A plan of arrangement must first be approved by the directors of the BVI company. The directors must then make an application to the Court to sanction the arrangement. The Court has wide powers including (among others):

- The power to require the arrangement to be notified and/or approved by other parties (including the shareholders and creditors of the BVI company).
- The power to conduct a hearing and allow interested parties to appear.
- The power to reject or approve the plan of arrangement with such amendments as it may direct.

In practice, a plan of arrangement is usually approved in advance by all interested parties in order to reduce the likelihood of the Court rejecting or amending the plan of arrangement.

#### Contractual offer

In a contractual offer, an offer is made by the bidder to the target's shareholders.

#### Forced minority shareholder redemption

*See Question 20.*

#### Scheme of transfer or merger for BVI company carrying on insurance business

For BVI companies carrying on insurance business, no part can be transferred or merged unless carried out under a scheme that complies with the BVI Regulatory Code.

In the case of a general insurer, the transfer/merger must have the prior approval of the BVI Financial Services Commission. In the case of a long-term insurer, the transfer/merger must be approved by the Court.

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## HOSTILE BIDS

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### 3. Are hostile bids allowed? If so, are they common?

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Hostile bids are permitted but are not common. In practice, hostile bids are generally more difficult than recommended bids, as the bidder only has access to a limited amount of information available in the public domain (see *Public domain*).

## REGULATION AND REGULATORY BODIES

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### 4. How are public takeovers and mergers regulated, and by whom?

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The BVI Business Companies Act 2004 (Companies Act) is the principal statute that governs companies. In 2012, the following legislation came into force:

- BVI Business Companies (Amendment) Act 2012 (Amendment Act).
- BVI Business Companies Regulations 2012.

There is no BVI takeover code or public filing requirement applicable to BVI listed companies. However, the BVI is a member of the:

- International Organization of Securities Commission (IOSCO) (that is, the global standard setter for the securities sector).
- Growth and Emerging Markets Committee.

In 2012, the Amendment Act introduced a new section into the Companies Act in relation to listed companies: section 240A. This section permits the Cabinet of the Virgin Islands (on the advice of the Commission) to make regulations concerning the application of the Companies Act to listed companies. However, to date no specific regulations have been passed in relation to listed companies.

If a BVI regulated fund is involved in M&A activity, certain statutory provisions imposed by the Securities and Investment Business Act 2010 (SIBA) must be considered, for example:

- Prior written approval from the Commission is required before a person owning, holding or acquiring a significant interest in a BVI regulated fund can sell or dispose of its interest in a regulated fund.
- A BVI regulated fund must not acquire a subsidiary without the prior approval of the Commission.

Part II of SIBA (Public Issue of Securities) is not yet in force.

Similar provisions apply under the Insurance Act 2008 in respect of a BVI company carrying on insurance business.

A BVI bank or trust company licensed under the Banks and Trust Companies Act 1990 must also comply with specific statutory provisions if involved in M&A activity. In particular, no shares in a bank or company can be issued, transferred or otherwise disposed of without the prior approval of the BVI Governor in Council.

## PRE-BID

### *Due diligence*

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### 5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

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#### Recommended bid

The bidder will obtain information from public sources and will approach the target's board of directors with a comprehensive list of legal, financial and operational due diligence questions. The target's physical assets can be inspected and certain assets, such as the target's real estate, can be valued independently.

#### Hostile bid

The bidder will seek to obtain as much information as possible from public sources or from shareholders who are sympathetic to the bid. The due diligence will be limited to information available in the public domain (see *below, Public domain*).

#### Public domain

The following information is available in respect of a BVI company from the BVI Registry of Corporate Affairs (Registry):

- Memorandum and articles.
- Certificate of incorporation and certificate(s) of change of name.
- Details of the registered agent and registered office.
- The status of the BVI company (for example, active, in penalty, struck-off, in liquidation or dissolved) and whether the BVI company is in good standing.
- Whether the BVI company has paid its annual licence fee.
- Whether the BVI company has complied with the statutory requirement to file its register of directors (even if a copy of the register is not available to the public).
- Optional filings made by the BVI company.

Unless a BVI company has chosen to file such documents at the Registry, the following information is not available from the Registry:

- The company's own register of members.
- The company's own register of directors.
- The company's own register of charges.
- Company accounts.

In addition to the above, information may also be available from:

- The BVI company's website.
- The BVI High Court, which will provide details of any legal proceedings filed against the BVI company.
- The investment exchange on which the BVI company is listed.

#### Secrecy

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### 6. Are there any rules on maintaining secrecy until the bid is made?

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There are no rules on maintaining secrecy until the bid is made.

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## Agreements with shareholders

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### 7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

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It is common for a bidder to seek irrevocable undertakings from key shareholders when making a recommended bid. This is less common in the case of a hostile bid.

Undertakings sought from key shareholders who are not directors of the target include:

- Soft undertakings, which fall away in the event of a higher competing offer.
- Semi-soft undertakings, which specify a price (higher than the original bid) above which a competing offer would cause the undertaking to fall away.

Key shareholders who are also directors of the target are usually requested to provide hard undertakings which remain binding in the case of a higher competing offer.

## Stakebuilding

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### 8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

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In general, the BVI does not impose any disclosure requirements, restrictions or timescales should a bidder decide to build a stake in the target BVI company before announcing the bid.

However, if the BVI target is a regulated fund, bank, trust company or insurance company, there are certain approvals that must be sought under the following Acts (as applicable):

- Securities and Investment Business Act 2010.
- Banks and Trust Companies Act 1990.
- Insurance Act 2008.

See *Question 4*.

## Agreements in recommended bids

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### 9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

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Once the bid has been recommended by the BVI target company's board of directors, a formal agreement will likely be executed by the bidder and the target BVI company.

Subject to the terms of the BVI target's constitutional documents and any agreements to the contrary, the target's board is permitted to provide such undertakings as it deems necessary. In the case of a statutory merger or consolidation, a plan of merger that sets out the terms of the merger or consolidation must be executed by the bidder and target (or other companies that are party to the merger or consolidation).

## Break fees

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### 10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

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Break fees can be included in the terms of any agreement between the bidder and the target in relation to events that could cause the bid to fail (for example, where the target accepts a competing bid).

There are no specific legal restrictions in the BVI on the amount of any break fee payment. However, corporate benefit issues and the value of the deal must be considered and taken into account when determining the level of any break fee.

## Committed funding

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### 11. Is committed funding required before announcing an offer?

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Committed funding is not required before announcing the offer.

## ANNOUNCING AND MAKING THE OFFER

### Making the bid public

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### 12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

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There are no specific requirements determining how and when a bid is made public. This will be determined by the rules applicable to the BVI company imposed by the specific investment exchange on which it is listed.

## Offer conditions

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### 13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

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There are no standard conditions that must be included in a takeover offer under BVI law.

The conditions attached to a takeover offer will be influenced by the regulatory regime to which the target is a party. An offer can be made subject to the satisfaction of pre-conditions.

## Bid documents

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### 14. What documents do the target's shareholders receive on a recommended and hostile bid?

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BVI law does not require the delivery of any specific documents.

The documents the target's shareholders receive are largely determined by:

- The listing rules of the applicable stock exchange.
- The specific provisions drafted into the constitutional documents or the shareholders agreement (or similar agreement, if any) of the BVI company.

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## Employee consultation

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### 15. Are there any requirements for a target's board to inform or consult its employees about the offer?

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There is no requirement for a target's board to inform or consult its employees about the offer.

## Mandatory offers

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### 16. Is there a requirement to make a mandatory offer?

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There is no requirement to make a mandatory offer.

## CONSIDERATION

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### 17. What form of consideration is commonly offered on a public takeover?

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There are no restrictions on the form of the consideration, unless the BVI target is a regulated fund under Securities and Investment Business Act 2010 (SIBA).

Under SIBA, a share in a regulated fund can only be issued for consideration other than cash when it is either:

- Permitted by the Regulatory Code issued by the BVI Financial Services Commission (Commission) under the Financial Services Commission Act 2001.
- Authorised by the Commission in writing, on application of the regulated fund.

For all other BVI targets, the bidder can offer cash, shares, loan notes, other securities or a combination of different types of consideration.

### 18. Are there any regulations that provide for a minimum level of consideration?

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Consideration paid for a share being issued by a BVI company must not be less than the par value of the share. Subject to the terms of the target's memorandum and articles and contract law, once a share is issued, there are no restrictions on the minimum level of consideration that must be paid for any subsequent transfer of the share.

### 19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

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There are no additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders.

## POST-BID

### Compulsory purchase of minority shareholdings

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### 20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

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Subject to the memorandum and articles of a BVI company, the shareholders of a BVI company can give written notice to the BVI company instructing it to redeem the shares held by the remaining minority shareholders, provided the instructing shareholders of the

BVI company requesting the redemption both (*section 176, BVI Business Companies Act 2004 (Companies Act)*):

- Hold 90% of the voting rights of the outstanding shares in the BVI company.
- Hold 90% of the voting rights of the outstanding shares of each class of shares entitled to vote as a class in the BVI company.

Therefore, a bidder who successfully acquires 90% or more of the shares in a target BVI company, will be able to exercise its right to direct the target BVI company to redeem the shares of the remaining minority shareholders.

On receipt of the written notice, the target BVI company will redeem the shares specified in the notice (regardless of whether the shares are by their terms redeemable). The target BVI company must give written notice to each shareholder whose shares are to be redeemed, stating the redemption price and the manner in which the redemption is to be effected. The forced redemption of the minority shareholder's stake (squeeze out) will result in the shareholder(s) who forced the redemption of the shares of the minority shareholder(s) being the only remaining shareholder(s) of the target BVI company.

A minority shareholder can dissent from the redemption of all of its shares pursuant to *section 179 (section 179, Companies Act)*. However, the minority shareholder's election to dissent only applies to the price being offered in respect of its shares, not to the actual redemption. On electing to dissent, the minority shareholder is entitled to payment of a fair value of its shares pursuant to the process set out in *section 179* of the Companies Act.

## Restrictions on new offers

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### 21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

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There are no such restrictions in the BVI. However, consideration should be given to the rules imposed by the relevant investment exchange.

## De-listing

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### 22. What action is required to de-list a company?

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This will be determined by the relevant investment exchange. There are no additional actions required under BVI law.

## TARGET'S RESPONSE

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### 23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

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Subject to any restrictions imposed by the relevant investment exchange on which the target is listed, there are a number of measures that a target's board can implement in an attempt to defend a hostile bid.

#### White knight

In a white knight defence, a third party company is sought to make an alternative offer for the target company.

#### Poison pill/ blank check preferred shares

If permitted under the target's constitutional documents, the current shareholders of the target acquire further shares in the target once a hostile bidder acquires a certain number of shares in the target or if a bid is made. A class of unissued preference shares

are created which are issued when certain trigger events arise, for example, a hostile bid.

### Staggered boards

The target's board of directors is made up of different classes of directors. Usually, there are at least three classes, with each class serving for a different term length than the other classes.

### Constitutional documents

It is not unusual for a listed target company to include anti-takeover provisions in its memorandum and articles. These provisions can include:

- Setting a higher threshold that must be met before shareholder resolutions can be passed to approve a merger/acquisition or amend the provisions of the target's memorandum and articles.
- Requiring directors to refuse to register the transfer of shares.

### TAX

#### 24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

There are no BVI transfer duties payable on the sale of shares in a company incorporated in the BVI.

### OTHER REGULATORY RESTRICTIONS

#### 25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

No other regulatory approvals are required unless the target is a BVI regulated fund, bank, trust company or insurance company, for example:

- If the target is a BVI regulated fund, it must comply with the applicable provisions of Securities and Investment Business Act 2010.
- If the target is a BVI bank or trust company, it must comply with the terms of the Banks and Trust Companies Act 1990.
- If the target is a BVI insurer, it must comply with the terms of the Insurance Act 2008.

See *Question 4*.

The timescales for obtaining such approval from the BVI Financial Services Commission (in the case of a regulated fund or insurance company) or the BVI Governor in Council (for a bank or trust company) vary depending on the nature of the M&A transaction.

#### 26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

There are no restrictions on the foreign ownership of shares.

#### 27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no restrictions on the repatriation of profits or exchange control rules for foreign companies.

#### 28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

There are no such restrictions or disclosure requirements imposed on persons unless the target is:

- A regulated fund under the Securities and Investment Business Act 2010.
- A bank or trust company regulated by the Banks and Trust Companies Act 1990.
- An insurance company regulated by the Insurance Act 2008.

See *Question 4*.

### REFORM

#### 29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

The BVI Business Amendment Act 2012 has paved the way for the Cabinet of the BVI, on the recommendation of the BVI Financial Services Commission, to introduce Regulations in the future in respect of listed companies. However, to date no such Regulations have been proposed or drafted for listed companies.

Part II of the Securities and Investment Business Act 2010 (Public Issue of Securities) has yet to come into force. There is no news as to when this is likely to happen.

## THE REGULATORY AUTHORITY

### BVI Financial Services Commission

W [www.bvifsc.vg](http://www.bvifsc.vg)

Main area of responsibility. Financial services regulator.

## ONLINE RESOURCES

### BVI Financial Services Commission

W [www.bvifsc.vg](http://www.bvifsc.vg)

**Description.** The BVI's regulator for financial services. The Commission is responsible for authorising and licensing companies or persons to conduct financial services business and for monitoring regulated financial services activity, to safeguard the public against any illegal and/or unauthorised financial services business operating in the BVI.

## Practical Law Contributor profiles



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