

Mergers and acquisitions: BVI companies

Service area / [Corporate](#)

Legal jurisdictions / [British Virgin Islands](#)

Date / [September 2020](#)

The flexible corporate legislative framework in the British Virgin Islands (the “BVI”) makes the BVI an attractive jurisdiction for incorporating public companies. BVI companies are listed on the world’s largest stock exchanges including LSE, NYSE, NASDAQ, AIM, HKSE, ISE and TSX. It is, therefore, of little surprise that the BVI is frequently at the forefront of significant global M&A deals. Recent examples of M&A deals which involved BVI companies include:

- The US\$2 billion acquisition of Luxoft Holding, Inc. (NYSE: LXFT), the global digital strategy and software engineering firm, by DXC Technology (NYSE: DXC) by way of statutory merger under the BVI Business Companies Act, 2004 (the “Act”).
- The acquisition of a BVI company, UTi Worldwide Inc., by DSV via a statutory merger for US\$1.35 billion.
- The acquisition of a controlling stake in BVI company, Mail. Ru Group (listed on the LSE) by MegaFon for US\$740 million.
- The acquisition by Unilever N.V. of assets and shares of the personal and home care brands of Quala Inc.’s eight BVI subsidiaries.

Whilst the BVI faces the same uncertainties presented across the globe by the current Novel (COVID-19) Coronavirus pandemic, we are confident that the BVI will, in the long term, continue to see a considerable amount of M&A work involving BVI companies, given the number of active BVI companies on the register of companies in the BVI, the uninterrupted operation of all limbs of the BVI financial services industry

during these unprecedented times and the flexible legislative framework mentioned above.

Obtaining Control of a Public Company

The most common methods of obtaining control of a public company 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 (“**memorandum and articles**”) and, therefore, the terms of a BVI company’s memorandum and articles can significantly influence how public M&A transactions are structured.

Statutory Merger

A statutory merger is governed by the Act. Under a statutory merger process a BVI company can merge with companies incorporated inside or outside of the BVI (provided that this is permitted under the relevant foreign law), and this merger will result in one surviving BVI company.

Statutory Consolidation

A statutory consolidation is similar to a statutory merger as set out above. However, the statutory consolidation will result in two or more constituent companies consolidating into a new BVI company.

Scheme of Arrangement

A scheme of arrangement is approved by 75% of the votes of shareholders of a BVI company and sanctioned by the BVI

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY
CAPE TOWN HONG KONG LONDON SINGAPORE

High Court (the “Court”). Once approved by the Court, the scheme of arrangement is binding on all shareholders of the BVI company. A scheme is considered a useful mechanism for takeovers and reverse takeovers due to the lower threshold required compared to forced minority shareholder redemptions (see below for further details on forced shareholder redemptions).

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 our experience, 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.

Scheme of Transfer or Merger for BVI Companies 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 (the “Commission”). In the case of a long-term insurer, the transfer or merger must be approved by the Court.

Hostile Bids

Whilst hostile bids are permitted they are not common with respect to BVI companies. 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 below Information in the Public Domain).

Regulation and Regulatory Bodies

Regulation of Public Mergers and Takeovers

The Act is the principal statute that governs the law surrounding BVI companies, supported by the BVI Business Companies (Amendment) Act, 2012 (the “Amendment Act”) and the 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 section 240A into the Act in relation to listed companies. This section permits the Cabinet of the Virgin Islands (on the advice of the Commission) to make regulations concerning the application of the 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.

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 – 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.

Due Diligence – 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, Information in the Public Domain).

Information in the Public Domain

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

- Memorandum and articles.
- Certificate of incorporation and certificate(s) of change of name.

Continued

- Details of the registered agent and registered office.
- The status of the BVI company (e.g. 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 (albeit 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 register of members.
- The company's register of directors.
- The company's 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 may be listed.

Agreements with Shareholders

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

Where a bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, in general the BVI does not impose any disclosure requirements, restrictions or timescales prior to announcement of 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 SIBA, Banks and Trust Companies Act, 1990 and Insurance Act, 2008.

Agreements in Recommended Bids

Once a 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 pursuant to sections 169 to 174 of the Act, 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) in accordance with section 170(2) of the Act.

Announcing and Making the Offer

Making the Bid Public

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

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

BVI law does not require the delivery of any specific documents in connection with a bid or takeover.

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.

Employee Consultation

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

Mandatory Offers

There is no requirement to make a mandatory offer.

Consideration

There are no restrictions in connection with BVI companies on

Continued

the form of the consideration payable on a public takeover, unless the BVI target is a regulated fund under 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 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.

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.

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

Post-bid

Compulsory purchase of minority shareholdings

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:

- 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.

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 of the 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 Act.

Restrictions on New Offers

Whilst there are no restrictions on new offers being made in the BVI, consideration should be given to the rules imposed by any relevant investment exchange.

De-listing

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

Target's response

Subject to any restrictions imposed by any 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 is sought to make an alternative offer for the target company.

Poison Pill

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.

Continued

Other regulatory restrictions

No other regulatory approvals are required for a takeover 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 SIBA.
- 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.

The timescales for obtaining such approval from the 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. However, regulatory approval should be one of the first points to consider in any M&A transaction to ensure that it does not delay the process.

Foreign Ownership of Shares

There are no restrictions in the BVI on the foreign ownership of shares of a BVI company.

Repatriation of Profits

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

Disclosure Requirements

Following the announcement of the offer, there are no restriction or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) unless the target is:

- A regulated fund under SIBA.
- A bank or trust company regulated by the Banks and Trust Companies Act, 1990.
- An insurance company regulated by the Insurance Act, 2008.

Please feel free to contact a member of our Carey Olsen corporate team should you require advice on this matter.

Continued

Key contacts

For further information or professional advice please contact our lawyers below:



Clinton Hempel

Partner

D +27 76 412 6091
E clinton.hempel@careyolsen.com



Jasmine Amaria

Partner

D +44 (0)20 7614 5628
E jasmine.amaria@careyolsen.com



Anthony McKenzie

Partner

D +65 6911 8311
E anthony.mckenzie@careyolsen.com



Michael Padarin

Partner

D +852 3628 9006
E michael.padarin@careyolsen.com



James Webb

Partner

D +852 3628 9012
E james.webb@careyolsen.com



Sharon Mungall

Counsel

D +1 284 394 4023
E sharon.mungall@careyolsen.com



FIND US

Carey Olsen
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com



FOLLOW US

Visit our corporate team at
careyolsen.com



PLEASE NOTE

This briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such. © Carey Olsen 2020.