

MALAYSIA'S EXPERIENCE IN TAKE-OVER REGULATION AND SUPERVISION

IOSCO EMC Working Group 4 Seminar
11 - 14 June 2008

OUTLINE

- **Background**
- State of M&As in Malaysia
- Issues/Experiences
- Other Issues
- Conclusion and Q & A

BACKGROUND

Legal Framework

SECURITIES COMMISSION ACT 1993

- Definitions of "control", "take-overs", "PACs" etc
- Underlying objectives
- Requires Compliance with Code & rulings
- Actions for non-compliance
- Power of Minister to prescribe a Code



MALAYSIAN CODE ON TAKE-OVERS AND MERGERS 1998

Principles and rules governing conduct in a take-over



PRACTICE NOTES

BACKGROUND

Objective of take-over regulation:

Identity of the acquirer and offeror **made known**

Reasonable time and sufficient information for consideration and assessment of take-over offer

Fair and equal treatment of all shareholders, especially minority

"ensuring that the acquisition of voting shares or control of companies takes place in an **efficient, competitive and informed market**"

Equal opportunity to all shareholders to participate in benefits accruing from the take-over offer

Directors of offeree and acquirer act in **good faith**, and minority **not subject to oppression or disadvantaged**

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STATE OF M&As

“Malaysia’s M&A market continues to remain active in 2007, although total announced deals in 2007 reported a drop of 16% to US\$21.2 billion from US\$25.3 billion in 2006.... Malaysia, however, continues to be the second most active market in South Asia after India”

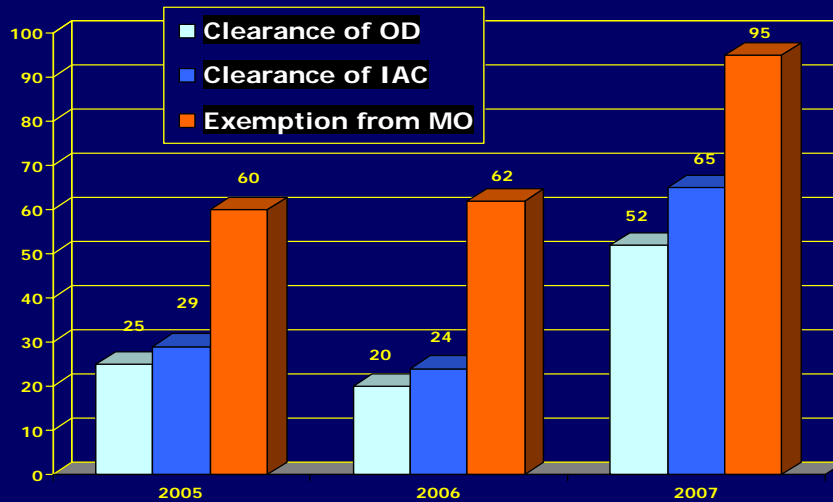
*PricewaterhouseCoopers
Year-end 2007
Asia-Pacific
M&A Bulletin*



Due to:
measures/incentives introduced
to promote M&A activities:

- Exemption from stamp duty & RPGT
- Group relief on income tax
- Quicker time-to-market

Applications Considered in Malaysia



Landmark Take-overs and Mergers



- market capitalisation of RM57 billion
- arguably world's largest listed plantation company
- 80 applications on take-overs



- investment take-over by national pension fund
- major tussle for RHB and prized asset
- protection of EPF's stake



- privatisation by parent company
- value of RM40 billion
- completed within 4 months



- largest of take-over of 2006
- value of RM6.54 billion
- merger of banking industry

IMPLICATIONS OF TAKE-OVERS

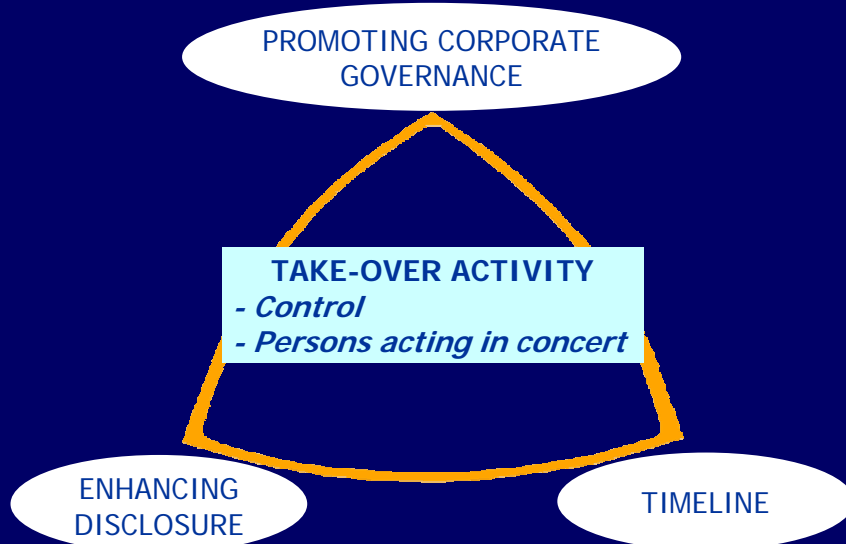
The result of take-overs:

- privatisation 
- delisting  
- liquidation of acquiree brand  
- transformation into acquirer's branch  
- Economies of scale/ market consolidation     

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ISSUES/EXPERIENCE



ISSUES/EXPERIENCES - Persons Acting in Concert

The concept of PACs:

"Acquirer" has been defined under the SCA as:

- a person who acquires or proposes to acquire control in a company whether the acquisition is effected by the person or by an agent; or
- 2 or more persons who, *acting in concert* with one another, acquire or propose to acquire control in a company, whether the acquisition is effected by the persons or by an agent.

ISSUES/EXPERIENCES

- Persons Acting in Concert



Under the SCA, "persons acting in concert" shall be construed as a reference to persons who, pursuant to an agreement, arrangement or understanding, co-operate to:

- acquire jointly or severally voting shares of a company for the purpose of obtaining control of that company; or
- act jointly or severally for the purpose of exercising control over a company.

ISSUES/EXPERIENCES

- Persons Acting in Concert



The SCA states:

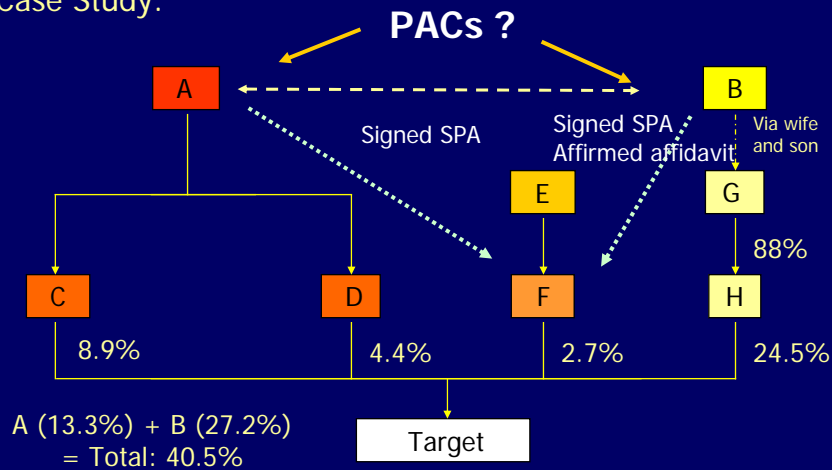
"Agreement", "arrangement" or "understanding", means an agreement, arrangement or understanding-

- whether formal or informal,
- whether written or oral,
- whether expressed or implied, or
- whether or not having legal or equitable force.

Persons who are presumed to be acting in concert unless the contrary is established, by virtue of the relationship between the parties concerned.

ISSUES/EXPERIENCES - Persons Acting in Concert

Case Study:



ISSUES/EXPERIENCES - Persons Acting in Concert

Conclusion

Evidence suggests:

- an arrangement or understanding on the part of C, D and F, A and B in respect of the funding facility for the acquisition by C, D and F of Target's shares
- collusion and concerted effort by PACs (particularly B (through F, H, G) and A (through C and D) in respect of the acquisition of Target's shares

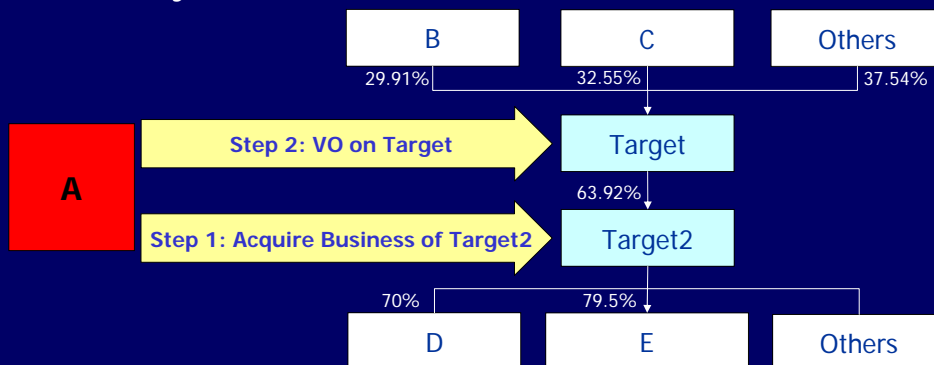
ISSUES/EXPERIENCES - Promoting Corporate Governance

- Spirit of the Code in promoting good corporate governance

- **Fair and equal treatment** of all shareholders, especially the minority; and
- Directors of the offeree and acquirer act in **good faith**, and minority are **not subject to oppression or disadvantaged**.

ISSUES/EXPERIENCES - Promoting Corporate Governance

7 February 2007: A's Offer

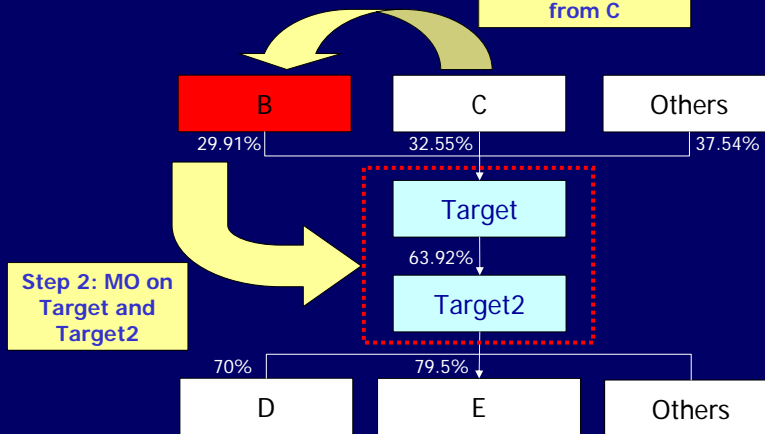


The voluntary offer (VO) was conditional upon, amongst others, the Proposed Business Acquisition of Target2 becoming unconditional.

ISSUES/EXPERIENCES - Promoting Corporate Governance

6 March 2007: B's Offer

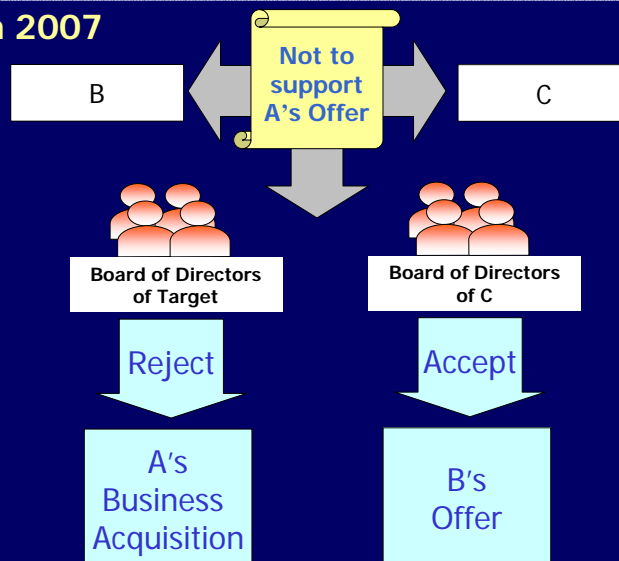
Step 1: B to acquire 32.55% interest of Target from C



Step 2: MO on Target and Target2

ISSUES/EXPERIENCES - Promoting Corporate Governance

9 March 2007



ISSUES/EXPERIENCES - Promoting Corporate Governance

- SC, in administrating the Code, viewed that the Board of Target was not acting in the best interests of the company.
- The Board of Target ***failed*** to ensure, pursuant to Section 33A(5), that:
 - ***Fair and equal treatment*** of all shareholders, in particular minority shareholders in relation to the Offer; and
 - The Directors of Target did not act in good faith to observe the objects, and the manner in which they observe the objects, and that ***minority shareholders*** are subject to ***oppression or disadvantaged*** by the treatment and conduct of the directors of Target.

ISSUES/EXPERIENCES - Enhancing Disclosure

- Spirit of the Code
 - Notice of take-over offer, offer document, independent advice circular, dealings
- **Identity** of the acquirer and offeror **made known**;
 - **Reasonable time** and **sufficient information** for consideration and assessment of takeover offer;

ISSUES/EXPERIENCES - Enhancing Disclosure



What we expect from disclosure:

- Continuous duty of disclosure e.g. material developments relating to a take-over.
- False or misleading information and material omission – provided in the Code.
- Pursuant to Bursa Securities Listing Requirements, information is considered material, if it is reasonably expected to have a material effect on:-
 - (a) the price, value or market activity of any of the listed issuer's securities; or
 - (b) the decision of an investor in determining his choice of action.

ISSUES/EXPERIENCES - Timeline



- Reduction in time-to-market
- Posting of offer document – from 35 to 21 days
- “Immediate” approval of certain exemptions – from 21 to 1 day (24 hours)
- Problems: delay in mandatory offer – meeting conditionality requirement prior to posting of offer document

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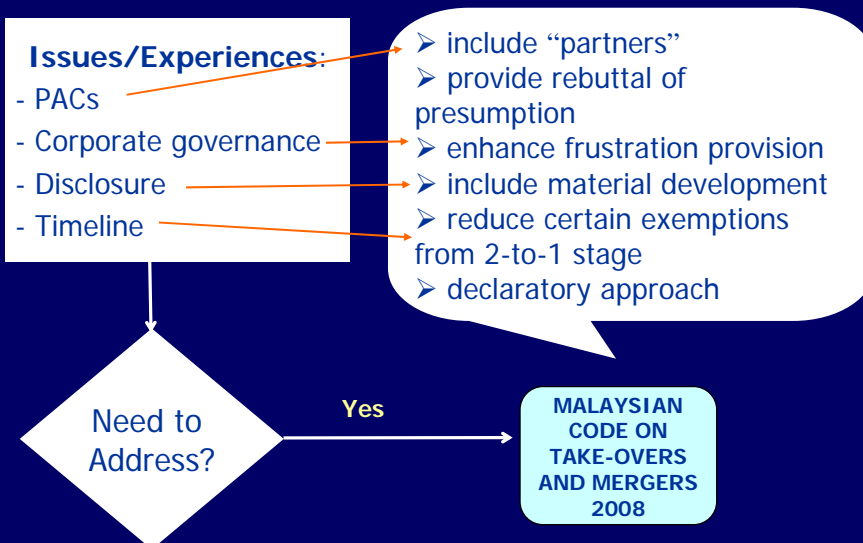
OTHER ISSUES

- Protection of shareholders – majority and minority
- Compulsory acquisition – facilitating M&A vs protecting minorities
- Timeliness of disclosure

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CONCLUSION



CONCLUSION

- Take-over regulation and supervision ever-evolving
- Regulators still need to patrol industry
- With new Code, most lessons learnt



Thank you.
Q&A