

Going Private for Public Listed Companies - Issues and Challenges

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Let me begin as follows:

- Rationale for going private
- Mechanisms for making the offer
 - Announcement and notice
 - Offer document
 - Typical timetable for the offer
- Conditional and Unconditional Offers
- Directors' duties and liabilities
- Conclusions

Rationale for going private

- Administrative and compliance burdens reduced e.g. quarterly reporting and announcements
- Costs of meeting continuing listing obligations reduced
- Independence enhanced and risky vulnerability to a take-over bid reduced
- In a financially distressed condition, the company's share prices are not under public scrutiny
- Agency costs reduced with major controlling shareholders' goals similar to management
- Owner-management controlled company makes it easier to decide on its direction and performance without reference to minority shareholders

Of course, there are other rationales for going private

- Turning the company into a wholly-owned subsidiary
- Dispensing with the decision to appoint non-executive and independent directors
- Having corporate governance flexibility
- Promoting investor relations an expensive programme
- Establishing a more friendly shareholder base
- Minimizing the escalating costs of D & O insurance coverage
- Avoiding disclosure of competitive business and price sensitive information
- Flexible convenience to decide on the venue of general meetings e.g. AGM and EGM

Case Study

Going Private: Airline Travel & Tour Operator

Airline Travel & Tour Operator (or the Company) for over 30 years had decided to change its status from public to private in 1990. The Company was listed on the stock exchange in 1980. The family owned 60 per cent of the shares made a bid for the remaining shares. The family intended to raise the finance to purchase the shares by bank borrowings.

As a public listed company, it was not enjoying the advantage of one of the important benefits of being quoted, i.e. to use its quoted status to fund acquisitions because the founder did not wish to dilute his controlling interest. The fear was that if the family lost control, the risk was that its successful travel and tour operations, being quoted, would become vulnerable to a hostile take-over bid.

Besides the possibility of a hostile take-over bid, there was also a possible conflict between the long term interests of the family business and satisfying outside minority shareholders for their short term expectations. Occasionally, the family wished to make medium and longer term investments in the business but were conscious of the need to pay dividends to meet the short term expectations of investors.

The family having owned the majority stake on going private could decide in what they saw as the long term interests of the business completely free from the short term pressures of minority shareholders.

Mechanisms for making the take-over offer

- Reference to Malaysian Code on Take-overs & Mergers 1998 & Subsidiary Legislation (the Code, effective 1 January 1999), Capital Markets and Services Act 2007 (Division 2, Sections 216-225), Securities Commission Act 1993 (Division 2, Part IV, Sections 33-34C) and Practice Notes
- The take-over offer must be made in accordance with the Code and rules issued by Securities Commission. The rules are covered in Practice Notes which are interpretations of the Code administered by Securities Commission.
 - Announcement and notice: Press Notice and Written Notice
 - Submission of offer document
 - Typical timetable for a take-over bid

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- All take-overs, mergers and compulsory acquisitions must take place in a competitive, informed and efficient manner. All the shareholders particularly minority shareholders must be treated fairly and be given equal opportunities to participate in the benefits accruing from the take-over offer.
 - The Code governs principles and rules on the conduct of all parties (involved in a take-over offer, merger or compulsory acquisition) including the offeror, offeree, their officers, associates and advisers.
 - Parties acting in concert are those persons who co-operate to acquire voting shares to obtain control or act together with the offeror to obtain or exercise control of the company. This fact must be made known.

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- The Press Notice and Written Notice must disclose the identity of the offeror and his parties acting in concert, full disclosure of the terms and conditions of the offer including information and particulars of voting shares (quantity held and controlled with prices paid, undertakings to accept offer including options available).
 - Disclosure of details of arrangements between the offeror, parties acting in concert and other shareholders.
 - The offer price is set to be the highest price paid or agreed to be paid by the offeror within six (6) months prior to the offer period.
 - If the offeror acquires at higher prices than the offer price during the offer period, then the offer price must be revised upwards. The payment to shareholders must be in cash or in a cash alternative.

Typical timetable for a take-over bid

Day	Event
1	Announcements and Notice: Press Notice and Written Notice
4	Submission of draft offer document to Securities Commission for its consent
7	Notification to all the shareholders
35	Posting of offer document to the Board and shareholders
45	Board's recommendations Independent Advice Letter/Circular
56	The Offer closes
57	Announcement as to acceptance: Conditional to Unconditional
77	Dispatch of consideration/payment to shareholders

Essential points to note:

- Draft offer document must be submitted to Securities Commission for its consent within four (4) days from the date of press notice and written notice for the take-over offer.
- Draft offer document must also be sent to Bursa Securities. Due diligence on offer document is essential.
- Notification to shareholders of the company within seven (7) days upon press notice and written notice of the take-over offer.

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- Offer document must be posted to the Board and shareholders within thirty five (35) days upon notice of the take-over offer.
 - The Board's recommendations and Independent Advice Letter/Circular (IAL/C) must be posted to shareholders of the company within ten (10) days upon posting of the offer document. Independent Adviser to minority shareholders appointed subject to Securities Commission's consent.
 - The Board's recommendations and IAL/C must contain information for shareholders to make an informed decision of either to accept or reject the offer.

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- The closing date for the offer has a minimum period of twenty one (21) days from the posting of the offer document.
 - The expiry date for unconditional offer must be set at the outset subject to the minimum period of twenty one (21) days from the posting of the offer document.
 - The conditional offer must be open for not less than fourteen (14) days after the offer has become/declared unconditional from the posting of the offer document.
 - However, if the offer has become/ declared unconditional before forty six (46) days upon posting the offer document, the closing date must not be later than sixty (60) days.

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- Furthermore, if the offer has become/ declared unconditional after forty six (46) days, the closing date should be further extended not later than sixty (60) days or as may be required not later than seventy four (74) days after the posting of the offer document.
 - Dispatch of consideration/payment must be made within twenty one (21) days after the offer has become/ declared unconditional as to acceptance.

Conditional Offer

- Only one condition is permitted.
- The offeror must receive acceptances which should result together with his parties acting in concert holding more than 50 per cent of the voting shares in the target company.
- The offer should lapse if the condition is not fulfilled upon sixty (60) days after the posting of the offer document.
- Hence, the condition in a mandatory general offer is to achieve 50 per cent or more of the voting shares. In the event the acceptance level has reached 50 per cent or more, the offer has been deemed successful. In conditional offer, the offer price is normally more attractive than an unconditional offer.
- If the acceptance level fails to reach 50 per cent or more, the offer has been deemed unsuccessful.
- Legal control is achieved when the shareholding level reaches 50.1 per cent of the voting shares.

Unconditional Offer

- If the offeror together with his parties acting in concert already hold more than 50 per cent, the offer must become/ declare unconditional.

Case Study

■ IOI Corp's Take-over Bid for Palmco Holdings Berhad

In August 2001, Sime Darby Berhad made a voluntary offer for Palmco Holdings Berhad (or Palmco) when it held less than 33 per cent of Palmco's shares.

IOI Corporation Berhad (or IOI Corp) increased its stake from 32 per cent to 41 per cent, triggering IOI Corp to make a mandatory general offer for all the remaining shares in Palmco not already held by IOI Corp.

By October 2001, IOI Corp announced that it had acquired 51.49 per cent of Palmco comprising 97.5 million shares of RM1.00 each. This essentially rendered IOI Corp's offer for Palmco's shares and warrants at RM4.60 per share and RM1.60 per warrant respectively unconditional.

Essential points to note:

A company is usually taken private generally through a mandatory general offer to the shareholders. As mentioned above, the conduct of take-over bids are regulated by Securities Commission and are subject to the Malaysian Code on Take-overs and Mergers 1998 (or the Code) and the Capital Markets and Services Act 2007 (Division 2, Section 216-225). In line with Sections 33 to 33C of the Securities Commission Act, 1993 and Section 6 of the Code, a mandatory general offer is made to the shareholders when:

- A person acquires, taken together with shares held or acquired by his concert parties control in a company 33 per cent or more of its voting shares; or
- A person, who together with his parties acting in concert hold more than 33 per cent but less than 50 per cent of the voting shares of a company and acting alone or in concert with other parties, acquires more than 2 per cent of the remaining voting shares within a period of six (6) months.

Section 216 of the Capital Markets and Services Act 2007 interprets “control” to mean the acquisition or holding of, or entitlement to exercise or control the exercise of, voting shares or voting rights of thirty (30) per cent or more, or such other amount as may be prescribed in the Code in a company.

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- The six (6) month period would effectively reduce the time taken to “creep” into control of a company. Previously, any person and/or his parties acting in concert were not allowed to acquire more than 2 per cent of the voting shares in a company in any twelve (12) months period. The creeping provision is enforced to restrict the acquisition of larger stakes in a shorter space of time whereby any person and/or his parties acting in concert can obtain statutory control of a company. It also helps to regulate stake-building activities whether carried out in isolation or before a general offer until the time when a formal take-over bid is announced.

Directors' Duties and Liabilities

- The offeror and his parties acting in concert cannot appoint directors to the Board of the company or exercise voting rights attached to their voting shares during the offer period.
- The persons who intend to sell their shares to the offeror cannot resign or cause his nominees to resign from the Board of the company before the closing date or when the offer has become/declared as unconditional whichever is later.
- The obligations of the offeror during the offer period.
 - Restrictions on more favourable deals by the offeror
 - Sales of voting shares by the offeror and his parties acting in concert
 - Full disclosure of all dealings in company's shares.

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- The obligations of directors in the company during the offer period.
 - Prohibition to frustrate the take-over offer
 - Transparency and full disclosure of all dealings in shares
 - Obligations to act in good faith by providing information to another potential offeror (on a need to know basis).
 - Observance of all reporting requirements

 - Announcements of acceptance level, quantity and price of shares held by the offeror and his parties acting in concert, including disclosure of all dealings in shares by the offeror and his parties acting in concert, including the directors and officers of the offeror's companies. Persons connected with the offeror including the offeror's holding company, subsidiary companies, and associates as well as bankers, stockbrokers, financial and other advisers.

 - **Civil and criminal liabilities are enforceable under the provisions of the Capital Markets and Services Act 2007 and the Securities Commission Act 1993 respectively.**

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- Reporting requirements include those connected with the offeror and his parties acting in concert, such as directors, spouses, parents, children (adopted and step children), brothers, sisters and spouses of children, brothers or sisters. Reporting requirements also include shareholdings of two (2) per cent or more interest in voting shares in the target company as well as deemed interests under section 69E(1) of the Companies Act 1965.

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- In addition to complying with the Code, the Listing Requirements must be complied with in every take-over and merger transaction of a listed issuer.
 - The offeror must comply with the Listing Requirements set out under Chapter 3, paragraph 3.05 (for non-compliance of 25 per cent public spread), Chapter 10, paragraphs 10.04 to 10.07 (relating to acquisitions), Chapter 11 (for take-overs and mergers) and Chapter 16, paragraphs 16.04-16.09. Chapter 16, Part D of the Listing Requirements contains enforcement for breaches by directors and officers.

Conclusions

- The possibility of a take-over bid is price sensitive and the need for secrecy and security is important during the discussion stage.
- Not only is secrecy a matter of good commercial sense, it is also an important requirement of the Code.
- Information should be passed only to persons on a need to know basis.
- In all respects, shareholders irrespective of their stakes should be treated fairly.
- The circulars to shareholders must contain all the essential information that will enable them to make a properly informed decision and they must be given sufficient time to do so under the Code.

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- Any unusual market activities on the company's share prices will be investigated by Bursa Securities. Securities Commission will check first not only with the directors and their professional advisers but also with the offeror and/or his parties acting in concert and his associates.
 - Any unusual market activities may require an immediate announcement even though all parties concerned may regard the events taking place as premature. Shareholders and investors at large as well as the general public must be able to appraise their position in a general offer and there should be no false market in the company's shares.
 - False or misleading statements or information, making omissions that are material or engaging in conduct that is misleading/deceptive or likely to mislead/deceive, is an offense with a fine not exceeding RM3.0 million or imprisonment term not exceeding 10 years or both.

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- The serious offenses are market rigging transactions, stock market manipulations and use of manipulative and deceptive devices to either lower, raise or maintain the share prices, and fraudulently to induce persons in dealing in the company's shares.
 - Securities Commission is empowered to reprimand the offender, invoke a penalty with a fine of up to RM250,000 or to suspend trading of the company's shares.

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- In a take-over bid, all decisions must be taken promptly with problems dealt with swiftly and efficiently. The company secretary must ensure appropriate procedures and arrangements properly put place for effective monitoring of the conduct of the offer. The Code stresses the collective responsibility of the Board and directors.
 - The directors must ignore their personal interests other than the interests of shareholders and not to do anything to frustrate the offer without shareholders' approval.
 - It is only the shareholders to decide either to accept or reject an offer, not the directors. The rights to control the company must be exercised in good faith with no oppression of minority shareholders.

Questions and Answers

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