Introduction

Due Diligence is a standard exercise in investigating and assessing the risks and liabilities associated with a particular property, be it in the form of shares or real estates, in a proposed acquisition or take-over of that property. It serves as a useful tool in evaluating the suitability of the property to be acquired or taken over and often, the findings of the due diligence will determine whether the proposed transaction is "good-to-go" or a "no-go".

For transactions pertaining to acquisition or take-over of non-listed companies, the due diligence exercise plays a very pivotal role and should be a mandatory requirement for the acquirer. This is because non-listed companies are not subject to a more stringent regulatory framework as compared to listed companies which have a heavier duty of compliance.

Be that as it may, for listed companies, though due diligence is seen as a prudent component to be undertaken by the acquirer/offeror, there are legal aspects which would need to be complied with. Failure to do so could lead to significant legal implications not only on the acquirer/offeror, but also the listed target company and its management on the basis of engaging in insider trading.

This article will traverse some of the main legal aspects in conducting due diligence over listed companies, in addition to aspects which apply to due diligence of companies in general (either for private companies or non-listed public companies).

Regulators and Regulations

Other than the Companies Commission of Malaysia ("**CCM**"), listed companies are regulated by other regulators, namely (i) Bursa Malaysia and (ii) the Securities Commission of Malaysia ("**SC**"). Accordingly, aside from the Companies Act 2016 and its

subsidiary legislations which are under the purview of the CCM, listed companies shall comply with the regulations under the purview of Bursa Malaysia and the SC.

These regulations include Bursa Malaysia Listing Requirements (and the Practice Notes issued thereunder) and the Capital Market and Services Act 2007 ("**CMSA 2007**") (and the subsidiary legislations as well as rules made thereunder including the Malaysian Code on Take-Overs and Mergers 2016 and the Rules on Take-Overs, Mergers and Compulsory Acquisitions).

By virtue of these regulations, any dealing with shares and disclosure of information by listed companies are subject to the rules and restrictions specified thereunder. Accordingly, the conduct of due diligence over shares of listed companies must observe the provisions of the said regulations.

Rules on Disclosures

The conduct of due diligence on listed companies is limited (or rather, confined) to information and records that are publicly available in the systems and databases of the relevant regulators (e.g., CCM, Bursa Malaysia, SC, etc.). Additional sources include CTOS reports, CCRIS reports, winding-up searches, and bankruptcy searches. In some instances, court documents concerning suits involving listed companies may also be accessible or obtainable from the relevant courts for the purpose of due diligence.

In other words, a listed company may disclose, share, or provide its information and records to the acquirer/offeror for the purpose of the due diligence, but such disclosure shall only be made in respect of the information and records of the listed company which are otherwise available or procurable from the relevant regulators, whether directly or indirectly.

This restriction on disclosure is due to the insider trading laws under the CMSA 2007 and/or the disclosure restriction under the Bursa Malaysia Listing Requirements. In essence, by virtue of Section 188(2) of the CMSA 2007, an acquirer/offeror shall not acquire shares of listed company if the acquirer/offeror is an "insider".

As defined under Section 188(1) of the CMSA 2007, an "insider" is someone who possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of shares of the listed company and who knows or ought reasonably to know that the information is not generally available.

As such, an acquirer/offeror can fall under the scope of "insider" if the acquirer/offeror obtains information from the target company which are not public and price-sensitive. Therefore, the acquirer/offeror needs to be careful in enquiring for information from the target company especially in the course of the due diligence process (and the target company needs to likewise be careful in disclosing the enquired information to the acquirer/offeror) so as not to contravene the restriction under the CMSA 2007.

However, as listed companies are required to adhere to a high standard of public disclosure, those information and records as publicly available ought to be sufficient for the purpose of the due diligence. Under the Bursa Malaysia Listing Requirements, listed companies have the duty to make announcement or disclosure to the public, via filing/lodgement/submission of the announcement or disclosure documents to Bursa Malaysia, of all material information necessary for informed investing. In this regard, Paragraph 9.01(4), Part A, Chapter 9 of the Main Market Listing Requirements ("**MMLR**") states as follows:

"*Continuing disclosure ensures a credible and responsible market in which participants conduct themselves with the highest standards of due diligence and investors have access to timely and accurate information to facilitate the evaluation of securities.*"

Conversely, it is a clear and major red flag if the target company does not observe this public disclosure obligation or does not make the requisite announcement or disclosure when it is required to do so under the MMLR. It indicates that the target company has been neglectful or may even be in a state of bad governance by not complying with this primary duty as a listed company, and it should be sufficient for the acquirer/offeror to form an opinion against the transaction on this basis alone.

Conclusion

The conduct of the due diligence for acquisition or take-over of listed companies is confined to the public information and records of the target company as filed/lodged/submitted to the relevant regulators. In this regard, caution needs to be exercised by the acquirer/offeror (and the target company) in the course of the due diligence process so as not to be caught by the prohibitions under the insider trading laws and the restrictions on disclosure under the Bursa Malaysia Listing Requirements. However, as long as the target company is in due compliance with the disclosure duty, the information and records ought to be sufficient for the acquirer/offeror to form an opinion in favour of the transaction.

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