COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

Gibraltar

MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Gibraltar.

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GIBRALTAR
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1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

The key rules and laws relevant to M&A transactions are largely dependent on firstly identifying whether the nature of the transaction is: (i) private; (ii) public; and/or (iii) involves a Gibraltar regulated activity.

Generally speaking, all M&A transactions will be subject to both the Companies Act 2014 and Competition Act 2020.

To the extent that an M&A transaction is being pursued in relation to a Gibraltar target company which is publicly listed on a regulated market, the corresponding rules and regulations governing such regulated market will also need to be adhered to (e.g. an M&A transaction involving a Gibraltar target company which is listed on the London Stock Exchange will need to comply with the City Code on Takeovers and Mergers).

The Financial Services Act 2019 (together with such applicable subsidiary legislation in the form of industry specific regulations) will apply in relation to M&A transactions where the target company and/or group is carrying out a form of licensable activity as regulated by the Gibraltar Financial Services Commission.

Lastly, Gibraltar is a common law jurisdiction, and as such the overarching principles of the common law will apply and need to be borne in mind in such circumstances.

The key regulatory authority relevant to M&A transactions in Gibraltar is the Gibraltar Financial Services Commission, although depending on the nature and process of the applicable M&A transaction, each of the Supreme Court of Gibraltar, the Gibraltar Companies Registry and Gibraltar Income Tax authorities may also feature.

2. What is the current state of the market?

Other than in limited areas where Gibraltar has prominent activity, such as online gaming (where it is a market leader), insurance (primarily UK-facing, with one in five cars in the UK presently covered by Gibraltar insurers) and more recently fintech (where it has pioneered the provision and continuing development of a regulatory framework), Gibraltar has not traditionally been a primary M&A jurisdiction, with most activity involving mergers or acquisitions of large multi-national groups of which a Gibco forms part (sometimes as the target entity but typically as an indirect subsidiary).

However, an in principle agreement revealed on 31 December 2020 regarding a proposed framework for a UK-EU legal instrument setting out Gibraltar's future relationship with the EU, allowing steps to be taken to eradicate the physical border between Gibraltar and Spain through the application of certain aspects of the Schengen acquis in Gibraltar (including but not limited, to those extending to the enhanced movement of goods and people) together with Gibraltar and the UK's agreeing of a temporary (and in early course set to become permanent) permissions framework affording continuing post-Brexit market access to a wide range of licensed financial services firms to passport their services to – and from – each of the respective jurisdictions, and which is already beginning to bear fruit in terms of influx of UK-facing financial services operations to Gibraltar, is expected to lead to substantial growth in the Gibraltar M&A market. Initially this is likely to be in relation to the established gaming, insurance and fintech sectors, but also in due course in respect of wider financial services (as Gibraltar gains prominence as a gateway to the UK, including for EU firms facing the loss of automatic passporting rights into the UK previously available), and which may (including in part in consequence of the Covid-19 pandemic) see firms consolidate and restructure their respective corporate groups and affairs in a bid to seek to optimize efficiency in the post-Covid-19 climate.

3. Which market sectors have been

particularly active recently?

The financial services industries (presently particularly gaming, insurance, fintech and funds) have been most active, and are expected to continue to generate the bulk of the activity in the market in light of the Gibraltar and the UK's agreed framework, allowing continuing post-Brexit (at the time of writing, exclusive) market access to licensed financial services firms to passport their services to – and from – each of the respective jurisdictions.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

The three most significant factors over the next 2 years will be: (i) the precise form of the Schengen-style treaty governing Gibraltar's future relationship with the EU; (ii) the UK-Gibraltar post-Brexit financial services mutual market access regime; and (iii) global trends and developments in both the corporate and tax space (including as a result of the effects of the Covid-19 pandemic, as well as the OECD Pillar 1 and 2 tax proposals).

In addition to the background provided in Questions 2 and 3 on factors (i) and (ii), the absence of high global M&A activity in 2020 should encourage a stark increase in activity for 2021. Invariably dependent on how different sectors and industries have been affected by Covid-19, the expectation is that businesses (following their efforts to mitigate the effect of the pandemic on their operations), will be keen to revert back to incomplete, or deferred deals and transactions (in a bid to avoid further disruption from potentially anticipated increases in hostile takeovers and shareholder activism). An increasing trend for alternative deal models (in the form of joint-ventures and alliances) is also expected, allowing corporations to diversify risk and pursue strategic shifts and reinvestment following changes (as a result of Covid-19) in consumer behaviourial trends which have gravitated towards e-commerce alternatives.

Further, ongoing developments in global taxation (including specifically in the wake of Brexit and Covid-19 as well as the OECD's continuing Pillar 1 and Pillar 2 tax proposals) may also drive M&A activity globally, including in Gibraltar.

5. What are the key means of effecting the acquisition of a publicly traded company?

The acquisition of shares in a publicly traded company would firstly require consideration and adherence to the applicable rules and regulations of the relevant regulated market on which the shares of said public company are being traded on. Furthermore, Part VIII of the Gibraltar Companies Act 2014 permits the acquisition of a publicly traded company by undertaking a scheme or arrangement by way of a merger. Alternatively, a share for share exchange may also be pursued, or an outright contractual sale and purchase of shares may be pursued.

Finally, and to the extent that the publicly traded company carries out a form of licensable activity in Gibraltar which is regulated by the Gibraltar Financial Services Commission, the general provisions of the Financial Services Act 2019 will also need to be adhered to (together with such applicable subsidiary legislation in the form of industry specific regulations), including but not limited to the obligation of notifying the Gibraltar Finances Services Commission of any acquisition of control, or increased control, over a Gibraltar regulated public company.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

Save for any contractual obligations, or subject to any additional requirements and obligations in the case of a target company which is regulated by the Gibraltar Financial Services Commission, which may be requested from time to time, generally speaking there are no Gibraltar law statutory provisions requiring formal disclosure by the target company to a potential acquirer. Notwithstanding the foregoing, it is standard market practice for prospective acquirers to undertake customary checks and (as a minimum), request basic due diligence on the target company.

The acquirer may be able have seek to procure publicly available information from the following Gibraltar authorities, namely the: (i) Gibraltar Companies Registry (specifically in regard to the details of a target company's officers, members, memorandum of association and articles of association, annual accounts, nature of any charges registered against the target company, and said company's good standing (which accordingly confirms that the company is fully compliant with all timely Registry filings); (ii) Supreme Court of Gibraltar (specifically in regard to whether there are any existing or historical claims against the target company); (iii) Gibraltar Income Tax authorities (specifically in regard to information on the target company's

compliance with all tax filings and deliverables in connection therewith); (iv) Register of Ultimate Beneficial Owners (specifically in regard to the particulars of the target company's ultimate beneficial owner(s) and corresponding controlling person(s)); and (v) Gibraltar Financial Services Commission's public register (in the event that the target company is regulated and carries out a form of licensable activity in Gibraltar).

In the context of public M&A transactions, and publicly listed Gibraltar companies, the target company in such instance may also be subject to additional and ongoing disclosure obligations (e.g. notification of changes to capital or board of directors' composition), depending on the regulated market which their shares are traded on.

Finally, save for the aforementioned public filings and disclosures, and while noting that there no express statutory provisions requiring any disclosures by a target company, Gibraltar is a common law jurisdiction, and as such dishonestly concealing any material fact or making a statement that is false or misleading with the intention of inducing, or being reckless as to whether doing so may induce another party to enter into an agreement, amounts to a criminal offence.

7. To what level of detail is due diligence customarily undertaken?

The level of due diligence customarily undertaken in M&A transactions will largely vary depending on whether the nature of said transaction is: (i) private; (ii) public; and/or (iii) involves a Gibraltar regulated activity.

The level of due diligence in private M&A transactions will be dependent on the size and magnitude of the transaction. Due diligence in smaller, or more straightforward private M&A transactions will likely be restricted in scope to basic searches on publicly available records of the target company, with a view to confirming all details and particulars of the target company, together with further confirming any existing encumbrance on the shares or existing claims by third party creditors. Larger scale M&A transactions will likely involve an enhanced search and analysis of the target company, including all records contained within the target company's statutory minute-book, and review of all historical transactional documents (inclusive of board minutes/written resolutions and shareholder resolutions). Full due diligence will also include requests for provision of copies of all relevant correspondence pertaining to the target company. Finally, it is common practice that a form of virtual data room be created for all requested documentation to be uploaded for the acquirer's (and respective advisors') review and inspection.

In the context of a public M&A transaction, the acquirer will undertake a due diligence exercise on publicly available information (and may, depending on the form of the transaction (notably in the case of a hostile takeover) make a determination on whether additional due diligence is required). In the case of public M&A transactions, there will be a need to adhere to the disclosure obligations of any rules/regulations prescribed by the public market on which the public company's shares are traded on.

Lastly, and in the context of an M&A transaction concerning a regulated Gibraltar entity, the Gibraltar Financial Services Commission may utilize its wide powers of discretion to reserve its right as the regulator to request and impose additional disclosure and/or due diligence obligations on any of the concerned parties.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

In both public and private M&A transactions, the target company's board of directors are the key decision-making body. The directors must have regard to their fiduciary duties, and act in the best interests of the company as a whole (essentially considering all interested persons, including the Gibco in its self, its shareholders and third-party creditors).

Specifically in the context of a private M&A transaction, individual shareholders will ultimately exercise their rights of ownership over their shares when deciding whether to sell said shares or not. Save for the mandate granted by shareholders (in the context of the powers and rights bestowed on them in the company's memorandum of association and articles of association, or shareholders' agreement), or in circumstances involving financial assistance, or the sale to or purchase from a director of the company of a substantial asset), specific shareholder approval in private M&A transactions is not typically required.

In the context of public M&A transactions, shareholders may be able to vote on, or approve a scheme proposed by the board of directors, or alternatively decide to accept a takeover offer in respect of their shares. Shareholders with a larger stake in a publicly traded company may also be consulted by the board of directors on the form, terms and provisions of any bid which is formally received in relation to any proposed takeover and/or purchase of a controlling percentage of shares.

9. What are the duties of the directors and controlling shareholders of a target company?

Save for section 227 Companies Act 2014, where directors have a statutory duty to disclose the nature and extent of any conflicts of interests in contracts relating to the company, directors' duties are not generally codified in Gibraltar statute. Nevertheless, directors are subject to certain fiduciary duties by virtue of the common law's application in Gibraltar, and which include: (i) a duty to act in the best interests of the company as a whole; (ii) a duty to exercise a degree of skill and care that may be reasonably expected from them; and (iii) a duty to act for a proper purpose (as more particularly set out in the company's articles of association, which ordinarily impose certain specific duties to secure proper use of the powers bestowed upon directors).

Shareholders do not owe fiduciary duties to other shareholders, whether majority or controlling shareholders, or otherwise. Whilst minority shareholders do not, per se, have any right to challenge the majority, there are limited exceptions to this general rule. These exceptions include a claim for unfair prejudice, whereby a shareholder of a company may apply to the court where such member feels that the company's affairs are being, have been or are proposed to be conducted in a manner that is unfairly prejudicial to the interests of members. If the court finds the application to be successful, it can order the company to refrain from doing any act complained of, authorise civil proceedings, or make a compulsory share purchase order.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

Per Gibraltar's transposition of the EU's Acquired Rights Directive (77/187/EC, which provides the European standard on employment matters) into the Employment Act 1932, certain, extensive consultation and information provisions and other rights form part of applicable Gibraltar legislation, and require adherence. One feature warranting consideration is the automatic transfer of any applicable employees from the seller to the purchaser in an M&A transaction. Incidentally, where the Gibraltar target company is regulated by the Gibraltar Financial Services Commission, there may be additional requirements (including in relation to regulated pension schemes) that may also need to be complied with.

11. To what degree is conditionality an accepted market feature on acquisitions?

Absent any regulated market rules and regulations (in the context of a public M&A transaction where the target entity is a publicly listed Gibraltar company), or restrictions or conditions stipulated by the Gibraltar Financial Services Commission (in the context of an M&A transaction concerning a Gibraltar regulated entity), there are generally speaking no provisions inhibiting conditionality. In the context of private M&A transactions, conditions are a matter of negotiation between the parties and will likely be driven by the commerciality and requirements of both the seller and purchaser.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

Absent any regulated market rules and regulations (in the context of a public M&A transaction where the target entity is a publicly listed Gibraltar company), or restrictions or conditions stipulated by the Gibraltar Financial Services Commission (in the context of an M&A transaction concerning a Gibraltar regulated entity), there are generally no provisions inhibiting an acquirer of a target company from seeking to secure deal exclusivity. In the context of private M&A transactions, parties are broadly free to negotiate and agree on whatever exclusivity arrangements they may wish, including but not limited to entering into such applicable exclusivity agreements and/or break fee arrangements.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Absent any regulated market rules and regulations (in the context of a public M&A transaction where the target entity is a publicly listed Gibraltar company), or restrictions or conditions stipulated by the Gibraltar Financial Services Commission (in the context of an M&A transaction concerning a Gibraltar regulated entity), there are generally no provisions inhibiting an acquirer of a target company from seeking to negotiate and implement deal protection and costs coverage mechanisms. Traditional mechanisms and arrangements have included forms of cross-indemnities and break fee arrangements (which in the context of private M&A transactions, parties are able to negotiate and agree on). In light of the current climate, and effects which the Covid-19 pandemic is having on the marketplace, we would expect an increase in parties' seeking to negotiate on terms including but not limited to: (i) force majeure

clauses; (ii) specific warranties and representations (particularly for businesses and/or target companies operating as a going concern); and (iii) forms of protective insurance to benefit and protect either party (or their respective stake and/or policy holders).

14. Which forms of consideration are most commonly used?

In public M&As, the consideration for the transfer, or each of the transfers, envisaged is to be shares in the transferee company, or one or more of the transferee companies, receivable by members of the transferor company, or transferor companies, with or without any cash payment to members.

In private M&As, the most common forms of consideration in relation to the acquisition of a target company are usually by cash (either actually transferred between bank accounts or by accounting entries) and/or by the putting in place of a receivable/promissory note or loan arrangement for the full or partial purchase price of the target company. In circumstances where the entities are all entities of the same group, it may also be common to assign, transfer and set off any existing intercompany positions as amongst the acquirer and the seller as consideration.

For regulated entities, a buyer may offer securities, cash or a combination of both as consideration (but the exclusive alternative of cash must be available).

Typically, the Gibraltar entity is a direct or indirect subsidiary of the holding/parent entity (which is not a Gibraltar entity) being acquired – as such this would be subject to relevant practice in the corresponding jurisdiction governing the arrangements (typically English law governed agreements are used in these circumstances). Where the target is a Gibraltar entity then Gibraltar law would be the usual governing law.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

In Gibraltar, be it for private or public entities, there is no public disclosure required regardless of the ownership levels unless required by the target's constitutional documents or by a foreign stock exchange (if the target's shares are listed). However, for regulated entities, a decision by any person to make a takeover bid (no matter the proposed ownership level) must be made public without delay and the person must inform the Gibraltar Financial Services Commission of the bid at the first reasonable opportunity. Notwithstanding the foregoing, any acquirer who acquires any legal holding (i.e. direct shares of any amount and value) in the target company will have its name and details registered at Companies House, Gibraltar and included in the Register of Members kept by the target company in its books at its registered office.

More generally, Gibraltar incorporated the 5th EU Anti-Money Laundering Directive into domestic legislation (ie the Proceeds of Crime Act 2015) with the directive having already been implemented into the legislation by way of the Register of Ultimate Beneficial Owners Regulations 2017. Broadly speaking, a person is an ultimate beneficial owner ("UBO") if they directly or indirectly (i) hold more than 25% of the shares in a company; (ii) hold more than 25% of the voting rights in a company; (iii) hold the power to appoint or remove a majority of the board of directors of a company; (iv) have the right to exercise a significant influence or control over a company; or (v) have the right to exercise a significant influence or control over a trust or firm (or similar non-legal arrangement) where that trust or firm meets one or more of the criteria in points (i) to (iv) above. A person is also a UBO where they are in agreement with another UBO and they jointly meet one or more of the criteria. This requirement applies to, amongst others, companies or legal entities incorporated in Gibraltar, trusts and partnerships. The UBO must be registered with the Register of Ultimate Beneficial Owners within Gibraltar as soon as it becomes one with this information must be maintained by the legal entity and changes to the information must be reported to the UBO register within 30 days.

The UBO register is now available to members of the public. They, however, only have access to the name, month and year of birth, nationality, the country of residence and nature and extent of beneficial interest upon payment of a small fee, but more details are available to international competent authorities.

16. At what stage of negotiation is public disclosure required or customary?

In both public and private M&As, there is no requirement to do so at any stage of negotiation but if said arrangement requires court sanction where a court hearing will be required, the relevant disclosure is made to the court of the intended arrangement and shall become public at that stage. Similarly, the directors of each of the public merging companies must deliver a copy of the draft terms to the Registrar which is then published in the Gazette at least 1 month before the

date of any meeting of that company summoned for the purpose of approving the scheme.

For regulated entities, a decision by any person to make a takeover bid must be made public without delay and the person must inform the Gibraltar Financial Services Commission of the bid at the first reasonable opportunity. Where a bid has been made public, the boards of the offeree and offeror companies must inform the representatives of their respective employees or, where there are no such representatives, the employees themselves of the fact.

17. Is there any maximum time period for negotiations or due diligence?

For public and private M&As, there is no statutory limitation time period for negotiations or due diligence. However, in relation to regulated entities, the time allowed by an offeror for acceptance of a bid must be not less than two weeks nor more than ten weeks from the date of publication of the offer document. An offeror may extend the period during which a bid will remain open for acceptance but only if (a) the offeror gives at least two weeks' notice of the offeror's intention of closing the bid; and (b) doing so will not be contrary to an offeree company and must not be hindered in the conduct of its affairs by a bid for its securities for longer than is reasonable. The Gibraltar Financial Services Commission may grant a derogation from the period to allow the offeree company to call a general meeting of shareholders to consider the bid.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

In a private M&A transaction, the consideration payable is a commercial matter for the parties and in a public M&A transaction, there could be certain conditions as set by the relevant stock exchange. When it comes to regulated entities, depending on specific percentages of voting rights being acquired by a buyer or a buyer together with any person acting in concert with a buyer and as a means for protecting the minority shareholders, an "equitable price" is typically set.

19. Is it possible for target companies to provide financial assistance?

Pursuant to the Companies Act 2014, it shall not be lawful for a public company or any of its subsidiaries to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company. Nothing in the relevant section shall be taken to prohibit (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business; (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase by trustees of fully-paid shares in the company to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company; and (c) the making by a company of loans to persons, other than directors, bona fide in the employment of the company with a view to enabling those persons to purchase fully-paid shares in the company to be held by themselves by way of beneficial ownership.

In relation to private companies (and if regulated may have additional requirements), the Companies Act 2014 does not generally prohibit a private company from giving financial assistance in a case where the acquisition of the shares in question was an acquisition of shares in the company or, if it is a subsidiary of another private company, in that other company. The relevant legislation provides further conditions and procedural aspects which much be adhered to in order for a private company to avail itself of the same. Directors must also consider the company's articles of association, their fiduciary duties and corporate benefit when weighing up this option.

20. Which governing law is customarily used on acquisitions?

Notwithstanding that any governing law may be used, typically Gibraltar law is used on Gibraltar situs acquisitions. Further, with Gibraltar law being a common law jurisdiction and as such English law being persuasive, it is common to see English law agreements being used. At Hassans, we have both Gibraltar and English law qualified practitioners.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

In relation to public mergers or private schemes of arrangement, a draft of the proposed terms of the merger/scheme must be drawn up and adopted by the directors of the merging companies. There may be further requirements under the relevant stock exchange

where the entity is listed.

In relation to regulated entities, an offeror must prepare and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. An offer document must be communicated by the offeror to the Gibraltar Financial Services Commission before it is made public and when it is made public, must be communicated by the boards of the offeree and offeror companies to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

Generally, transfers of shares require that an instrument of transfer (e.g. stock transfer form) is executed and delivered to the directors of the target company, that the directors are not only satisfied with the same but that they provide express approval to the transfer and related updates, and with the company secretary updating the Register of Members and making certain filings at Companies House, Gibraltar for a prescribed filing fee in order to reflect the transfer as a matter of public record. The articles of association of the company usually specify additional requirements, which usually include (where the shares are certificated) the delivery and cancellation of relevant share certificates.

There are no registration, stamp, documentary or any similar taxes or duties of any kind payable in Gibraltar in connection with transfers of shares (unless the shares in question relate to real property situate in Gibraltar). Stamp duty is however payable on an increase of share capital in the fixed nominal amount of GBP10.00.

23. Are hostile acquisitions a common feature?

Hostile acquisitions are not common in Gibraltar.

24. What protections do directors of a target company have against a hostile approach?

Gibraltar law does not provide any express specific provisions for protection of directors of a target company against a hostile approach. However, directors (in accordance with their fiduciary duties) must act in the best interest of the company, so would typically be expected to take such steps as may be consonant with the same, and which shall be fact specific.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Unless stipulated in the articles of association (e.g. tag along rights), in unregulated private and public M&A, there are generally no Gibraltar law requirements to make a mandatory or compulsory offer, albeit noting that listed entities will need to comply with any relevant stock exchange requirements.

Additionally, in respect of regulated entities, the Gibraltar Financial Services Commission must direct a buyer to make a mandatory offer if the buyer (a) acquires securities which when taken together with securities in which persons acting in concert with the buyer are interested, carry 30% or more of the voting rights of a company; or (b) together with any person acting in concert with the buyer– (i) is interested in securities to which the aggregate carry not less than 30% of the voting rights of a company but does not hold shares carrying more than 50% of those voting rights; and (ii) acquires an interest in any other securities which increases the percentage of securities carrying voting rights in which the buyer is interested.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

Statute and common law provide, and provisions of the articles of association of the target company may provide, a number of protections to minority shareholders, and the minority shareholders may petition the Gibraltar courts for relief if they believe they have been unfairly prejudiced.

27. Is a mechanism available to compulsorily acquire minority stakes?

Gibraltar statute provides that if a buyer has acquired not less than 90% of the shares to which the offer relates and not less than 90% of the voting rights carried by such shares, the buyer can squeeze out the minority shareholders and acquire their shares at a fair price, provided that it does so within three months of the end of the time allowed for acceptance of the bid. Alternatively, if the buyer holds not less than 90% of all shares in the company, which carry not less than 90% of

the total voting rights in the company, minority shareholders can require the buyer to acquire their shares in the company at a fair price within three months of the end of the time allowed for acceptance of the bid.

Further, if after making a petition to the Gibraltar court (by either a member of the target company and/or the relevant governmental Minister in charge of such affairs) against unfair prejudice, the court may order for the purchase of the shares of any members of the company by other members or by the company itself.

More generally, certain provisions may be included in the articles of association of the target company prescribing the manner in which to compulsorily acquire minority stakes.

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