Global Public M&A Guide - United Kingdom

Effecting a Takeover

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# 4. Effecting a Takeover

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**4.1 Structure of UK takeover bids**

The vast majority of takeover bids in the UK are made either by way of a contractual offer, which may be a voluntary offer or a mandatory offer, or by way of a statutory, court approved scheme of arrangement. It is possible, although relatively rare, for the structure of a takeover to be changed from a scheme of arrangement to a contractual offer, or vice versa, part of the way through the transaction.

**4.2 Contractual offers**

A contractual offer in the UK is made by way of an offer document. The document, constituting an offer to acquire shares, is sent to target shareholders. Shareholders may then accept the offer either by completing and returning a form of acceptance or by electronic acceptance through CREST. If a shareholder accepts, it is bound to transfer its shares to the bidder subject to satisfaction or waiver of the conditions of the offer. In order to acquire 100% of the target's shares using an offer, the bidder needs to acquire 90% of the shares to which the offer relates, following which the bidder can utilize a compulsory acquisition procedure under the Companies Act 2006 to acquire the remaining shares (see 7.1).

Where this method is adopted in preference to a scheme of arrangement, this is often because it does not involve a court approval process and has certain other advantages over a scheme:

in order for the offer to succeed (that is, for the bidder to acquire control of the target), the bidder needs to achieve any level over 50% of the voting share capital as compared to (broadly) a 75% threshold under a scheme;

the timetable to achieve control can be much shorter than in the case of a scheme and, in a recommended offer, control can frequently be obtained within a month;

the target board effectively controls the implementation of a scheme whereas the bidder has effective control of the contractual offer process; and

a contractual offer, unlike a scheme, can be made without the co-operation of the target board.

**4.3 Schemes of arrangement**

A scheme of arrangement is a mechanism provided by the Companies Act 2006 under which a takeover can be effected by the passing of resolutions by the shareholders of the target company and with the approval of the court. A scheme requires the approval of a majority in number representing 75% in value of the target shareholders voting on the necessary resolutions. However, once approved, all shareholders are bound by the scheme. A scheme is a process promoted and undertaken by the target, requiring the full co-operation of the target and cannot, therefore, be used in hostile situations.

Where a scheme of arrangement is adopted in preference to a contractual offer (as is usually the case on recommended bids), this is often due to the following advantages a scheme has:

whilst a scheme may be slower in terms of acquiring effective control, i.e., 50%, it will generally be quicker in achieving 100%. This means that the target can be re-registered as a private company and, thereafter, give any necessary financial assistance much more quickly than under an offer;

a scheme requires a lower threshold to achieve 100% (a vote of a majority in number, representing 75% in value of shareholders voting on the scheme) than a contractual offer ("squeeze out" threshold of 90% of all shares to which the offer relates);

a scheme, unlike a contractual offer, will not generally constitute an "offer for securities" and, therefore, can often avoid certain procedural and other difficulties of acquiring the shares of overseas shareholders; and

if share consideration is to be offered, a scheme, unlike a contractual offer, may allow a bidder not to issue a prospectus in connection with the offer.

**4.4 Mandatory bids and whitewashes**

Where a person acquires an interest in shares carrying 30% or more of the voting rights of a company, or where a person already has an interest in shares carrying 30% or more, but less than 50% of the voting rights, and acquires a further interest which increases their holding of such rights, they must make an offer to all shareholders to acquire their shares. Such a mandatory offer must:

normally be unconditional, apart from a condition that acceptances result in the bidder holding 50% or more of the voting shares in the target; and

be in cash or accompanied by a cash alternative at not less than the highest price paid by the bidder during the offer period and within the 12 months preceding its commencement.

Certain dispensations from this rule are available from the Panel on application. The Panel will normally waive the mandatory bid obligation under the so-called "whitewash" exemption where the mandatory bid requirement arises as a result of the issue of new securities by the "target" as consideration for an acquisition or as a result of a cash subscription, provided that a majority of independent shareholders approve this in a poll in a general meeting. The target must prepare a circular known as the "whitewash circular" to be sent to its shareholders which describes the proposed acquisition and share issuance. This circular must be pre- approved by the Panel.

The Panel will not normally waive the obligation to make a mandatory bid if the person to whom the new securities are to be issued has acquired an interest in shares in the target in the 12 months prior to the publication of the circular relating to the whitewash but subsequent to negotiations, discussions or the reaching of an understanding or an agreement with the directors of the target in relation to the proposed issue of new securities. A waiver granted by the Panel will also be invalidated if any acquisitions of interests in shares in the target are made in the period between the publication of the circular and the shareholders' meeting to approve the whitewash.

**4.5 Conditionality, certain funds and minimum price**

The Takeover Code states that a bidder should announce a bid "only after the most careful and responsible consideration and when the bidder has every reason to believe that it can and will continue to be able to implement the offer". The Panel has specifically stated that the withdrawal of a bid after its announcement is a most undesirable step which should not normally be considered, except in the most extreme circumstances. Accordingly, even though a bid (other than a mandatory bid) is usually subject to extensive conditions, the Panel will apply a very high materiality test when agreeing to allow the bidder to rely on a condition and withdraw.

The Takeover Code states that a bidder should only announce a bid after ensuring that it can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration. The Panel does not normally permit a bid to be subject to any financing condition. As a result, both the bidder and its financial advisers have obligations under the Takeover Code to conduct all possible due diligence before making an announcement of a bid. In addition, the announcement of a firm intention to make a cash bid must include a statement of confirmation by the bidder's financial adviser that sufficient resources are available to the bidder to satisfy full acceptance of the bid. The financial adviser giving this confirmation could itself be required to provide the cash consideration if it did not take all reasonable steps to ensure that the cash was available. This means that if the bid is to be wholly or partially funded by drawing down on debt facilities, the ability to draw down on such debt facilities must normally be wholly unconditional, or conditional only on sufficient acceptances of the bid being received.

Except where the bidder or anyone acting in concert with the bidder acquires or has acquired any interest in securities of the target, there are no restrictions on the nature of consideration or price at which the bid can be made (see 6.1).

**4.6 Offer documents**

The Takeover Code contains a number of specific provisions on the contents of offer documents. This includes scheme documents. In particular, the offer document must satisfy the highest standards of care and accuracy, fairly and adequately present all information and give target shareholders sufficient information to reach a properly informed decision.

The Takeover Code expressly requires the directors of the bidder and, where appropriate, the target to accept responsibility for the information contained in the document. The directors are required to state "that to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case) the information contained in the document is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the import of such information". In addition, under the Companies Act 2006, the bidder and any director, officer or member of the bidder will commit a criminal offense if it publishes or causes to be published an offer document for a company whose securities are admitted to trading on a regulated market which does not comply with the relevant takeover rules, if they knew that the document did not comply with or were reckless as to whether it complied with such rules. It is therefore essential that the utmost care is exercised in the drafting and approval of offer documents.

The Takeover Code requires the offer document to be sent or made available to all shareholders (as well as to employee representatives or employees) of the target, including overseas shareholders, unless (in the case of shareholders located outside the UK, the Channel Islands and the Isle of Man) there is sufficient objective justification for not doing so. It is therefore important to examine the target shareholder register at an early stage and consider whether any laws or regulations of an overseas jurisdiction in which target shareholders are resident impose particular requirements that either entail additional work to ensure compliance, or are sufficiently onerous to enable the bidder to obtain a dispensation from the Panel from having to make the document available to shareholders in that jurisdiction. The Panel will not normally grant a dispensation in relation to residents of the UK, the Channel Islands or the Isle of Man but, in certain circumstances, will grant a dispensation in relation to another country where there may otherwise be a significant risk of civil, regulatory or, particularly, criminal exposure for the bidder or the target.

Where the bidder wants the management of the target to retain a financial interest following the bid, the Panel's consent to the arrangements giving effect to this must be obtained. As a condition of its consent, the Panel will require that the target's financial adviser publicly states that, in its opinion, the arrangements are fair and reasonable and that such arrangements are approved by a vote of independent shareholders at a general meeting of the target. Where the bidder wants to make other arrangements to incentivize management, the Panel's consent will again be required but will not be conditional on shareholder approval, although a public fair and reasonable opinion from the target's financial adviser will again be required.

**4.7 Target board responsibilities and prohibition on frustrating action**

The target board must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of a bid.

During the course of a bid, or even before the commencement of an offer period, if the board of the target has reason to believe that a bona fide bid might be imminent, the board must not take steps which could effectively frustrate the bid. In particular, it may not issue shares, options or convertible securities, sell or acquire material assets or enter into contracts outside the ordinary course of business, without shareholder consent. If there is any doubt as to whether a proposed action may be caught by this restriction, the Panel should be consulted. The Panel may consent to such proposed action being taken without shareholder consent if, for example, it is in pursuance of a pre-existing contract or obligation.

The target board is required to obtain competent independent advice on any bid. The substance of the advice must be made known to shareholders. The target board must also give its own opinion on the bid, including its views on the effects of implementation of the bid on all the company's interests, including, specifically, employment, and its views on the bidder's strategic plan for the target company and its likely repercussions on employment and the locations of the target company's places of business. The target is also obliged to keep employee representatives and pension fund trustees informed of the announcements made and the rights of each of them to append their opinion to the bid documentation.

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