WHITE & CASE

Public to Private Deals in UK

Six key things you need to consider

The UK market is complex and highly regulated, requiring expert advice to navigate. Here are the key things you need to consider in a public to private deal (“P2P deal”) where the UK Takeover Code (the “Code”) applies.

Structure and Timeline

In the UK, a P2P deal can be implemented by way of either a contractual takeover offer or scheme of arrangement.

Contractual takeover offer

Under a contractual offer, the bidder makes a general offer directly to all target shareholders, to acquire the shares in the target company. One of the key advantages of a contractual offer is that there is potentially a shorter time until change of control (more than 50 percent) relative to a scheme. Change of control can happen as quickly as 21 days from posting the offer document. This compares to 5 - 6 weeks from posting the scheme document. Bidders should note that merger controls and other regulatory approvals may extend this timeline significantly. There is also a degree of flexibility under a contractual offer for the bidder to amend terms and make share purchases during the offer period.

Scheme of arrangement

A scheme is a formal arrangement between the target company and its shareholders governed by the Companies Act 2006. A scheme must be approved by target shareholders and sanctioned by the court. As schemes are target-driven, schemes are generally entered into on a recommended basis and parties will enter into a co-operation agreement that sets out the mechanics of executing the scheme. Schemes provide a quicker route to gain 100 percent control and certainty that there will be no minority shareholders left. For these reasons bidders generally favour schemes in the UK.

Secrecy is Paramount

"Rule of six"

Bidders should limit disclosure and put appropriate procedures in place to reduce the possibility of a leak and avoid a premature announcement of a potential takeover. A bidder must consult the Panel on Takeovers and Mergers (the "Panel") if they intend to approach more than six external parties (*e.g.,* financiers, shareholders in target, potential management team candidates and significant customers/suppliers of the target).

Triggering an announcement

Bidders must monitor the target's share price, news and bulletin boards once they begin "active consideration" of a takeover. Under the Code, the Panel must be consulted (and may require an immediate announcement) where there is an untoward share price movement (10 percent over lowest price since "active consideration" began or 5 percent in the course of a single day) or rumour and speculation about the possibility of a takeover.

The responsibility for Panel consultation and releasing an announcement will depend on whether the bidder has approached the target. Prior to an approach, the bidder is responsible. However, once an approach has been made it will become the target's responsibility (assuming the target has not unequivocally rejected the approach).

To avoid premature disclosure, it is important that bidders continue to monitor whether they fall within the parameters of "active consideration." Where an offer has been considered internally at the senior executive/board level or the bidder has approached external parties (advisers, financiers and target shareholders) the Panel will generally assume "active consideration" (noting the Panel has broad discretion).

Secrecy is Paramount

If an announcement is required

If the Panel requires an announcement to be made there are broadly three options available to the bidder:

(i) private "downing of tools" (ceasing work);

(ii) a "no intention to bid" statement; or

(iii) an announcement of a "possible" or "firm" offer.

Bidders should set up a leak protocol detailing the preferred approach once the bidder begins "active consideration." Bidders need to be aware that the first two options will leave them subject to certain restrictions for the next six months.

Any "possible" offer announcement will trigger a "put up or shut up" ("PUSU") deadline for the bidder. This is a 28 day deadline for the bidder to either announce a "firm" intention to make an offer (which would be binding and fully financed) or a "no intention to bid" statement. The PUSU deadline can be extended with the consent of the target and the Panel.

Financing

Certain funds

There must be absolute certainty that the takeover offer consideration will be available to shareholders in the event that the bidder is successful. Accordingly, a bidder must have “certain funds” prior to releasing a “firm” offer announcement. Financing conditions are generally not permitted (other than regulatory clearances) and drawstops within financing documentation will need to be disapplied at the time of the announcement.

It is the financial adviser’s responsibility to ensure that the bidder has sufficient cash resources to undertake its bid from the time of announcement until payment. This is done through a “cash confirmation” exercise. The financial adviser will undertake detailed diligence of the bidder’s financing arrangements (equity and debt) to ensure that there is sufficient cash available to the bidder to satisfy full acceptance under the takeover offer.

Access to target cash

Bidders will only be able to push down debt and gain access to target cash once the target is re-registered as a private company. Re-registration requires a special resolution (a majority of 75 percent or more) and may take 1 - 2 weeks to effect post completion of the acquisition.

Financing

Syndication and club deals

Careful thought needs to be given to any syndication process or club deal as there are a number of rules under the Code which could impact timing and approach. In particular:

- **"Rule of six"** – prior to an announcement, the "rule of six" applies to all financing banks. Syndication may need to be delayed, therefore, until after an announcement has been made.
- **Equality of information and special deals** – equality of information requirements and special deal restrictions will apply to any prospective syndicatee or equity investor where it is also a shareholder in the target. This may prevent information passing to prospective financiers or prohibit involvement altogether.
- **Disclosure** – the terms of the financing documents (including fees) must be disclosed publicly at the time of announcement. Certain dispensations can be sought on market flex terms at the time of announcing, however disclosure is still required at the offer documentation stage. This may be unpalatable and push syndication beyond the offer period.
- **Concert parties** – where third parties are providing equity funding, "concert party" issues generally arise. Purchases by concert party members will be treated as if made by the bidder and will have implications in relation to offer price and consideration being offered, including whether a mandatory offer is required. Therefore, bidders will need to implement controls on the wider group, including restricting further share purchases by the relevant entities.

Diligence

Diligence can be limited in P2P deals, with targets often restricting access to information. This is largely due to the equality of information principle, which requires information provided to one bidder to be equally provided to any other "bona fide" bidder (whether welcome or not welcome). Accordingly, both bidders and targets should consider interloper risk and whether they would want commercially sensitive information to be available to other bidders before requesting or providing this information.

Management buyouts

In circumstances where the bidder wants to retain management as part of a MBO (or there is management rollover as part of the offer), information flow must be managed.

- Any information prepared by management in their capacity as managers of the company and passed to external financiers (including private equity) must be provided to all competing bidders.
- In addition, any information prepared by management (both in their capacity as managers of the target and as MBO participants) must be provided to the independent target board and the target's financial adviser, on request.

This latter rule covers any business model or due diligence reports that management has reviewed and/or fed into. Therefore, bidders should be very careful to separate out management participation in business plans.

Special Deals and Management Incentivisation

While special deals are generally prohibited under the Code, management incentivisation is permitted subject to certain constraints. The Code requires that all management proposals entered into or that are at an advanced stage prior to a firm offer announcement (i) must be disclosed in the offer documentation; and (ii) must be the subject of a “fair and reasonable” opinion from the target’s financial adviser. The proposed arrangements are also likely to be subject to an independent shareholders’ vote which will require a majority of the independent shareholders to pass. In these circumstances, the offer can be inter-conditional on the shareholder vote.

Even where there are only limited discussions or no management proposal at all, this fact must be disclosed publicly. If a bidder takes any action post-offer that deviates from an intention statement disclosed, then the Panel will want to investigate whether the statement was genuinely and reasonably made at the time. Accordingly, a “maybe” statement is generally better than a “no intention” statement.

When considering whether to enter into management incentivisation arrangements prior to or during an offer period, key points to consider are as follows:

- **Execution risk** – recommendation of the offer will be from the independent directors only and management may form a separate scheme class in a scheme of arrangement.
- **Disclosure requirements** – this will need to be balanced against the comfort of locking in the management team.
- **Management will become concert parties** – any dealings by management could impact offer price floor and should be restricted.

Deal Protections

Offer-related arrangements (*i.e.,* deal protections) between the bidder and target are generally prohibited. The Code is more "target-friendly" than other equivalent takeover regimes, so bidders often look above the target entity and seek certain protections from target shareholders.

It is common practice in the UK market to de-risk an offer by seeking shareholder commitments. Management, cornerstone investors and key institutional shareholders may sign up for either:

- **letters of intent** – non-binding indications of support which can be published but do not bind the shareholder to support the bid; or
- **irrevocable undertakings** – binding commitments to accept an offer or vote in favour of a scheme.

Rather than seeking commitments to accept or vote in favour of an offer, bidders may also stakebuild. This can provide certain financial benefits to a bidder while blocking/deterring an interloper. However, there are risks with this approach, including setting a floor price for any offer, and bidders should always discuss share purchases with their advisers before undertaking any stakebuilding.

One final method of deal protection, which we are seeing a little more now, particularly in the context of competing bids, is shareholders giving "cost cover" or "break fees." While the target (or persons "acting in concert" with the target, including directors of the target) generally cannot enter into any inducement or break fee arrangement with a bidder, target shareholders may. This provides some cost cover in the event that the bid is unsuccessful.

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