**The formal approach and the firm intention announcement**

This element considers the formal approach made by the bidder to the target board and the drafting of the Rule 2.7 announcement; it also discusses pre-conditions.

**The formal approach: how is it made?**

Under Rule 1.1: “An offeror (or its advisers) must notify a firm intention to make an offer in the first instance to the board of the offeree company (or its advisers).”

This applies whether or not the offer is recommended. This is the formal approach where the bidder is ready to announce a firm intention to make an offer. Note that it is highly likely, especially where the offer is recommended, that there will have been informal approaches but these do not fall under Rule 1.1. In a recommended takeover, the formal approach takes on the nature of an agreed trigger for the announcement.

Under Rule 2.2(a): “an announcement is required….when a firm intention to make an offer is notified to the board of the offeree company by or on behalf of an offeror.”

Under Rule 2.7(a): “An offeror should announce a firm intention to make an offer only after the most careful and responsible consideration and when the offeror has every reason to believe that it can and will continue to be able to implement the offer. Responsibility in this connection also rests on the financial adviser to the offeror.”

**Formal approach: recommended takeover**

The announcement of a formal offer will usually be made jointly by the bidder and target when the bid is recommended. Following the announcement, the target must circulate the announcement to its shareholders, persons with information rights, the trustees of its pension scheme and the Panel. The bidder and target must also make it readily available to their employee representatives or, where there are no employee representatives, to the employees themselves (Rule 2.11(b)).

**Formal approach: hostile offer**

Sometimes there is no negotiation between bidder and target and the bidder simply calls the Chair or Chief Executive Officer of the target company shortly before making an announcement of its firm intention to make a hostile offer. Alternatively, the bidder may have approached the target board seeking a recommendation and negotiations may have subsequently broken down leading to the hostile offer being made; alternatively a competing offer may have become the preferred recommended offer.

It is therefore less likely that a hostile bidder will have been provided with confidential information or approached target shareholders for irrevocable undertakings unless the bid turned hostile at a later stage in the bid process.

The same Takeover Code Rules apply as for recommended offers and therefore, as for recommended takeovers, a hostile bidder must notify the target board of its bid (under Rule 1.1) prior to making a public announcement.

Note that the bidder can make an announcement of a formal offer “….irrespective of the attitude of the board [of the offeree] to the offer ” (Rule 2.2(a)) and the offeree is required to circulate the bidder’s announcement to, among others, its shareholders in the same way as detailed above for recommended offers in accordance with Rule 2.11(b).

**Consequences of making a firm intention announcement**

It is important to understand that the firm intention announcement does not formally make the offer to the target shareholders. The firm intention announcement indicates that the bidder intends to make the takeover bid. For this purpose, the offer is only made once the bidder publishes the offer document (or the target company publishes the scheme document). However, bidders must be aware of the effect of Rule 2.7(b) which states that: “Following an announcement of a firm intention to make an offer, the offeror must proceed to make the offer...”.

Rule 2.7(b) sets out some limited circumstances in which a bidder may be permitted to withdraw from making the offer. Once a bidder has made an announcement of its firm intention to make an offer, it will only be able to withdraw from making the offer (i.e. publishing the offer document) in the following circumstances:

• the bidder has made the making of the offer subject to a pre-condition (with Panel consent) and is permitted to invoke the pre-condition or would be permitted to invoke a condition to the offer if the offer were made; or

• with Panel consent, if a competing bidder subsequently announces a firm intention to make a higher offer.

The aim of Rule 2.7(b) is to ensure that target companies are not distracted from their business or de-stabilised by speculative offers that have little or no substance.

**Content of firm intention announcement**

The content requirements of a firm intention announcement are set out in Rule 2.7(c) and (d). The announcement must contain in particular (amongst other items):

* the terms of the offer and all conditions (and any pre-conditions) to which the offer is subject;
* the identity of the bidder;
* language which appropriately reflects that the bidder may only invoke any condition or pre-condition which is the subject of Rule13.5(a) with the consent of the Panel;
* a statement as to which conditions and pre-conditions are not subject to Rule 13.5(a);
* a statement that any condition or pre-condition that is subject to Rule 13.5(a) may be waived by the bidder;
* the intentions of the bidder with regard to the business, employees and pension scheme(s) of the target company;
* details of any relevant securities of the target company in which the bidder or any person acting in concert with it has an interest; and
* a confirmation that sufficient resources are available to satisfy any cash element of the offer if the consideration offered includes cash (the “cash confirmation statement”) (Rule 2.7(d)).

**Pre-conditional bids**

It is possible that a bidder may be permitted to withdraw from making an offer or proceeding with its scheme if its bid was subject to a pre-condition and the pre-condition has not been satisfied.

It is important to distinguish between pre-conditions and conditions. Pre-conditions are applied to a bid before it is made. As set out above, if a pre-condition is not satisfied then a bidder may not actually have to make the bid at all. Any pre-condition is set out in the Rule 2.7 announcement.

Conditions are applied to the bid itself and are set out in both the Rule 2.7 announcement and the offer document or scheme circular. If a condition is not satisfied then the bidder may be able to withdraw.

Rule 2.5(c) and Rule 13.3(a) both require a bidder to consult the Panel before including a pre-condition in any announcement. Once an announcement of a firm intention to make an offer has been made, the offer/scheme document should normally be sent to shareholders within 28 days of that announcement being made (Rule 24.1(a) and Appendix 7 Section 3(a)). If a Rule 2.7 announcement is made, and the offer is subject to pre-conditions, the 28 day maximum period following the offer will not be triggered until the pre-conditions are met. As such, the main advantage of using a pre-conditional offer is not having to move forward with the bid documentation until the bidder knows whether the pre-conditions are met.

Rule 13.3(b) sets out the limited types of pre-conditions that are acceptable under the Takeover Code:

Except with the consent of the Panel, “…an offer must not be announced subject to a pre-condition unless the pre-condition involves an official authorisation or regulatory clearance relating to the offer and either:

* (i) the offeree company agrees to the pre-condition; or
* (ii) the authorisation or clearance is a material official authorisation or regulatory clearance.”

A material official authorisation or regulatory clearance is defined in the Code as one which applies “…if the Panel is satisfied that the failure to obtain the authorisation or clearance could give rise to circumstances which are of material significance to the offeror in the context of the offer” under Rule 13.5(a) (see Definitions).

Normally a bidder cannot include other, more subjective pre-conditions, such as financing being available (Rule 13.4(a)). This is because a bidder should ensure that its finances are in order before stating an intention to make the bid. Rule 13.1 confirms that the Takeover Code’s rules for subjective pre-conditions and subjective conditions are the same.

However, a financing pre-condition may be accepted by the Panel in exceptional circumstances where the bidder has included another permitted pre-condition (Rule 13.4(c)). This is because the Panel recognises that, where a bidder is using debt finance to make an offer, the cost of having a bank facility on standby throughout, for example, a long regulatory clearance process, would be prohibitive.

**Summary**

* Once a firm intention announcement has been made, the bidder is bound to make the offer (unless certain very limited exceptions apply).
* The 2.7 announcement contains very detailed disclosures about the bid.
* The bidder’s financial adviser confirms in the 2.7 announcement (and later in the offer/scheme document) that the bidder has the resources to satisfy any cash element of the bid consideration.
* If the bidder is permitted to include a pre-condition in the 2.7 announcement, it is not bound to make the offer/proceed with the scheme until the pre-condition has been satisfied or waived.