**Mandatory offers**

This element looks at mandatory offers, including what triggers them and how they differ from voluntary offers.

**What is a mandatory offer?**

The majority of takeover bids are voluntary i.e. the bidder consciously decides to made an offer for all of the shares in the target company it does not already own. However, in some circumstances, the Takeover Code will require a shareholder to make an offer for a company in which they hold shares. This is known as a ‘mandatory offer’ or a ‘Rule 9 offer’. The reason for the mandatory offer requirement is that the Takeover Code treats a person who holds 30% or more of the voting rights in a company as having control of that company. In practice, a 30% shareholder can block special resolutions (“negative control”) and, particularly if other shareholders are disengaged, they may be able to use their voting rights to pass ordinary resolutions.

As a general rule, a bidder takes care not to trigger a mandatory offer by accident. However, a bidder will occasionally trigger a mandatory offer deliberately as a tactic in a takeover situation.

Whether it is intentional or not, any purchase which takes the bidder’s holding to 30% or above must comply with Rule 5 of the Takeover Code.

**Rule 5: restrictions on purchases resulting in a holding of 30% or more**

The basic rule is that a person (including anyone acting in concert with them – see below) may not become interested in shares carrying 30% or more of the voting rights in a company (Rule 5.1).

The exceptions to this prohibition are set out in Rule 5.2. These include:

• an acquisition from a single shareholder in a 7 day period, provided it is the only such acquisition in that period (Rule 5.2(a)); and

• immediately before a recommended firm intention announcement (Rule 5.2(b)); and

• acceptances to the offer (Rule 5.2(d)).

For the purposes of Rule 5 only, irrevocable commitments which a bidder has received must be included when calculating their interest in voting rights in the target company. As such, if a target shareholder is planning to enter into an irrevocable undertaking with a bidder which will take the bidder’s holding to 30% or above, it must do so pursuant to an exception in Rule 5.2: for example, the undertaking could be entered into immediately before the bidder makes its recommended firm intention announcement.

**Rule 9: triggering a mandatory offer**

Under Rule 9, a person must make a mandatory offer if they acquire an interest in shares which takes their total interest to 30% or more. This includes any interests in shares acquired by any person acting in concert with them.

(Note that the requirements in Rules 5 and 9 also apply to a situation where a person who is already interested in 30% or more (but no more than 50%) of the voting rights in a company acquires additional voting rights. This is much less common and will not be considered further in these materials.)

There are some exceptions to the requirement to make a mandatory bid which are set out in the Notes on Dispensations from Rule 9. For example, if a company issues new securities in consideration for an acquisition or in respect of a cash subscription for its shares and the result would be an obligation on a shareholder to make a mandatory offer under Rule 9, the Panel will normally waive this obligation provided that the shareholders who are independent of the transaction pass a resolution approving the waiver. This is referred to as a **“Rule 9 waiver”** and occurs relatively frequently.

**How does a mandatory offer differ from a voluntary offer?**

The problems for anyone required to make a mandatory offer under Rule 9 are, first, that the bidder may not have intended to acquire the whole company at all and, second, that the Takeover Code restricts how this offer can be made.

In particular, a Rule 9 bidder cannot make its offer for the target subject to any conditions other than a requirement that over 50% acceptances are received (see Rule 9.3). In addition, any offer under Rule 9 must be for cash or have a cash alternative and must be made at not less than the highest price paid by the bidder (or by any concert party) for shares purchased in the target during the 12 months prior to the announcement of the mandatory offer (Rule 9.5(a)).

By contrast, a voluntary bidder would usually make its offer subject to a much wider range of conditions, including a higher acceptance level, and may well choose not to offer cash. The Panel will also not usually permit a mandatory offer to be satisfied by way of scheme of arrangement. It is therefore essential that solicitors advise their clients of the consequences of falling within the scope of Rule 9.

**Summary**

* The Takeover Code treats a person with 30% or more of the shares in a company as having control of it.
* In order to protect other shareholders, the Takeover Code requires a mandatory (or Rule 9) offer to be made if a shareholder acquires 30% or more.
* Rule 5 states that a person may not become interested in shares carrying 30% or more of the voting rights in a company but a number of exceptions apply.
* Limited exceptions to the requirement to make a mandatory offer are contained in the Notes on Dispensations from Rule 9: these include obtaining independent shareholder approval in a “Rule 9 waiver”.
* The conditions which may be attached to a mandatory offer are much more limited than on a voluntary offer.
* The Panel will generally not permit a mandatory offer to be satisfied by way of scheme.