**Schemes of arrangement: timetable and procedure**

This element looks at key aspects of the timetable and procedure involved in a takeover undertaken by way of scheme of arrangement.

**Introduction**

With limited exceptions, the target company must implement the scheme in accordance with the timetable set out in its scheme circular. It must announce any changes to this timetable promptly (**Sections 3 and 6 of Appendix 7 of the Takeover Code**).

The key steps in a scheme of arrangement are set out below. Schemes do not use the concept of ‘Day 0’ in the same way as offers but some of the relevant time intervals prescribed by the Code work in a similar way.

This element sets out in turn the key steps on a scheme of arrangement. In practice, these will vary in accordance with the terms of the transaction.

**Timetable for a scheme**

**Step 1: announcement of the scheme (maximum 28 days before the scheme circular sent to target shareholders)**

Given the collaborative nature of a scheme, the firm intention announcement under Rule 2.7 will take the form of a joint announcement from the bidder and the target.

Under Section 3(a) of Appendix 7, the scheme circular must be sent to shareholders by the target company within 28 days of that announcement.

**Step 2: application to Court (approx. 14 days before the scheme circular is sent to target shareholders)**

The target issues a claim form with an accompanying witness statement in the High Court.

**Step 3: seeking the Court’s permission to convene the Court Meeting (approx. 7 days before the scheme circular is sent to target shareholders)**

The Court hears the application and orders a meeting of shareholders (excluding the bidder and persons connected with it) to be convened.

**Step 4: scheme circular (also known as the scheme document) sent to target shareholders**

The Court may require the existence of the scheme to be advertised in a national newspaper: this is generally considered necessary where the target company does not have a reliable contact address for more than 2-3% of target shareholders.

The target must **announce that the scheme circular has been published** and place the scheme circular on its website. The announcement must include details of the expected scheme timetable contained in the scheme circular. (Continues below after ‘Contents of the scheme document’ and ‘Timetable conditions to the scheme’).

**Contents of the scheme document**

The scheme circular must contain, amongst other things:

* details of the scheme;
* an explanatory statement setting out the information required by s.897 CA 2006 (including the effect of the scheme, the directors’ interests and how they will be affected by the scheme);
* information required by the Takeover Code (Rules 24 and 25, as for a recommended contractual offer document);
* details of the expected timetable for the scheme (Section 3(d) of Appendix 7 of the Takeover Code);
* notice of Court Meeting; and
* a notice of the GM required to approve any other steps and resolutions needed to implement the scheme.

**Timetable conditions to the scheme**

Under Section 3(b) of Appendix 7 to the Takeover Code, the parties to the scheme are permitted to include within the conditions to the scheme:

* a long-stop date by which the scheme must become effective;
* a specific date by which the Court Meeting and any additional GM must be held (provided that the date specified must be **more than 21 days after the expected date of the Shareholder Meeting**(s)); and
* a specific date by which the court sanction hearing must be held (provided that the date specified must be more than 21 days after the expected date of the court sanction hearing).

Under Section 3(c) of Appendix 7 to the Takeover Code, these timetable conditions must be given prominent reference in the bidder’s announcement and must not be capable of being invoked or waived after the specified date unless extended with the agreement of the parties to the offer.

**Timetable conditions to the scheme (continued)**

If a timetable condition is not capable of being satisfied by the date specified, the bidder must make an announcement no later than 8.00 am on the business day following the specified date, stating whether the bidder has invoked the condition or waived the condition or, with the agreement of the target, specified a new date by which that condition must be satisfied (see Section 5(a) of Appendix 7).

**Step 5: last date to revise scheme (14 days before Shareholder Meeting(s))**

Any **revision to a scheme of arrangement** should normally be made by **no later than 14 days before the Shareholder Meeting**(s). The consent of the Panel must be sought to make any revision less than 14 days before the Shareholder Meeting(s) or after the Shareholder Meeting(s) (Section 7 of Appendix 7).

**Step 6: Court Meeting (no earlier than 21 days after scheme circular is sent to target shareholders; held immediately before the GM)**

Section 3(d)(iii) of Appendix 7 of the Takeover Code states that the court meeting must normally be convened for a date which is at least 21 days after the date of the scheme circular. In practice, the notice period for the associated GM will be longer than 21 days and both meetings will be held on the same day. The notice period for the Court Meeting will be agreed with the Court. (Continues later after ‘Classes of members in a scheme’ and ‘Voting at the court meeting’).

**Classes of members in a scheme**

In practice, there may be more than one Court Meeting in a scheme of arrangement. The Court must summon a Court Meeting for each of the relevant ‘classes’ of member of the target company. These meetings operate in much the same way as a standard GM except that they are convened by the Court to enable members to vote to approve or reject the scheme.

If there are several classes of member, each class needs to have a separate Court Meeting to approve the scheme. However, note that ‘classes’ for this purpose are not constituted strictly according to the legal rights attached to different classes of shares e.g. ordinary and preference shares (although legal rights attaching to shares generally form the starting point in determining composition of classes and holders of, for example, ordinary and preference shares will usually be in different classes for the purposes of a scheme). Instead, case law dictates that each class must consist of members ‘whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest’ (Sovereign Life Assurance v Dodd (1892) 2 QB 573).

More recently, in Re Hawk Insurance Company Limited (2001) BCLC 480, the Court seemed to simplify the test by indicating that, unless there is some enormous dissimilarity in members' rights, they should all be capable of consulting together.

‘Dissimilarity’ may arise for example, when the scheme offers certain rights to some members which are not applicable to all. For example, if directors of a target (who are also shareholders of the target) are involved in a management buy-out that will leave them with an interest in the combined group after the offer, they will constitute a distinct class of members and will not be able to vote alongside the other shareholders.

Class issues are considered by lawyers early on in the scheme process and may involve complex discussions with counsel. The decision about the number and type of classes must be stated in the claim form submitted to the Court. A bidder will usually seek advance informal approval from the Court. However, there is always a risk that a disgruntled member will petition the Court not to sanction the scheme on the grounds that they had different rights from the rest of their class. This may result in failure of the scheme at a late stage, resulting in wasted time and expense.

**Voting at the court meeting**

Under s.899 CA, at the Court Meeting, the target company must obtain approval for each class separately from:

* (i) a majority in number of those present and voting at the meeting (the ‘headcount’ test); and
* (ii) 75% in value of the votes of those present and voting at the meeting (the ‘value’ test).

Voting at any Court Meeting is by way of poll. **Any shares held by the bidder or persons connected with the bidder are excluded from voting with the other ordinary shareholders (Re Hellenic & General Trust Ltd [1976] 1 WLR 123).**

A bidder holding shares in the target will simply consent to be bound by the scheme; there is no need to hold a vote where a class only has one or two members.

So if the bidder has a large shareholding in the target company, it may be more difficult to achieve the required 75% threshold on a scheme of arrangement, as a hostile third party investor with a substantial holding is more likely to succeed in blocking the scheme.

Note also that shares held by the target in treasury are not counted as part of the scheme since the voting rights attaching to treasury shares are suspended (s.726(2) CA 2006).

The chairman of the Court Meeting prepares a report to be lodged with the court to confirm the voting in the Court Meeting. In accordance with Section 5(b)(ii) of Appendix 7, as soon as practicable after the Court Meeting and, in any case by no later than 8:00 a.m. on the business day following the meeting, the target company must make an announcement stating whether or not the resolution(s) were passed (and if not, whether the scheme has lapsed) and giving details of the vote.

**Timetable for a scheme (continued)**

**Step 7: additional GM (held immediately after the Court Meeting)**

A court meeting can only consider whether to approve the scheme of arrangement; it cannot vote on any other resolution. An additional GM will therefore be required to approve any other steps needed to implement the scheme. For example, the articles of association of the target company are typically amended to include a provision that any target shares issued post-scheme (for example, on the exercise of options) will be transferred to the bidder.

There is a requirement under Section 5(b)(i) of Appendix 7 to **announce the results of the GM**. The GM normally takes place immediately after the Court Meeting(s).

**Step 8: chairman’s report and additional witness statements lodged with court (shortly after the Shareholder Meetings have taken place)**

**Step 9: Court sanction hearing (usually a few days after Court Meeting if there are no outstanding conditions)**

The Court sanction hearing is supposed to ensure that any minority members are not unfairly prejudiced by the decisions of the Court Meeting. The Court must be satisfied that the various statutory provisions have been complied with, i.e.:

* (a) correct notice of the Court Meeting has been given;
* (b) the explanatory statement as required by s.897 CA 2006 has been sent;
* (c) the requisite resolution has been passed; and
* (d) the class of members was fairly represented and that approval of the scheme was reasonable.

A claim form submitted by the target company (supported by various witness statements) will be put before the Court to prove that these criteria have been satisfied. Counsel will be appointed to represent the target at Court and will advise on the documentation provided to the Court. The Court will then use a ‘reasonable person’ test to judge the fairness of the scheme, in this case the reasonable person being an ‘intelligent shareholder’. Provided the scheme is fair and equitable, the Court will not itself judge the scheme’s commercial merits.

Although the Court is not bound by the decisions of the Court Meeting (Re Anglo - Continental Supply Ltd [1922] 2 ch 723), **provided it is satisfied that the scheme has been correctly implemented, s. 899 CA 2006 gives the Court the power to sanction the scheme.**

In accordance with Section 5(c) of Appendix 7, as soon as practicable after the hearing, the target company must make an announcement stating the decision of the Court and details of whether the scheme will proceed or lapse.

**Step 10: Court Order delivered to Registrar of Companies (the ‘Effective Date’ as defined in Appendix 7 of the Takeover Code – the working day after the Court sanction hearing)**

The scheme becomes effective and binding on all members only when the Court order sanctioning the scheme has been delivered to the Registrar of Companies (s.899(4) CA 2006).

In accordance with Section 5(d) of Appendix 7, as soon as practicable on the Effective Date, the target company must make an announcement stating that the scheme has become effective.

**Step 11: consideration sent to members (max. 14 days after the scheme Effective Date)**

Except with the consent of the Panel, the consideration must be posted within 14 days of the Effective Date (Section 10 of Appendix 7).

**Factors which could impact the scheme timetable**

**Holding Statements**In accordance with Section 4 of Appendix 7, if a bidder has announced a firm intention to make an offer to be implemented by way of scheme and it has been announced that a potential competing bidder might make an offer (see Rule 2.6(d) or (e)), then the Panel will require the potential bidder to clarify its position by no later than 5pm on the seventh day prior to the date of the Shareholder Meeting(s), unless the Panel considers it necessary, having regard to the interests of the target’s shareholders and the time pressures of the bidder, to extend the period for clarification, in which case the date chosen may be after the Shareholder Meeting(s) but must be before the Court sanction hearing.

**Alternative Consideration**In accordance with Section 9 of Appendix 7, if the scheme permits shareholders to elect to receive alternative forms of consideration then the deadline for making such elections must not be any earlier than one week prior to the Court Sanction Hearing. A shareholder must also be permitted to withdraw any such election at any time before a deadline of the bidder’s choosing - providing such deadline is not more than one week before the date of the Court Sanction Hearing.

**Summary**

* With limited exceptions, the target must keep to the scheme timetable set out in its scheme document.
* Schemes do not use ‘Day 0’ or other day numbers in the same way as offers, but some of the time intervals which apply on a scheme apply in the same way as in an offer.
* The target must apply to the court for leave to convene the court scheme meeting which must take place no earlier than 21 days after the scheme document is sent to target shareholders.
* It is important to establish whether more than one class of shareholders exists for the purposes of the scheme as each class must approve the scheme separately.
* Provided the court is satisfied that shareholder approval has been correctly given and that procedure has been followed, it will approve the scheme which does not become effective until the court order is delivered to Companies House.