**Takeovers: content of offer documents and scheme circulars**

This element looks at the key content requirements of offer documents and scheme circulars, including the pre-conditions and conditions which may be included.

**Takeover Code General Principle 2(1)**

**‘The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the takeover bid…’.**

This general principle underpins many of the Takeover Code rules in relation to timing but it also underpins the parties’ obligation to give target shareholders all of the information that they need to assess the bid.

In addition to the General Principles, Rules 24 and 25 provide detailed content requirements for the offer document and offeree board circular.

For schemes, the definition of Offer documents and offeree board circulars in Appendix 7 makes it clear that these content requirements also apply to scheme circulars (as varied and supplemented by Appendix 7).

**Responsibility for content**

Rule 19.1 requires each document, announcement or other information published, or statement made during the offer process to ‘be prepared with the highest standards of care and accuracy’ and each director of the bidder company and the target company must accept responsibility for the contents of documents prepared by each of them in connection with a takeover – see Rule 19.2.

A director can only be excluded from the responsibility statement with the consent of the Panel. It is important to note that Rule 19 applies to both the bidder and the target company.

**Opinions of employee representatives and pension scheme trustees**

Under Rule 2.11(d), when there has been an announcement of a bid or possible bid, the target company must inform its employee representatives that they have the right to have their opinion on the bid appended to the target board’s circular/scheme circular (when that is published). This is further confirmed by Rule 25.9. In a recommended offer, the target board’s circular forms part of the offer document, so the opinion of the employee representatives should be appended to the offer document. The target company must meet the costs of publishing the opinion of the employee representatives as well as any costs reasonably incurred by them in obtaining advice verifying the information in the opinion in order to comply with Rule 19.1.

In addition, the trustees of the target company’s pension scheme are also entitled to have their opinion on the bid appended to the target board circular.

**Sending to target shareholders**

Rule 24.1(a): ‘Except with the consent of the Panel, the offeror must, within 28 days of the announcement of a firm intention to make an offer, send an offer document to shareholders of the offeree company........ in accordance with Rule 30.2.’

Section 3(a) of Appendix 7: ‘Where an offeror announces a firm intention to make an offer which is to be implemented by means of a scheme of arrangement and the board of the offeree company agrees to the inclusion of a statement of its intention to recommend the scheme in that announcement, then the offeree company must, except with the consent of the Panel, ensure that the scheme circular is sent to shareholders… within 28 days of that announcement.’

Under Rule 30.2, the offer document or scheme circular will be treated as having been sent if it is: (a) sent in hard copy form, (b) sent in electronic form; or (c) published on a website provided that the shareholder is sent a website notification no later than the date on which it is published on the website.

The offer document or scheme circular must also be published on a website and there must be an announcement via an RIS that the document has been published (Rule 24.1(c) and Section 3(e) Appendix 7). The document must also be made available to the trustees of the target company’s pension scheme, to the employees of both the bidder and the target (Rule 24.1(b)) and, before it is published, to the Panel (Rule 30.5(a)).

In a hostile bid, the bidder is unlikely to wait until the end of the 28 day period before sending out the offer document as the bidder will want to limit the amount of time the target board has to prepare its defence circular (see below).

Rule 30.4 specifically requires documentation to be made available to recipients outside the UK, the Channel Islands and the Isle of Man unless there is sufficient objective justification for not doing so. The Note on Rule 30.4 gives guidance as to when exemptions may apply in the event of issues arising under local securities laws.

**Key date:** in an offer, the publication of the offer document starts the ‘takeover clock’ under the Takeover Code. This is known as **Day 0** as many of the subsequent dates in the takeover clock run from this date. For example, the target board has 14 days from Day 0 to publish its defence circular if the bid is hostile (Day 14).

**Sending the offer document in a hostile takeover**

Rule 24.1(a) states that: ‘…the offeror may only publish an offer document within the 14 days following the announcement of its firm intention to make an offer with the consent of the board of the offeree company.’ Where the target company is working towards a recommended offer, it is likely to give its consent.

In a hostile bid, however, the target would not give consent to the early publication of the offer document, meaning that the hostile bidder could not send out its offer document for at least 14 days following the Rule 2.7 announcement. This gives the target some breathing space to prepare its defence.

**Schemes of arrangement: CA 2006 requirements**

It is important to recognise that, in addition to complying with the various Takeover Code content requirements, the scheme circular forms part of the court procedure set out in Part 26 CA 2006.

s. 897 CA 2006 requires the notice which summons the court meeting (which, in practice, will be included in the scheme circular) to be accompanied by a statement which:

* Explains the effect of the arrangement; and
* States any material interests of the directors of the company and the effect on those interests of the arrangement, in so far as it is different from the effect on the like interests of other persons.

Note that failure to comply with this requirement is an offence committed by the company and every officer of the company who is in default (s. 897(5) CA 2006).

**Conditions**

Offers and schemes of arrangements generally contain a number of conditions. The bidder may be able to withdraw from the bid if any of the conditions are not met. Only upon satisfaction or waiver of all the conditions will the bid complete. The bidder will want to include as many conditions as possible to protect itself against changes in the nature of the target company or the economic climate as a whole. However as discussed below, in practice a bidder is rarely allowed to invoke general business conditions.

**Offers only: acceptance condition – Rule 10.1**

This condition sets out the level of acceptances that the offeror must receive from the offeree shareholders before it is able to declare that the acceptance condition has been satisfied.

Rule 10.1 requires a minimum acceptance condition of over 50% of the voting rights of the offeree company. This level may include any shares already owned by the offeror or its concert parties prior to posting the offer document. For example, if an offeror already holds 47% of the offeree company, it only needs acceptances in relation to a further 3% plus one share to declare the offer unconditional and take control of the company.

However, as most offerors do not simply want majority control (ideally they want to own 100% of the company), the wording in the acceptance condition often refers to a requirement for acceptances to have been received in respect of ‘90% of shares to which the offer relates…’ This is because an offeror which has attained this threshold can utilise the compulsory acquisition (‘squeeze out’) procedure set out in section 979 CA 2006 to buy out the remaining non-accepting shareholders. It is important to appreciate that, when calculating ‘90%... of the shares to which the offer relates’, this excludes any shares held by the offeror at the date of the offer (i.e. on Day 0 when the offer document is published) (s.974(2) CA 2006)).

It is therefore common for the acceptance condition in an offer document to state that the offer is conditional upon acceptances being received in respect of 90% in nominal value of shares to which the offer relates plus 90% of the voting rights carried by those shares. The offer document will also allow the offeror to waive this condition down to a lower percentage as long as this is over 50% of the voting rights of the offeree company (under Rule 10.1).

An acceptance condition drafted in this way then gives the offeror flexibility to decide during the course of the offer what level of acceptances between 50% and 90% it will accept. In most cases, the offeror will receive less than 90% acceptances and waive the 90% condition. This does not necessarily mean that the offeror will not be able to utilise the compulsory acquisition procedure. Once the remaining shareholders realise that the offeror has taken control, more of them are likely to accept which may result in the offeror acquiring the requisite 90%, as above. Where the offeror’s bank is lending to finance the offer, it is likely to reserve the right to approve any such waiver.

Under Rule 10.2, the acceptance condition must not be capable of being satisfied until all of the other conditions to the offer have either been satisfied or waived. Note that Rule 10 does not apply to schemes of arrangement.

**Offers only: long stop date – Rule 12.1**

Rule 12.1 provides that the offeror must include a term in the firm offer announcement and in the offer document that the offer will not proceed, will lapse or will be withdrawn on a specific date (‘long-stop date’) either:

a) if sufficient acceptances have not been received to satisfy the acceptance condition; or

b) with Panel consent, if a condition or pre-condition relating to an official authorisation or regulatory clearance has not been satisfied or waived.

The Panel will consent to the offer lapsing if it is satisfied that the outstanding condition, or any remedial action required to obtain clearance, is material.

If the offer is not recommended by the board of the target company, the Panel must be consulted prior to the publication of the firm intention announcement as to the date of the long-stop date. The Panel will normally require the long-stop date to be no earlier than the date by which the last condition relating to an official authorisation or regulatory clearance is reasonably expected to be satisfied. If the offer is recommended, it will be for the bidder and target to agree the long-stop date.

Under Rule 12.3, except with the consent of the Panel, the long-stop date may only be extended by the offeror with the agreement of the target company.

Note that Rule 12 does not apply to schemes of arrangement although it is common for a long stop date to be included voluntarily in a scheme.

**Conditions that relate to official authorisation or regulatory clearance**

As part of its preparation for the takeover, a bidder must consider if the offer gives rise to competition or regulatory issues (either in the UK or overseas). Examples include where there is the potential for a Phase 2 Competition and Markets Authority reference or a requirement for clearance under the NSI Act. Issues of this kind will be identified during the course of the due diligence work undertaken in the early part of the transaction; the way in which the issue is handled will be tailored to the facts of the deal.

Competition or regulatory issues may be dealt with by way of a **pre-condition** to the bid. This is more likely to be the case if there are significant and difficult regulatory hurdles which may involve a lengthy clearance period which the bidder wants to have dealt with before committing fully to the transaction.

Where there are competition or other regulatory issues which have not been dealt with as pre-conditions, the bidder is likely to include a condition relating to the obtaining of the relevant competition or regulatory clearance in the offer document/scheme circular.

The term ‘official authorisation or regulatory clearance’ is not defined in the Code although the Panel has stated that it covers clearances or authorisations from governmental or regulatory bodies which relate to the question of whether a bidder is permitted to acquire the target or its assets, such as those from competition regulators (such as the CMA), sector or industry regulators (such as the FCA or PRA), or government approvals in relation to national security.

All conditions that relate to official authorisations or regulatory clearances are subject to Rule 13.5(a) and bidders must be mindful of Practice Statement No. 5 which sets out various factors that the Panel will consider in judging whether or not a condition can be invoked (see later in this element).

To assist this analysis, the Code does define a ‘material official authorisation or regulatory clearance’ (emphasis added) as arising where ‘the Panel is satisfied that 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 (see Rule 13.5(a))’.

Under Rule 31.4, if one or more conditions relating to an official authorisation or regulatory clearance has not been satisfied or waived by 5pm on the second day prior to Day 39 (which is the last date by which the target company can publish material new information under Rule 31.8), the Takeover Panel will normally suspend the offer timetable (sometimes referred to as ‘freezing’ the timetable), either at the joint request of the bidder and target or at the request of either party, provided that at least one of the conditions relates to a material official authorisation or regulatory clearance.

If the condition is satisfied or waived, then on that date the suspended offer timetable will restart as at the 28th day prior to Day 60 (Rule 31.4(c)), i.e. Day 32.

**Other conditions**

There will usually be numerous other conditions in the offer document or scheme circular: for example, a listing condition, material adverse change condition or negative conditions such as ‘…there not being any litigation other than X, Y and Z’. However, ‘an offer must not normally be subject to conditions which depend solely on subjective judgements by the offeror or offeree company (as the case may be) or, in either case, its directors or the fulfilment of which is in their hands’ (Rule 13.1).

**Listing condition**

If it is a listed company, the bidder may offer shares in itself as part/whole of the consideration given to the target shareholders. If so, it will need to obtain a listing for these new shares as the UKLRs require all shares of a particular class to be listed. The bidder will therefore make the bid subject to such shares being admitted to listing and trading.

**Material Adverse Change (‘MAC’) condition and other negative conditions**

A MAC condition allows a bidder to withdraw if any event occurs which constitutes a material adverse change to the business of the target or other factors which have influenced the bidder’s decision to make the bid. However, Rule 13.5(a) (see below) makes it difficult for a bidder to rely on such a clause.

**Invoking pre-conditions and conditions**

You will remember that, if a pre-condition is not satisfied, a bidder may be permitted to invoke that pre-condition and not make the bid at all. If a condition is not satisfied then the bidder may be able to invoke that condition and withdraw.

However, the Panel must give its permission for a bidder to invoke either a pre-condition or a condition and the Panel will only do this in very limited circumstances.

Under Rule 13.2, a bidder is required to ‘…use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the offer is subject.’

Under Rule 13.5(a), a bidder ‘…may only invoke a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn with the consent of the Panel……… The Panel will normally only give its consent if the circumstances….. are of material significance to the offeror in the context of the offer. This will be judged by reference to the facts of each case at the time that the relevant circumstances arise.’

Panel Practice Statement No.5 (which gives guidance on the application of Rules 13.5(a)), states that, in the context of a ‘material adverse change’ or ‘MAC’ condition, a bidder will be permitted to invoke such a condition only if ‘….the relevant circumstances are of very considerable significance striking at the very heart of the purpose of the transaction’ (Practice Statement No. 5, paragraph 3.8).   This is a very exacting standard to achieve and, in practice, it is rare for the Panel to permit a bidder to invoke a condition or pre-condition.

If a bidder wishes to invoke a condition that relates to the obtaining of an official authorisation or regulatory clearance (e.g. approval by competition authorities), various factors will be taken into account, including:

* the significance of the authorisation or clearance to the bidder;
* what action the bidder would need to take in order to obtain the authorisation or clearance and the strategic consequences for the bidder if it were to take that action; and
* the consequences for the bidder and its directors if it were to complete the offer without obtaining the authorisation or clearance (Practice Statement No.5, para 3.14).

Certain conditions are excluded from Rule 13.5(a) (i.e. the bidder does not have to demonstrate their ‘material significance’) and these are set out in Rule 13.5(b), e.g.:

* the acceptance condition;
* a condition relating to the approval of a scheme of arrangement by the target company’s shareholders or to the sanctioning of the scheme by the court; and
* a term relating to the long-stop date of a contractual offer (included under Rule 12).

**Summary**

* The offer document or scheme circular contains the terms and conditions of the bid. It must provide the information to allow the target shareholders to make a properly informed decision.
* Strict rules apply to any post-offer undertaking or intention statements which the parties include in their documents.
* The offer document or scheme circular must be published within 28 days of the firm intention announcement (but the offer document may not be sent in the first 14 days without target consent).
* Certain types of condition are found in all offer documents (e.g. acceptance, long stop).
* A bidder must have the Panel’s permission to invoke a pre-condition or a condition.