**Hostile and competitive bids**

This element looks at the defence tactics in a hostile situation as well as certain factors which are particular to competitive bids.

**Defending a hostile bid**

Rule 25.1(a): ‘Except with the consent of the Panel, the board of the offeree company must by no later than Day 14 send a circular to the offeree company’s shareholders...., in accordance with Rule 30.2’. At the same time, the target company must make the document readily available to its employee representatives (or, where there are no employee representatives, to the employees themselves) and to the trustees of its pension scheme(s).

Rules 25.2 to 25.9 go on to set out specific requirements relating to publicity, content and recipients in relation to the offeree circular. Under Rule 25.9, the target company’s employee representatives and pension scheme trustees are entitled to have their opinions of the offer appended to the offeree circular.

On a recommended offer, the board’s recommendation and other information required to be included in the offeree circular will be contained in the offer document and so no further circular will be needed. However, on a hostile offer, the target board will only have 14 days from the date of publication of the offer document to produce the offeree circular, often referred to as a defence document. This is Day 14 of the takeover timetable (i.e. 14 days after Day 0).

The defence document should comply with the content requirements set out in Rule 25, and must include, amongst other items: the views of the target board, relevant shareholdings, directors’ service contracts and material contracts. In addition, ‘The board of the offeree company must obtain competent independent advice as to whether the financial terms of any offer (including any alternative offers) are fair and reasonable and the substance of such advice must be made known to its shareholders’ (Rule 3.1). For this reason, the target board will have an investment bank (or possibly more than one) providing the offeree with advice who will be referred to as the ‘**Rule 3 adviser**’.

The target board is also likely to employ PR advisers to assist it in persuading shareholders not to accept the offeror’s bid.

In the same way as for any other document produced by a party to a takeover, the target board must ensure that its defence circular is prepared to the highest standards of care and accuracy (Rule 19.1) and that it avoids unacceptable statements which may be misleading or create uncertainty (Rule 19.3).

As for offer documents, the statutory provisions and common law principles relating to false / misleading statements will also apply to defence documents. However, s.21 FSMA will not usually apply to a defence circular as the document is not encouraging shareholders to engage in investment activity.

**Defence tactics and frustrating actions**

In addition to using PR advisers to discredit the offeror, the target board may wish to take action to frustrate the offeror’s bid i.e. make the target less attractive for the offeror. If a target board is considering such action, the directors should be advised of the provisions in General Principle 3 and Rule 21 of the Takeover Code as well as their duty under s.172 CA 2006 to promote the success of the target company for the benefit of its members as a whole.

The Takeover Code requires that shareholders should first approve any frustrating action.

**Competitive bids**

If another offeror makes a bid for the target company whilst an offer period is running, it is known as a competitive (or sometimes, a contested bid).

The Code sets a deadline by which a potential competing offeror must clarify its position (i.e. must either announce a firm intention to make an offer under Rule 2.7 or that it does not intend to make an offer under Rule 2.8).

**Where the original transaction is structured as an offer**

Where the original transaction is implemented by means of a contractual offer, the deadline is no later than 5.00pm on the 53rd day following the publication of the first offeror’s initial offer document, i.e. Day 53 (Rule 2.6(d)).

If a competing offeror announces a firm intention to make an offer, the Takeover Code states: ‘Day 60 for both offerors will normally be set by reference to the publication of the later offer document' (Rule 31.3 (a) and Note 1). This Rule has the effect of extending the first offeror’s Day 60 to the date of the second offeror’s Day 60.’ This has the effect of extending the timetable so that Day 60 is by reference to whichever offer document is published later; normally this means extending the first offeror’s Day 60 to the date of the second offeror’s Day 60 and follows the principle in General Principle 2 and Rule 23 that all shareholders should be given sufficient information and advice to enable them to reach a properly informed decision.

**Where the original transaction is structured as a scheme**

Where the original transaction is structured as a scheme of arrangement, the deadline will usually be 5.00pm on the seventh day before the date of the shareholder meetings convened to vote on the original bidder’s scheme (Appendix 7 Section 4(a)).

**Summary**

* The target board is obliged, on no later than Day 14, to send a circular to its shareholders.
* The defence circular must comply with the content requirements of Rule 25.
* The target board must take care not to engage in behaviour which may be treated as frustrating action for the purpose of Rule 21 of the Takeover Code; directors’ duties are also crucial.
* Where more than one bidder is pursuing a target, the Code sets a deadline by which the competing bidder(s) must put up or shut up.
* If a competing bid is announced, the timetable for the subsequent bidder will generally apply to both parties.