

# Review

## Corporate, Strategy and Finance



### Take Private

The last 12 months have seen a relative increase in the number of approaches to public companies by private equity backed bid vehicles (Bidder). Hammonds LLP has acted on a number of such transactions, including the take privates of SSP Holdings plc and Ascribe plc. A number of factors have triggered the recent popularity of these transactions:

- depressed stock market valuations leading to cheaper deals, which is helped by listed company valuations having fallen more visibly than those of their privately held counterparts.
- companies feeling undervalued and very much at the mercy of market sentiment, which may compound the feeling of management that the regulatory burden is now disproportionate to the benefits which can be derived from remaining public.
- private equity houses are sitting on funds that they are able to invest.

Private equity investors have their own investment criteria. Not every company is a suitable target and, as with all private equity backed transactions in the current market, another obstacle is bank funding.

#### THE CITY CODE

The City Code on Takeovers and Mergers (the City Code) and Part 28 of the Companies Act 2006 apply to take private transactions as they do to a conventional takeover. There are, however, a number of issues that are particularly relevant to a private equity backed public to private takeover.

#### INDEPENDENT DIRECTORS

In accordance with the City Code, the directors of the target company (Target) must include in the offer document their views on the offer, ie, whether or not Target shareholders should accept the offer. Any Target director who, if the offer is successful, is to have a continuing role (whether executive or not) in the Bidder or the Target (the MBO Team) is excluded from presenting their views on the offer. It is, therefore, usual to establish a committee of independent Target directors at the outset of the transaction. Further, the offer of an ongoing role with the Bidder or Target that is made before the conclusion of the takeover offer may compromise a director's independence and thereby result in such director being excluded from giving his or her views in respect of the offer.

Whilst they remain directors of the Target, members of the MBO Team must continue to observe their duties to the Target, including promoting its success. Additionally, the MBO Team must also disclose, to the independent directors, information or facts that are known to them and relevant to the production of an offer document in accordance with the City Code. Sometimes MBO Teams will be asked by independent directors to sign up to a code of conduct in respect of their responsibilities to the Target during the course of any possible offer.

#### PROVISION OF INFORMATION

The City Code provides that, in certain circumstances, information provided by the Target to one bidder must be passed to other "less welcome" bidders if so requested. In the context of a take private this means that the Target board must, where requested, pass to rival bidders information generated by the Target (including the management of the Target acting in their capacity as such), which is passed on to external providers or potential providers of finance to the Bidder. MBO Team members are expected to co-operate to assemble this information.

In addition, the Bidder/MBO Team must promptly furnish to the independent directors of the Target and/or its advisers (ie, not so as to be made available to rival bidders) all information which the Bidder/MBO Team has provided to external providers or potential providers of finance for the Bidder's bid including information that the MBO Team has generated itself (or in conjunction with the private equity house). This larger volume of information will often include business models and opinions, estimates and projections of management. The private equity house and the MBO Team should ask that the Target itself signs up

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to a non-disclosure agreement confirming that it will keep this information confidential.

## SPECIAL DEALS

The City Code prohibits an offer including special deals to certain shareholders and not to others. These rules are partially relaxed for take private transactions, subject to certain protections.

Subject to the consent of the Takeover Panel, members of the MBO Team who are Target shareholders may roll over some or all of their Target shares (Roll Over Shares) into shares or other securities in the Bidder provided such arrangements are (1) disclosed in the offer document together with an opinion from the Target's financial advisers that the arrangements are fair and reasonable and (2) approved by ordinary resolution of the independent shareholders of the Target at a general meeting on a poll. This means that the members of the MBO Team (and persons with whom they are acting in concert) cannot vote in favour of the resolution. The arrangements with the MBO Team must contain genuine equity risk and reward to be acceptable under the City Code.

Other forms of incentives payable to management to ensure their continued involvement in the business going forward may also be acceptable provided that such arrangements are disclosed in the offer document and in the opinion of the Target's financial advisers are fair and reasonable.

## STAKEBUILDING AND MBO TEAM SHAREHOLDING

It is unusual for a Bidder in a take private transaction to do any stakebuilding before announcing the deal although it is common for members of the MBO Team to have shares in the Target. These shareholdings may affect the level of offer acceptances that the Bidder can achieve and consequently its ability to "squeeze out" dissenting Target shareholders.

Notwithstanding the acceptance condition that the Bidder sets for the offer (on a contractual offer), the compulsory purchase (or squeeze out) provisions in Part 28 of the Companies Act 2006 only apply if the Bidder receives acceptances in respect of 90 per cent of the Target shares to which the offer relates.

For contractual offers, any Target shares held (or purchased) by the Bidder or certain of its associated parties (which definition should not catch members of the MBO Team) before the offer document is posted, cannot count towards the 90 per cent threshold for squeezing out minority shareholders' stakes. Purchases made by the Bidder after the offer document is posted can count towards the 90 per cent threshold so long as the value of the consideration paid for them does not exceed the consideration stated in the offer document.

It is usual for the MBO Team conditionally to contract to transfer their Roll Over Shares to the bidder. Consequently, such Roll Over Shares are not shares to which the offer relates and therefore, cannot count towards the acceptance condition. Other Target shares held by the MBO Team that are not to be rolled over into shares in the Bidder should usually be able to count towards the acceptance condition.

If the offer is made by way of scheme of arrangement, any Target shares held by the Bidder (or its concert parties, including the MBO Team), whether purchased before or after the scheme document is posted, cannot be voted at the shareholders' meeting to approve the scheme (75 per cent approval by a majority in number required).

## PROFESSIONAL ADVISERS

A take private transaction involves a large number of professional advisers. It is usual to have financial advisers (to Target and Bidder), lawyers (to Bidder, MBO Team, Target and the bank providing finance) and accountants (to Target, Bidder (financial and due diligence) and MBO Team (tax advice)).



## FURTHER INFORMATION

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