

Guidance Note - Restrictive Conditions

The Code allows a bidder to make a takeover offer subject to conditions but limits the nature of those conditions. Rule 25(1) of the Code provides that:

“An offer may be subject to any conditions, except those that depend on the judgement of the offeror or any associate of the offeror, or the fulfilment of which is in the power, or under the control, of the offeror or any associate of the offeror.”

The purpose of the limitation in rule 25(1) is to promote a level of certainty in takeover offers and prevent an offeror from circumventing the provisions of the Code preventing the withdrawal of an offer.

Recently the Panel has seen an increase in offer conditions which restrict the business activities of the target company during the period of the offer.

There may be legitimate reasons for some restrictions on the business activities of the target company during an offer. For example, an offer condition may restrict the target company from entering into a major transaction. In many cases this condition is appropriate as it protects an offeror who, having made an offer for a company, finds that the company's business has changed significantly during the offer period.

If the directors of the target company ignore conditions relating to the business activities of the target company they run the risk that their actions constitute a defensive tactic under rule 38 of the Code. Rule 38 of the Code provides that:

“If a takeover notice has been received, or the directors of a target company have reason to believe that a bonafide offer is imminent, the directors must not take or permit any action in relation to the affairs of the company that could effectively result in an offer being frustrated or the shareholders being denied an opportunity to decide on the merits of an offer.”

If an offer is conditional on specified events occurring or not occurring, and the target company directors take action relating to the target company which means

a condition cannot be satisfied, the action by the directors could arguably be seen as a defensive tactic.

Target company directors who want to take an action that runs the risk of constituting a defensive tactic can, under rule 39 of the Code, have the action approved by an ordinary resolution of the target company or seek prior approval of the proposed action from the Panel.

Obtaining approval under rule 39 protects the directors of the target company from a breach of rule 38 of the Code. However, it would not alter the fact that a condition of an offer will not be satisfied, thus providing the offeror with a right to withdraw the offer.

If an offer condition is so restrictive that it prevents a target company from undertaking activities that are part of its ordinary business, different considerations apply. The Panel's view is that this type of offer condition is likely to breach rule 25(1). It is almost inevitable that a condition of this type will be breached if the target company carries on its ordinary business. As a consequence the condition can only be fulfilled by the offeror waiving the condition. In effect the offeror controls the fulfilment of the condition which is not permitted by rule 25(1).

Consequently offers imposing unreasonable restrictive conditions face the prospect of being challenged because the condition breaches rule 25(1)