

## **Practice Note - Takeover Offers – Rule 25(1) & Clause 9, Schedule 1**

Rule 25(1) of the Takeovers Code provides that a takeover offer may be subject to conditions, except conditions that depend upon the judgement of the offeror or any associate of the offeror or conditions where fulfillment is in the power or under the control of the offeror or any associate of the offeror.

The Panel has been asked to clarify whether or not a condition that a takeover offer is subject to:

- approval of the shareholders of the offeror under section 129 of the Companies Act 1993;  
or
- the provision of finance or financial support by a third party

is permissible under rule 25(1) of the Code. In relation to finance conditions there is also the related issue of the requirements of clause 9 of the First Schedule to the Code.

### **Shareholder approval**

Whether or not a condition that a takeover offer is subject to shareholder approval under section 129 of the Companies Act is permissible under rule 25(1) turns on whether or not the approval of shareholders is a matter which is “in the power or under the control” of the offeror or any associate of the offeror.

Although in the case of a major transaction it is the shareholders of the offeror who will vote on the relevant resolution it is difficult to separate the offeror company from its shareholders. The directors have to call the shareholder meeting and advise the shareholders of the merits of the proposal. They also have a duty to act in good faith and to act in the best interests of the company i.e. the offeror. If an adverse event were to occur that resulted in the takeover no longer being in the best interests of the offeror, the directors could well be obliged to recommend that shareholders do not approve the takeover offer and it would lapse.

The intention of rule 25(1) is to promote certainty in takeover offers, thus preventing an offeror from circumventing restrictions in the Code regarding the withdrawal of an offer. To allow offers to be made subject to shareholder approval could in effect allow an offeror to have an option over the shares of the target company. This would be inconsistent with the

objectives of the Code. Accordingly, in the Panel's view offers conditional on the approval of shareholders of the offeror would not comply with rule 25(1).

The effect of the Panel's view is that shareholder approval will need to be obtained before the offer is sent to shareholders. This does not mean that approval need be obtained before the takeover notice is given. The period between the giving of the takeover notice and the last date by which an offer must be sent to shareholders provides some flexibility to the offeror in the timing of the meeting. However, where the takeover notice is given before shareholder approval is obtained, it should be made clear to the target company that the takeover offer cannot be dispatched if shareholder approval is not obtained by the time the offer is required to be sent. The takeover notice itself is required to be the same as the offer document and cannot include a condition related to shareholder approval.

### **Third party finance**

Where an offer is conditional on the provision of finance or financial support from a third party, whether or not the condition is permissible under rule 25(1) turns on whether the condition is "in the power or under the control" of the offeror or any associate of the offeror.

Firm financing arrangements would need to be in place at the time the offer is made with the ability to terminate the arrangements being with the third party and not the offeror. The conditions in the financing arrangements that allow termination by the third party are of critical importance. If the conditions are limited to conditions that are bona fide required to protect the third party and cannot be used as a device to avoid the takeover offer, then the finance condition in the offer should be permissible under rule 25(1). However, the facts of each case must be considered in terms of the requirements of rule 25(1).

### **Clause 9 of the First Schedule**

Clause 9 of the First Schedule to the Code provides that the takeover offer must contain confirmation by the offeror that resources will be available to the offeror sufficient to meet the consideration to be provided on full acceptance of the offer and to pay any debts incurred in connection with the offer (including debts arising under rule 49).

Here again with an offer conditional on finance, the question of whether clause 9 will be satisfied depends on the terms and conditions of the financing arrangements. In the Panel's

view the important words in clause 9 are that “resources *will be* available to the offeror”. Hence the grounds upon which the financial arrangements would be withdrawn would need to be very limited so that the offeror can be confident that the finance will in fact be available.

*This Practice Note is provided for guidance only. While it signals the attitude of the Takeovers Panel at this time the Panel is not bound by this or any other guidance note.*