

The takeovers regime under the Companies Act 2006:

AIM-listed companies

The takeovers section of the Companies Act 2006 (Part 28), which applies to takeover bids for AIM-listed companies, came into force on 6 April 2007. Below is a summary of the changes introduced by the 2006 Act which may be relevant to you in practice.

Impact on the Takeover Code

Under the 2006 Act, the City Code on Takeovers and Mergers now has statutory effect in respect of all transactions and rules to which it applies, except in relation to the Channel Islands and the Isle of Man where the Takeover Panel will claim jurisdiction on the same basis as before, but without statutory powers. The scope of application of the Takeover Code remains unchanged. Amendments have been made to the Introduction (and certain other provisions) of the Takeover Code on 6 April 2007 to reflect the commencement of Part 28 of the 2006 Act and the repeal of the Takeovers Directive (Interim Implementation) Regulations 2006 which were introduced, in relation to companies listed on the Official List, as a temporary measure to implement the EU Directive on Takeover Bids pending entry into force of the 2006 Act. The amendments to the Code also reflect the repeal of certain other parts of the 1985 Act and the introduction of the FSA's Disclosure and Transparency Rules.

The Panel's status and powers

The 2006 Act gives statutory authority to the Panel. The powers given to the Panel under the Regulations in relation to bids covered by the Takeovers Directive have now been extended to all transactions and rules within its jurisdiction. These powers include the ability:

- to make and amend rules in relation to all transactions within its jurisdiction;
- to require, upon written notice, the production of documents and information "reasonably required" in connection with the exercise by the Panel of its functions, subject to restrictions on onward disclosure;
- to give directions to a person requiring compliance with the rules;
- to impose sanctions and, in particular, to order compensation to be paid in the case of breaches of Rules 6, 9, 11, 14, 15, 16 and 35.3; and
- to apply to the Court to enforce its rulings.

Some City practitioners are still concerned that the Panel's new powers and status could open the floodgates to litigation over perceived breaches of the Code, but it is difficult to predict at this stage whether or not they will have such an effect. The Government has built in protections to try to prevent the provisions giving rise to tactical litigation and giving immunity to the Panel and its officers and employees in carrying out their regulatory functions.

Compulsory acquisition procedure

The compulsory acquisition procedure for all takeover bids for UK companies falling within the definition in the 2006 Act is governed by the new provisions. The provisions of the 1985 Act which used to govern the squeeze-out process in relation

to AIM-listed target companies have been repealed. The new regime contains a number of technical changes, chiefly to clarify some of the uncertainties in the 1985 Act. Points to note include the following:

- The calculation of the thresholds for both squeeze-out (right of the bidder to buy out minority shareholders) and sell-out (right of minority shareholders to be bought out by the bidder) involve a dual test, so that the bidder must have acquired or unconditionally contracted to acquire both 90% in value of the shares (or class of shares) to which the offer relates (being the existing threshold) and 90% of any voting rights attaching to those shares.
- The timing for the giving of a squeeze-out notice has changed and is no longer linked to the date on which the 90% threshold has been reached. The bidder must now give shareholders notice of its intention to exercise the squeeze-out rights within three months of the last date on which the offer can be accepted or within six months of the date of the offer if earlier.
- In relation to sell-out rights, the new provisions extend the right to be bought out to holders of non-voting shares which are subject to the offer, where the shares which the bidder has acquired or contracted to acquire amount to at least 90% in value of all the shares in the company. Sell-out rights must be exercised within three months from whichever is the later of the end of the period within which the offer can be accepted and the date of the notice to the shareholders informing them of their right to exercise the sell-out rights.
- It is now clear that an irrevocable undertaking executed by the beneficial owner or discretionary manager of shares (as opposed to the registered holder) will not (if properly drafted) deem the bidder to be the holder of those shares. This will benefit bidders when seeking irrevocables from fund managers.

Additional issues for bids for Official List companies

The following will be relevant if you are making a takeover bid for a company listed on the Official List:

Criminal offence of non-compliance with offer document content requirements - The offence may be committed by the "person making the bid" or, where the person making the bid is a company, any director, officer or member of that company who "caused the document to be published". Such persons will commit a criminal offence if an offer document (or response document) is published which does not comply with the content requirements of the Directive if the persons either knew that the offer document did not comply, or were reckless as to whether it complied, with these requirements and they failed to take all reasonable steps to ensure that it did comply. The offence is punishable by a fine but will not affect the validity of the bid. The creation of this offence has resulted in a move away from the conventional UK practice of the bidder's financial adviser making the offer on behalf of the bidder.

Breakthrough provisions - In certain circumstances, if a target company listed on the Official List has followed a prescribed "opt-in" process, a bidder for it can "break through" any restrictions on transfers of shares which would otherwise exist, so that it can have shares transferred to it regardless of these restrictions. Restrictions on the exercise of voting rights would also be broken through in these circumstances. The drafting of the relevant provisions in the 2006 Act is unclear but we do not expect the opt-in procedure to be widely used in the UK as the vast majority of companies do not have differential voting rights or transfer restrictions which these provisions are designed to overcome.

Shared jurisdiction - Where the target is registered in one Member State but has its securities admitted to trading on a regulated market in another Member State (or vice versa), the Code will determine the extent of the Panel's jurisdiction and whether or not this will be shared with the supervisory authority of the other Member State.

If you would like any further information on any of the topics discussed in this note, please contact Richard Spedding or Oliver Barnes on 020 7295 3000 or your usual contact at Travers Smith.

Travers Smith

May 2007

10 Snow Hill, London EC1A 2AL

Tel: +44 (0)20 7295 3000 Fax: +44 (0)20 7295 3500

www.traverssmith.com