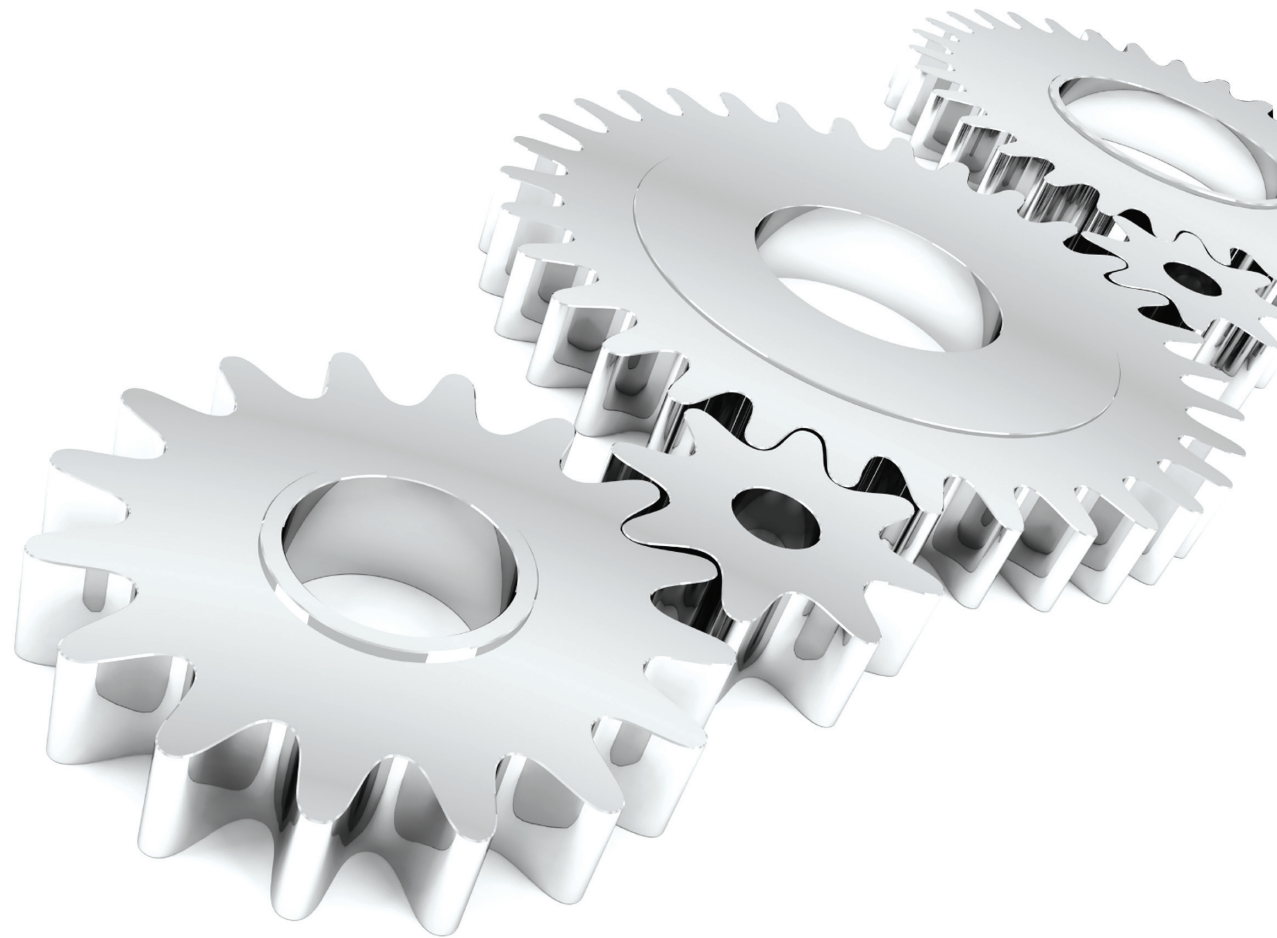




Corporate

The Takeover Code and Guernsey companies



Increasing use of the Takeover Code in Guernsey

Over the past couple of years we have seen an increase in transactions involving Guernsey companies in which the City Code on Takeovers and Mergers (the “Takeover Code”) has been a significant factor.

In part, this is due to the fact that the Companies (Guernsey) Law, 2008 (the “Companies Law”) made it possible for schemes of arrangement to be conducted in relation to Guernsey companies for the first time. Since that time, there has been a gradual increase in the number of Guernsey schemes being conducted or investigated.

The Companies Law also introduced statutory squeeze-out rights to Guernsey law. These rights make a public takeover offer feasible since the bidder can be sure that it will acquire 100% of the shares of a target company even if a small minority (less than 10%) object to the offer or simply do not respond.

There have been a number of transactions that involve listed property funds, whether as a takeover offer or scheme of arrangement. This has been due to depressed property prices during the last few years and the consequent under-performance of certain funds concentrating on property assets. Not all of these transactions have been successful, for various reasons, but consideration of the Takeover Code has been a key part of the planning process.

In this note we briefly explain what the Takeover Code is, why it is relevant to Guernsey companies, which companies it applies to and when it applies.

References in this note to “takeovers” include all types of transaction covered by the Takeover Code, including scheme of arrangement.

What is the Takeover Code?

The Takeover Code is published by the Panel on Takeovers and Mergers (the “Takeover Panel”), based in London. It was created in 1968 for the purpose of regulating the process by which persons acquire control of publicly traded companies.

The Takeover Code governs the process of takeovers and mergers and does not concern itself with the financial or commercial merits of the proposal. The Takeover Code is based on the assumption that if the process is fair, then shareholders will be able to properly assess the merits of the takeover for themselves.

The principal purpose of the Takeover Code is to ensure fair treatment of shareholders during takeovers of publicly traded companies. It seeks to ensure that shareholders have the opportunity to decide on the merits of a takeover and that shareholders of the same class are afforded equivalent treatment. In doing so, the Takeover Code is designed to promote the integrity of the financial markets.

Specifically, the Takeover Code includes rules which do the following:

- controlling the timing of the release of information to the public regarding the takeover.
- ensuring that the intentions of potential bidders are made clear to the market within a reasonable timeframe.
- creating deadlines that must be met to ensure that (once made public) takeovers are either concluded promptly or abandoned, thereby reducing market uncertainty.
- ensuring that shareholders of the same class are treated equally in any takeover transaction.
- ensuring that shareholders are provided with sufficient information to enable them to properly consider any takeover offer.
- ensuring that competing bidders operate on a level playing field so that shareholders are able to choose between competing bids.
- restricting the ability of directors of the target to take action designed to frustrate a bid.
- restricting the ability of a shareholder (or persons acting in concert with each other) to acquire a controlling stake in a company.

The Takeover Code was originally a non-statutory code and the Takeover Panel had no statutory powers. Despite this, the Takeover Code was afforded a high degree of respect by the City of London and the consequences of breaching the Takeover Code included being shut out by City institutions and regulators. In more recent years, the Takeover Code has been placed on a statutory footing in England and Guernsey, so that it has the full force of law.

What jurisdiction does the Takeover Panel have in Guernsey?

The Takeover Code has applied to publicly traded companies in Guernsey since its creation.

With effect from 1 July 2009 the Companies (Panel on Takeovers and Mergers) Ordinance, 2009 amended the Companies Law and created statutory provisions enabling the appointment of a body to regulate takeovers and mergers in Guernsey, and authorising that body to issue rules and regulations, and to impose sanctions in Guernsey. The Royal Court of Guernsey (the “Royal Court”) may also impose sanctions, upon application by the appointed body.

At present, there is insufficient demand or justification for a local regulator and so the Takeover Panel has been appointed to perform that role, under to the Companies (Appointment of Panel on Takeovers and Mergers) Regulations, 2009.

Which companies are subject to the Takeover Code?

The Code will apply to any company which has its registered office in Guernsey, when either:

- the company’s securities are admitted to trading on a regulated market in the UK, the Channel Islands or the Isle of Man. This includes the Channel Islands Stock Exchange, but does not include the AIM Market of the London Stock Exchange; or

- the Takeover Panel considers the company’s place of central management and control to be in the UK, the Channel Islands or the Isle of Man and one of the following applies:
 - o any of its securities have been admitted to the Official List of the London Stock Exchange at any time during the previous ten years;
 - o dealings and/or prices at which persons were willing to deal in any of their securities have been published on a regular basis for a continuous period of at least six months in the previous ten years;
 - o any of the company’s securities have been subject to a marketing arrangement at any time in the previous ten years, as described in section 693(3)(b) of the UK Companies Act 2006; or
 - o the company was required to file a prospectus for the issue of securities with the Registrar of Companies or any other relevant authority in the UK, the Channel Islands or the Isle of Man or to have a prospectus approved by the UK Listing Authority at any time during the previous ten years.

Companies which are admitted to trading on AIM are subject to the Takeover Code if they fall within this second category.

The Takeover Code does not apply to open-ended investment companies, but does apply to closed-ended investment companies.

Which transactions will the Takeover Panel seek to regulate?

If the relevant target company is subject to the Takeover Code, the Takeover Code will apply to all:

- takeover bids and merger transactions.
- transactions which have the objective or potential effect of obtaining or consolidating control of the relevant company (e.g a majority shareholder seeking to buy-out minority shareholders).

- partial offers to shareholders for securities in the relevant company (i.e. offers to acquire less than 100% of the shares of a company).
- unitisation proposals (that is, offers) which compete with another transaction to which the Takeover Code applies.

The following types of legal transactions are possible methods of obtaining 100% control of a company, and would fall within the scope of the Takeover Code:

Takeover offer: An offer made by the bidder to the target's shareholders, offering to acquire their shares. This is the most common method of obtaining 100% control of a company.

Scheme of arrangement: The target company puts a proposal to its shareholders for their approval. This method can take various forms, but in the context of takeovers it usually involves an exchange of shares in which the target's shares are exchanged for shares in the bidder, an acquisition of the target's shares for cash, or a combination of the two. This method must be approved by a special resolution passed at a general meeting, but there is an additional requirement that a majority in number of shareholders voting at the meeting must vote in favour of that resolution. Once approved by the shareholders, the arrangement must be sanctioned by the Royal Court.

Legal merger: This method involves two or more companies being merged by an order of the Royal Court. The same initial procedure applies as for a scheme of arrangement, including the need for shareholder approval.

Amalgamation: This is a process where two or more companies merge to become one company (either as one of the original companies, or a new company). Each of the merging companies must approve the proposal by passing a special resolution. The consent of the Guernsey Financial Services Commission (GFSC) is also required in certain cases, including if a merging company has not been incorporated in Guernsey.

In addition, the acquisition of any number of shares can be governed by the Takeover Code if this leads to the acquisition or consolidation of a controlling stake, as described below under the heading "Rule 9 – the mandatory offer".

Rule 9 – the mandatory offer

Rule 9 of the Takeover Code ("Rule 9") can potentially catch many other transactions which may not immediately be considered to be a takeover.

Rule 9 controls the ability of shareholders to acquire a controlling stake in a company. If the requirements of Rule 9 are triggered, the shareholder in question (the "Rule 9 Shareholder") is required to make an offer to all of the remaining shareholders at a price equal to the highest price that the Rule 9 Shareholder has paid for shares in the company in the previous 12 months. If the consideration for the offer is not in cash, the other shareholders must be able to elect to take the consideration in cash.

The requirement to make a mandatory offer under Rule 9 is triggered if:

- any person acquires an interest in shares which, when taken with those already held, carry 30% or more of the voting rights of the company; or
- any person who already holds shares carrying 30% or more of the voting rights of the company (but not more than 50%) acquires an interest in any other shares which increases the percentage of shares carrying voting rights in which he is interested.

Beware of the "concert party" – for the purposes of Rule 9, shareholders are deemed to be acting in concert with certain other persons connected with them or between whom there is an agreement or understanding, so that their interests are aggregated and treated as one holding. The assessment of who makes up the concert party can be a complicated process and advice should be sought.

It should also be noted that an "interest in shares" includes options, warrants and other rights to subscribe for shares if the shareholder has the right to acquire shares (i.e. the option has vested and is unconditional) or can be obliged to do so. Certain derivatives can also be included.

Rule 9 is aimed at preventing the creeping acquisition of control. However, certain 'innocent' transactions can also be caught, such as:

- a private placing fundraising in which a concert party increases its percentage holding.
- a buy-back of shares as a result of which a shareholder's percentage holding is increased (but normally only where the shareholder is a director or is acting in concert with a director).
- a reverse takeover where a group of the selling shareholders, acting in concert, will acquire 30% or more of the acquirer.
- a gift of shares.
- an option becoming exercisable.

In most cases in which Rule 9 applies, the parties will apply for a waiver of the requirement to make a mandatory offer. This is known as a "whitewash". The Takeover Panel will generally grant this waiver if it is satisfied that the transaction is being conducted for some other commercial purpose, with the increase in control of the Rule 9 Shareholder being an ancillary consequence. The waiver will not normally be granted if the Rule 9 Shareholder has acquired shares in the company since discussions began regarding the proposed transaction, and within the previous 12 months.

As a condition of the whitewash waiver, the Takeover Panel will require that those shareholders not connected with the Rule 9 Shareholder (the "Independent Shareholders") approve the waiver of Rule 9 by way of an ordinary resolution taken on a poll. The Takeover Code specifies the information that must be contained in the circular to the Independent Shareholders.

The importance of seeking advice at an early stage

Due to the fact that the Takeover Code regulates many aspects of takeovers, advice in relation to its application to a particular transaction should be sought as soon as possible.

In particular, there are certain events that may happen at an early stage in the negotiation of a possible transaction which require a consideration of the Takeover Code. A target company or bidder should ensure that none of the following actions are taken until advice has been obtained:

- entering into an agreement between the target company and the potential bidder which involve a "break fee" or "inducement fee" in which the target company agrees to pay a sum to the bidder if the deal does not proceed.
- shareholders of the target company providing irrevocable undertakings to accept the offer.
- announcement (however informally) of an intention to make an offer, or statements to the contrary.
- the acquisition of interests in shares by a potential bidder in advance of a bid.
- the target company taking any action designed to prevent an imminent takeover bid from succeeding (e.g. by issuing additional shares to persons opposed to the bid or taking steps to make the company less attractive to the bidder).

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

Contact us

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