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The Takeover Code and Guernsey companies

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The City Code on Takeovers and Mergers (the "Takeover Code") has applied to certain Guernsey publicly traded companies for many years.

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 schemes 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 and transparent, 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.

What jurisdiction does The Takeover Panel have in Guernsey?

The Takeover Code has applied to publicly traded companies registered in Guernsey since its creation. Initially, the Takeover Code had no legal force in the UK or in Guernsey but it was treated as being binding by the institutions working in the City of London, and was therefore treated as if it had legal force. More recently, the Takeover Code was given the force of law in each of the jurisdictions to which it applies, meaning that it is now enforceable as a matter of Guernsey law.

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.

The Takeover Panel has been appointed to be that regulatory body, under to the Companies (Appointment of Panel on Takeovers and Mergers) Regulations, 2009.

Which Guernsey 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 UK regulated market (eg. the Main Market of the London Stock Exchange) or a UK multilateral trading facility (such as the AIM Market of the London Stock Exchange) or on any stock exchange in the Channel Islands or the Isle of Man (which is currently only The International 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:
  - any of its securities have been admitted to trading on a regulated market or a multilateral trading facility in the UK or on any stock exchange in the Channel Islands or the Isle of Man at any time during the previous ten years;
  - 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;
  - 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
  - the company has filed a prospectus for the offer, admission to trading or issue of securities with the Registrar of Companies or (if on public record) any other relevant authority in the UK, the Channel Islands or the Isle of Man at any time during the previous ten years.

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.

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 (the "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.

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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.
- directors of the target company giving a commitment to a potential bidder to recommend any offer made by them.
- 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).

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