2005/29

THE TAKEOVER PANEL

THE PROSPECTUS DIRECTIVE - WITHDRAWAL RIGHTS AND THEIR EFFECT ON TAKEOVER BIDS

Background

The legislation to implement the Prospectus Directive in the UK will come into force on 1 July and contains provisions for withdrawal rights for investors which may be relevant to takeover bids if the consideration offered includes securities for which a prospectus is published.

Under the new section 87Q(4) of the Financial Services and Markets Act 2000 ("FSMA"), broadly, if a supplementary prospectus is published, shareholders who have already accepted the offer to which the prospectus relates may withdraw their acceptances within two working days. The period when the availability of withdrawal rights ceases is determined by sections 87G and 87Q of FSMA.

In addition, in some circumstances, foreign laws may be relevant to whether withdrawal rights arise - for example, where an overseas incorporated offeror which makes a securities exchange offer for a company to which the Code applies has its prospectus approved by the competent authority in its home Member State.

Offerors are advised to seek legal advice as to how the withdrawal rights in the Prospectus Directive and the relevant laws may apply to them.

The effect of withdrawal rights on takeover bids

The Executive has been considering the effect on takeover bids were withdrawal rights to arise and has identified certain issues which require further consideration. The Executive will raise these issues with the Code Committee in order to determine whether or not the Code needs to be changed. In the meantime, set out below is an analysis of the issues that have been identified.

Under the Code, withdrawal rights normally cease to be available after an offer has become or been declared unconditional as to acceptances. However, it is not clear at which point during an offer the new statutory withdrawal rights cease to be available.

Prior to the offer becoming or being declared unconditional as to acceptances, there are unlikely to be any material implications as a result of the new FSMA provisions. However, if statutory withdrawal rights arise once the offer is unconditional as to acceptances but is not yet wholly unconditional, there could be material implications if, for example, the offeror's acceptance level were to fall below 50% as a result of withdrawals; statutory control would be lost, offeree company shareholders' interests might be affected and financing arrangements might be put at risk.

The Executive has received legal advice that the new FSMA provisions can be interpreted as meaning that the period for withdrawal by an acceptor of an offer ends once the offer has become or been declared wholly unconditional and the relevant securities have been unconditionally allotted to the acceptor - i.e. wholly unconditional bids could not be re-opened through the exercise of withdrawal rights, provided unconditional allotments of the consideration securities have been made.

The Executive has also received legal advice that the withdrawal rights in FSMA will not arise if the securities exchange offer is made by means of an "equivalent document", rather than a prospectus. An equivalent document is one which is regarded by the FSA as containing information equivalent to a prospectus.

Practical consequences

Offerors intending to issue a prospectus in relation to a securities exchange offer should consider the consequences of such withdrawal rights arising. In particular, in the light of the above analysis, offerors may want to consider adding another condition or term to their offers. The Executive will be concerned to ensure that offers will not continue to be unconditional as to acceptances in the event that the offeror has no longer achieved the minimum 50% acceptance threshold. Offerors who might need to include such a provision should consult the Executive in advance.

In addition, offerors may want to take steps to avoid an offer becoming or being declared unconditional as to acceptances when a statutory withdrawal period is running or in circumstances where a supplementary prospectus may subsequently have to be published. Offerors may also consider it advisable to organise matters so that the offer becomes or is declared unconditional as to acceptances and wholly unconditional at the same time.

30 June 2005