Acquiring a UK Public Company: Issues for Chinese Bidders

Public M&A transactions in the UK are often complex and require careful navigation to reach a successful outcome. Steps taken at the beginning of a transaction, especially during the preliminary stages where the structure of an acquisition is being considered, can be vital (or, in some cases, fatal!).

The regulatory system in the UK, governed by the City Code on Takeovers and Mergers (Takeover Code) is designed to create a fair and transparent environment in which bidders can compete equally for an acquisition and all shareholders are treated fairly.

Takeover Code

The Takeover Code is a principles-based set of rules designed to ensure shareholders are treated equally and to avoid unnecessary market disruption. The Takeover Code is implemented and overseen by the Panel on Takeovers and Mergers (Takeover Panel).

It is the responsibility of the directors of a potential bidder to ensure that the Takeover Code is adhered to, so early input from advisors familiar with the Takeover Code and its interpretation is essential.

Which companies are subject to the Takeover Code?

The Takeover Code applies to any public company which has its registered office in the UK, the Channel Islands or the Isle of Man and has any of its securities admitted to trading on a regulated market or multilateral trading facility. It will also apply to unlisted UK registered public companies managed and controlled from the UK and, in certain circumstances, to some private UK companies.

When does the Takeover Code apply?

Generally speaking, an acquisition of a public company will be governed by the Takeover Code if the result would be for the bidder (and those acting in concert with it) to control 30% or more of the voting rights of the target. Concert parties include persons affiliated with the bidder and anyone cooperating with it under any arrangement or understanding to acquire or consolidate control of the target.

Where the bidder is a state-owned entity, all other state-owned entities could be concert parties, which could have significant implications under the Takeover Code including requiring disclosures to be made in respect of the bidder's concert parties to shareholders in an offer document. The Takeover Panel's consent would have to be obtained to limit the definition of concert party to the relevant group.

Stakebuilding and Mandatory Offers

Should a bidder increase its stake in the target company so that it holds above 30% of the voting rights, it will generally be required to make a takeover offer for all of the shares it does not own. In certain circumstances, it is possible to seek a waiver of the obligation to make an offer to acquire all of the shares in the target company (referred to as a "whitewash") from the company's shareholders, with the consent of the Takeover Panel.

Methods of Acquisition

A public takeover in the UK can be implemented either by a direct offer or a scheme of arrangement. In either case, the target company's board of directors will form a view as to whether to recommend to the target's shareholders to accept the offer or not. Some price negotiation between the target company's board and the potential bidder can occur at this stage. If the bidder chooses to proceed without the recommendation of the target board then this is known as a "hostile" takeover.

The target board is obliged to obtain competent and independent advice on any offer, including the value of the offer, usually from an investment bank. The board is then required to communicate such advice to shareholders. The independence of the target's advisers from the bidder's is paramount.

Direct offer

A direct offer is a contractual offer made by the bidder directly to the target company's shareholders to acquire their shares. The bidder's lawyers will prepare an offer document setting out the terms of the offer and providing information on the bidder. Unless the Panel's consent is given (which would occur in exceptional circumstances only), the terms of the offer must be the same for all shareholders.

Provided that shareholders holding at least 50% of the voting rights accept the offer within the designated time, then the offer will be successful in terms of board control and declared unconditional. Only if more than 90% of the voting rights not already owned by the bidder are acquired under the offer can the bidder force the remaining minority shareholders to sell their shares and obtain 100% ownership (this is referred to as "squeeze-out").

Scheme of arrangement

A scheme of arrangement is a court-based procedure managed by the target company. Such schemes can provide a faster route to guaranteeing the acquisition of 100% of the shares in the target than via a direct offer as it will bind all shareholders once approved by the High Court.

Key Differences from the Acquisition of a Private Company

Due Diligence

The requirement to keep the potential takeover confidential can mean that due diligence is only carried out at a high level before the offer to acquire is made. Indeed, the bidder may be restricted to reviewing publicly available information. If the target company is listed on the London Stock Exchange, regulations are such that a reasonable amount of information (for example as regards significant shareholders and historical financial information) will be disclosed to the public.

In a competitive bid situation, any due diligence information provided to one bidder, whether publicly announced or not, must be made available to any rival bidder. This information must be provided by the target irrespective of whether the board approves or is hostile to a particular bid.

Confidentiality

The need for secrecy is paramount. All confidential information should be communicated securely and with the use of code names between a small circle of directors and advisors within the bid team, with all recipients of information made aware of the necessity of secrecy. If rumours or speculation about a potential offer reach the market, the Takeover Panel will need to be consulted immediately.

Lack of Conditionality

While conditions imposed by a buyer in a private acquisition are generally unrestricted as negotiated between the parties, the Takeover Panel will take a keen interest in any conditions imposed on a takeover offer to shareholders as there are restrictions on the use of conditions/pre-conditions in the Takeover Code. For example, in order to back out of a takeover offer once it has been made, a bidder needs to demonstrate to the Takeover Panel that materially adverse circumstances have arisen which could not reasonably have been foreseen at the time of announcing the offer.

Commitment to the Acquisition

An announcement to the market will be required once an intention to make an offer has been discussed with the target board. Following such holding announcement in which the potential bidder is identified, the bidder has just 28 days in which it must announce a firm intention to make an offer or withdraw its interest: an obligation known as the "put up or shut up" regime.

Where the bidder indicates during this period that it does not intend to make an offer, that same bidder will generally be prevented from making an offer for the target during the following six months.

Certainty of Funds

The Takeover Code requires certainty that a bidder has the funds available to satisfy the cash required if acceptance of the offer were made in full. The bidder's financial adviser, will be required to confirm formally that the cash is available to the bidder. Since the financial adviser may be obliged to provide the money itself if the bidder fails to do so, significant due diligence into the bidder's funding arrangements is usually required.

The Panel does not normally grant concessions for the NDRC and SAFE approvals required by Chinese companies. In practice, this requirement can present significant difficulties for bidders from the People's Republic of China since such approvals can take some time to obtain and are rarely granted in advance.

It may be possible for bidders from the People's Republic of China to utilise a pre-funded offshore subsidiary in order to avoid such issues.

Contacts

Andrew Carpenter
Partner
T +44 20 7645 4228
M +44 7815 786165
E andrew.carpenter@dwf.law

Matthew Doughty
Partner
T +44 20 7645 4181
M +44 7725 757886
E matthew.doughty@dwf.law

Linda Fu
Head of China Desk
T +44 20 7280 8941
M +44 7732 644873
E linda.fu@dwf.law