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A legal update from Dechert's Corporate and Securities Group

UK Takeover Panel Seeks to Clarify Position on Syndication of Debt in UK Takeovers

Syndication of debt in UK public takeovers has traditionally been a thorny issue. Provisions of the City Code on Takeovers and Mergers (the "Takeover Code") intended to protect shareholders in a bid situation have inadvertently compromised the ability of banks to conduct adequate diligence and negotiate debt terms, resulting in syndication usually occurring post-completion when those sections of the Takeover Code no longer apply. With banks currently less willing to take the risk of being unable to procure syndicatees, and therefore less willing to make funding available for bids, the Takeover Panel released Practice Statement 25 on 17 June 2009, which outlines the position on how syndication can take place during an offer period. The Practice Statement was developed at the request of, and with assistance from, the Loan Market Association (the "LMA") and the London Investment Banking Association.

The crux of the issue is that the Takeover Code provides for all shareholders to be treated equally in terms of the information made available to them and the terms of the bid offer that is made to them. If a bank's debt department is a potential syndicatee, concerns could arise if its equity desk has taken a position in the shares of the target. Clearly, this limits the available number of syndicatees, and with a large enough target it may not be possible to find enough banks to cover the funding requirement that do not have a position in its shares.

Rule 20.1 of the Takeover Code provides that any non-public information on the target or the bidder that is made available to one shareholder in the target must be made available to all shareholders as nearly as possible at the same time and in the same manner. The level of information on a target that banks may require to conduct their diligence with a view to joining the syndicate will not usually be a level that the board of the target will be willing to make public. There is also a potential concern with Rule 16 of the Takeover Code (which provides that no

shareholder can be offered better terms than the general bid terms by the bidder), as it could be seen that the return offered by the bidder on the part of the debt funding that it offers to the bank is part of the overall package offered to induce the bank to accept the bid—particularly where the terms of the debt are better than market.

Practice Statement 25 sets out a potential solution to these problems, in the form of permanent information barriers between the equity and debt departments of banks. The logic is that provided information on target or the bid cannot flow between those two departments, it is legitimate to treat the equity desk as the shareholder and the debt desk as a quasi-separate entity—information provided to the debt arm of the bank would not, therefore, count as having been provided to a shareholder in target for the purposes of Rule 20.1, and there would be no concern over Rule 16 as the decision whether or not to accept the bid would be made by the equity arm without any knowledge of what, if any, participation in the debt the bank had been offered.

The Practice Statement sets out the Panel's view on the minimum standards for effective information barriers between the debt and equity departments. Those departments should comprise different personnel (other than senior management and compliance staff) who should not share offices and who should be made aware of the information barrier. They should have the ability to save documents and e-mails on areas of the bank's system that are not accessible to the other department, and their physical files should likewise be locked or in some other way protected from access by the other department.

With those information barriers permanently in place, the Panel has expressed that it will generally consider there to be no breach of Rules 16 or 20.1 in the approach to the bank to join the debt syndicate, although it retains the ability to make rulings on a case-by-case basis.

The intention of this statement is clearly to make moves towards easier syndication of debt finance prior to the takeover offer succeeding, and it is hoped that this move will alleviate some concerns over providing finance for public takeovers in the current market.

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