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UK Public M&A Update

Q2 2016

Contents

Overview

10 firm offers (in respect of 9 target companies) were announced in Q2 2016 (compared to 11 in Q1 2016) with a combined offer value of just £1.6bn (compared to £23bn in Q1 2016) so whilst deal volume has remained relatively stable in the second quarter, deal value has plummeted. Public M&A activity in the UK has slowed for a number of reasons not least the uncertainty surrounding the recent referendum on Brexit. It remains to be seen whether the seismic shift in the forex markets following the Brexit vote will leave UK companies more vulnerable to opportunistic takeover approaches in the coming months.

In the last quarter, Ashurst advised Dar Al-Handasah Consultants Shair and Partners Holdings on its competing bid for Sweett Group and UBS Switzerland AG on the UK aspects relating to the financing of Dätwyler Holding's offer for Premier Farnell.

A summary of the key features of each announced offer is set out in a table in the Appendix.

Announced bids	10
Recommended on announcement	9
Schemes of arrangement	6
Average of bid premia (unweighted)	45.42%
Average of bid premia (weighted)	46.51%

The period saw the Takeover Appeal Board publish Statement 2016/3 setting out the reasons for dismissing the appeal by Mr Desmond in connection with the merger of Ladbrokes and Gala Coral Group. Ashurst advised Gala Coral on its combination with Ladbrokes. Further details of this and other developments in the field of public M&A are set out in the News Digest on pages 2 to 7 of this publication.

News digest

Takeover Appeal Board publish Statement 2016/3 – Ladbrokes plc – Reasons for dismissing the Appeal by Mr Desmond

On 15 June 2016, the Takeover Appeal Board (**TAB**) published its reasons for dismissing a number of appeals made by Dermot Desmond, a 2.72% Ladbrokes shareholder against rulings of the Panel's Hearings Committee arising in connection with the merger of Ladbrokes and Gala Coral Group (**Merger**).

Background

In July 2015, Ladbrokes and Gala Coral Group announced their agreement on the terms of a recommended merger pursuant to which Ladbrokes agreed to acquire the Coral Group in exchange for new shares in Ladbrokes representing approximately 48.25% of Ladbrokes enlarged issued share capital. The Panel Executive ruled that this structure would trigger a Rule 9 mandatory bid absent a Code whitewash, giving the Panel jurisdiction over this element of the Merger. The Executive agreed that the Rule 9 offer obligation would be waived if independent Ladbrokes shareholders approved the waiver of the obligation (the Code whitewash resolution).

In March 2013, Ladbrokes entered into two agreements (the **Original Agreements**) with Playtech (an online gaming software and services supplier):

- a marketing services agreement (**MSA**) under which Playtech agreed to provide marketing and advisory services to grow Ladbrokes' digital business; and
- a software licence agreement (**SLA**) under which Playtech granted Ladbrokes access to software and services relating to online casino and other gaming activities.

On 23 July 2015, the day before the announcement of the Merger, Ladbrokes and Playtech entered into two amendment agreements in respect of the Original Agreements (the **Amendment Agreements**):

- an amendment agreement to the MSA (the **MSA Amendment Agreement**) under which, from completion of the Merger, the existing terms and obligations under the MSA would be replaced with new terms including (i) a payment by Ladbrokes to Playtech of £40m upon completion of the Merger to be satisfied by the issue of new Ladbrokes shares; and (ii) the payment to Playtech of a further guaranteed £35m in cash payable upon delivery of key operational milestones, but, in any event, within 42 months from completion of the Merger and
- an amendment agreement to the SLA (the **SLA Amendment Agreement**) pursuant to which revised fee arrangements would apply on completion of the Merger, break clause provisions relating to the SLA were agreed and certain other non-material amendments were made to the SLA.

Requests from Mr Desmond

The whitewash circular was published on 30 October 2015 containing summaries of the MSA, the SLA and the Amendments Agreements. None of these agreements were published on a website on the date of publication of the whitewash circular, however, following a request made on behalf of Mr Desmond, the Amendment Agreements were published in full on the Ladbrokes website on 5 November 2015. Ladbrokes informed Mr Desmond that this was not because of an obligation but a gesture of goodwill.

Mr Desmond raised concerns regarding the Original Agreements and the Amendment Agreements with the Executive on 16 November 2015. On 21 November, the Executive ruled that (i) the Original Agreements were not material contracts entered into by Ladbrokes in connection with the Merger which were required to be published on a website by Ladbrokes pursuant to Rule 26.3 of the Code; and (ii) the effect of the Amendment Agreements was capable of being understood without reference to the full text of the Original Agreements.

Mr. Desmond requested a review by the Hearings Committee of the rulings of the Executive that the Original Agreements were not material contracts and need not be published, and that the Amendment Agreements could be understood without reference to the full text of the Original Agreements.

On 24 November, Ladbrokes shareholders voted overwhelmingly in favour of all of the resolutions put to them (including the Code whitewash resolution).

A meeting of the Hearings Committee was convened on 26 November and on 14 December the Hearings Committee upheld the Executive's ruling.

Mr Desmond's advisers then wrote to the Executive setting out additional complaints relating to the Merger, alleging that: (i) the whitewash circular contained material omissions and inaccuracies which rendered it misleading, so that Ladbrokes shareholders voted on a false premise; and (ii) the Original Agreements and/or the Amendment Agreements constituted a dealing arrangement consisting of an inducement to deal, for the purposes of Note 11 on the definition of "acting in concert" referred to in Rule 26.2(c). Accordingly, Mr Desmond requested that (a) material new information omitted from the whitewash circular be brought to the attention of Ladbrokes shareholders (including through the publication of the Original Agreements on a website); (b) a further general meeting of Ladbrokes be convened for shareholders to vote again; and (c) the Original Agreements be published on a website pursuant to Rule 26.2(c).

In March of this year, the Executive ruled that: (1) no new information was required to be disclosed to Ladbrokes shareholders and a further general meeting of Ladbrokes should not be held for shareholders to vote again; and (2) the Original Agreements and/or the Amendment Agreements did not constitute an inducement to deal.

Appeals

The Hearings Committee and the Takeover Appeal Board considered the following issues:

Issue	Hearings Committee	Takeover Appeal Board
Were Ladbrokes shareholders given sufficient information?	Yes	Yes
Was a further general meeting of Ladbrokes required?	No	No
Were the Original Agreements and/or the Amendment Agreements an inducement to deal as per Note 11 on the definition of "acting in concert"?	No	No
Were the Amendment Agreements entered into "in the ordinary course"?	Yes	No
Were the Amendment Agreements entered into "in connection with the Merger"?	No	Yes
Were the Original Agreements required to be published on a website?	No	No
Could information obtained in the course of the proceedings be disclosed to the UKLA?	No – unless consent of parties obtained	No – unless consent of parties obtained

The questions regarding the Amendment Agreements being "in the ordinary course" and/or "in connection with the Merger" went to whether they should have been disclosed on a website pursuant to Rule 26.3(d). The Hearings Committee stated that the purpose of the requirement to publish such agreements was not directed at agreements which are simply "connected" to the Merger by reason of being required or impacted by it, but only those which are concerned with or directed to the implementation of the Merger itself.

The Hearings Committee was not obliged to consider these questions as Ladbrokes had already disclosed the Amendment Agreements in November 2015. The fact that the Amendment Agreements were "material" and well within the two-year time limit in Rule 25.7(a) was not in dispute. The Hearings Committee did not find the issues easy to address or resolve and considered that they were appropriate for consideration by the Code Committee to assess whether or not some amendments or clarifications should be made to the Takeover Code.

The TAB disagreed with the Hearings Committee as it considered that the MSA Amendment Agreement was "plainly outside the normal activity of the company and hence outside the ordinary course of its business". The TAB also disagreed with the Hearings Committee on the question of whether the MSA Amendment Agreement was made in connection with the Merger which it felt would be answered in the affirmative. On that basis, Ladbrokes had been right to publish the MSA Amendment Agreement on its website.

As a result of the TAB's ruling, the Original Agreements did not need to be put on Ladbrokes website, Ladbrokes did not need to prepare a supplementary circular and was not required to convene a further meeting of its shareholders.

The TAB statement also includes the three rulings of the Hearings Committee dated 14 December 2015, 17 February 2016 and 20 April 2016.

The full Takeover Appeal Board statement can be viewed at:

http://www.thetakeoverappealboard.org.uk/downloads/2016-03.pdf

Market Abuse Regulation – key issues on a takeover

The EU Market Abuse Regulation (596/2014) (**MAR**) came into force in the UK on 3 July 2016, replacing the existing market abuse regime established pursuant to the EU Market Abuse Directive. As a Regulation, MAR has direct effect without the need for implementing legislation thereby creating a more consistent market abuse regime across the EU. Whilst the impact on takeovers should not be too significant, we set out below a few areas of note. This summary is not intended to be exhaustive, but seeks to focus on the key issues of MAR likely to arise on a takeover.

Market soundings

Market abuse includes unlawful disclosure of inside information. Inside information will be deemed to be disclosed legitimately if it is disclosed in the normal course of the exercise of a person's employment, profession or duties, for example, in the context of market soundings.

Article 11 MAR contains a formal market soundings regime which is available to a bidder wishing to sound out target shareholders provided that:

(a) the information is necessary to enable target shareholders to form an opinion on their willingness to offer their securities: and

(a) the willingness of target shareholders to offer their securities is reasonably required for the decision to proceed with the bid.

The MAR market soundings regime imposes significantly more onerous regulatory requirements particularly as regards record-keeping than existing wall crossing protocols which have developed over many years.

To take advantage of the market soundings safe harbour, a bidder or its advisers would have to comply with the following obligations (among others):

- undertake an assessment of whether the information constitutes inside information (or not);
- establish protocols and record-keeping requirements ahead of a market sounding;
- restrict the number of employees responsible for sounding out target shareholders;

- obtain the consent of the market sounding recipient (**MSR**) prior to disclosure of inside information;
- provide prescribed information to the MSR including an indication of when the inside information will be cleansed or otherwise cease to be inside information;
- use recorded telephone lines where available – if recorded lines are not available or the MSR does not consent to their use, written notes must be kept and signed by both parties;
- keep detailed records for five years of (i) information disclosed pursuant to market sounding; (ii) compliance with the safe harbour requirements; and (iii) the identities of persons within the MSR that received the information; and
- notify the MSR when information ceases to be inside information.

Market participants are free to decide whether to comply with the more onerous market soundings regime in MAR or undertake soundings on a less prescriptive basis.

There is no presumption that market participants that do not comply with the MAR market soundings regime have unlawfully disclosed inside information.

Recital (35) MAR prescribes the basic requirements which should be followed as part of any wall crossing activities.

Where a market sounding involves the disclosure of inside information, the disclosing market participant will be considered to be acting within the normal course of his employment, profession or duties where, at the time of making the disclosure provided that:

(i) he informs and receives the consent of the recipient that the recipient may be given inside information;

(ii) the recipient is restricted from trading or acting on that information;

(iii) reasonable steps are taken to protect the on-going confidentiality of the information; and

(iv) the recipient informs the disclosing market participant of the identities of all natural and legal persons to whom the information is disclosed in the course of developing a response to the market sounding.

Many banks are opting for a unitary approach to compliance with the MAR market soundings regime whether or not the sounding is within the scope of Article 11 MAR.

Irrevocables from PDMRS during a closed period

Article 19(11) MAR will prevent a PDMR of a target company accepting an offer or giving an irrevocable containing an undertaking to accept an offer during the 30 day closed period before the announcement of the target's interim financial report or year-end report[1]. It should be noted that some issuers intend to apply a longer closed period (e.g. from the end of the reporting period until the interim or prelims announcement).

A PDMR can enter into an irrevocable undertaking to accept an offer prior to a closed period and satisfy that irrevocable during a closed period.

The restriction on PDMRs entering into irrevocables during closed periods will not apply to an irrevocable that only relates to an undertaking to vote in favour of a scheme. However, where (as is usually the case) the irrevocable undertaking includes an obligation to accept a contractual offer if the transaction structure is switched by the bidder, this will be caught by the PDMR closed period restriction.

A bidder will need to assess the timing of the closed period of the target to ensure that irrevocable undertakings from PDMRs can be obtained before the target moves into its closed period. Alternatively, announcement of the bid could be deferred to align with the announcement of the target's interims or prelims.

Stakebuilding

Stakebuilding is specifically excluded from the MAR bid facilitation safe harbour in Article 9(4) MAR. There is, however, a further safe harbour in Article 9(5) MAR which states that "the mere fact that a person uses its own knowledge that it has decided to acquire or dispose of financial instruments in the acquisition or disposal of those financial instruments shall not of itself constitute use of inside information". In addition Recital (31) MAR provides that "Acting on the basis of one's own plans and strategies for trading should not be considered as using inside information". There is broad support for the view that the exclusion of stakebuilding from bid facilitation safe harbour does not impact the scope of the "own intentions" safe harbour.

1 Pending clarification from the European Commission and ESMA, the FCA takes the view that, where an issuer announces preliminary results, the closed period will be the 30-day closed period immediately before the preliminary results are announced, provided that the announcement of preliminary results contains all of the inside information expected to be included in the annual report

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Appendix: Announced* UK takeover bids (1 April to 30 June 2016)

Target (Market)	Bidder	Bid value	Bid premium**	Recommended	Hostile/No recommendation	Rule 9 offer	Cash	Shares (L/U/A)	Other consideration	Mix and match	Offer***	Partial Offer	Scheme	Offer-related arrangements◊	Formal sale process	Non-solicit undertakings****	Matching/Topping rights****	Shareholder vote	Profit forecast/QFBS
Energy Assets Group plc	Alinda Capital Partners LLC	£209 m	40.4%	•			•						•	•C		•[1]	•[2]		
ANS Group Limited	Project Daytona Limited	£44.9 m	NP	•			•[3]		•[4]		•							•[5]	
TLA Worldwide plc	Atlantic Alliance Partnership Corp.	£98.5 m	53.8%	•				L[6]					•	•S[7]				•[8]	

1. A number of Energy Assets shareholders have agreed to notify Alinda Capital of the details of any approach by a third party made with a view to the making of an offer for shares in Energy Assets as soon as they become aware of the relevant matter.
2. Topping right (with a 7.5% improvement threshold).
3. The offers being made for both the ANS Ordinary Shares and ANS B Ordinary Shares are for consideration of 380 pence in cash for each ANS (or ANS B) Ordinary Share.
4. A loan note alternative will be available to ANS shareholders.
5. The offers are conditional upon the approval by independent ANS shareholders of arrangements made available to each of the management team to subscribe for loan notes, in accordance with Rule 16.2 of the Code.
6. 10 new AAPC shares for every 107 TLA shares. A partial cash alternative in a maximum aggregate amount of US$ 60 million will be made available to TLA shareholders.
7. The TLA Founders, who will hold new AAPC shares following completion of the transaction, will be entitled to registration rights (pursuant to a registration rights agreement expected to be entered into at completion) which will enable them to require AAPC to register their new AAPC shares with the SEC in the US.
8. AAPC is required, under NASDAQ rules, to seek shareholder approval for the issue of the new consideration shares.

Key

* This table includes details of takeovers, set out in chronological order, in respect of which a firm intention to make an offer has been announced under Rule 2.7 of the Code during the period under review. It excludes offers by existing majority shareholders for minority positions

** Premium of the offer price over the target's share price immediately prior to the commencement of the relevant offer period

*** Standard 90% (waivable) acceptance condition, unless otherwise stated

**** In shareholders' irrevocables (unless indicated otherwise)

◊ Permitted agreements under Rule 21.2 of the Code

A AIM traded shares

C Co-operation agreement/bid conduct agreement

F Break fee given under formal sale process

L Listed/traded shares

NP No premium given in offer documentation or nil premium

R Reverse break fee

S Standstill agreement

U Untraded shares

Appendix: Announced* UK takeover bids (1 April to 30 June 2016) Continued

Target (Market)	Bidder	Bid value	Bid premium**	Recommended	Hostile/No recommendation	Rule 9 offer	Cash	Shares (L/U/A)	Other consideration	Mix and match	Offer***	Partial Offer	Scheme	Offer-related arrangements°	Formal sale process	Non-solicit undertakings****	Matching/Topping rights****	Shareholder vote	Profit forecast/QFBS
Sweett Group plc[9]	WSP Global Inc	£24 m	52.17%		•[10]		•						•	◊[11]			•[12]		
British Polythene Industries plc	RPC Group plc	£261 m	30%	•			•	L[13]					•				•[14]		•[15]
Premier Farnell plc	Dätwyler Holding AG	£615 m	51%	•			•						•	•C[16]			•[17]		
Hydro International plc	Hanover Active Equity Fund LP	£28 m	8.1%	•			•		•[18]				•						

9. Sweett is also the subject of a firm offer by Dar Al-Handasah Consultants Shair and Partners Holdings.
10. The offer was initially recommended. The board of Sweett, however, withdrew its recommendation on 24 June 2016 in view of the superior financial terms attaching to the offer by Dar Al-Handasah Consultants Shair and Partners Holdings.
11. WSP and Sweett entered into a share scheme deed on 24 May 2016 setting out certain agreements between them in relation to the treatment of the Sweett share schemes.
12. Topping right (with a 10-15% improvement threshold).
13. In addition to 470 pence in cash, BPI shareholders will receive 0.60141 of a new RPC share for each BPI share.
14. Matching right (with a 10% improvement threshold).
15. The Rule 2.7 announcement contains statements of estimated cost savings and synergies arising from the merger (a quantified financial benefits statement (**QFBS**)). The QFBS has been reported on by KPMG and N M Rothschild & Sons as required by Rule 28.1(a) of the Takeover Code.
16. In addition to entering into a bid conduct agreement, Dätwyler and Premier Farnell entered into clean team arrangements on 3 June 2016 setting out how certain confidential information that is commercially and/or competitively sensitive can be disclosed, used or shared. Dätwyler and the trustees of the Premier Farnell UK Pension Scheme also signed a memorandum of understanding on 10 June 2016 setting out their understanding as to the funding and operation of the Premier Farnell UK Pension Scheme following the acquisition.
17. Matching right (with up to a 5% improvement threshold).
18. A loan note alternative will be available to Hydro shareholders (other than certain overseas shareholders).

Appendix: Announced* UK takeover bids (1 April to 30 June 2016) Continued

Target (Market)	Bidder	Bid value	Bid premium**	Recommended	Hostile/No recommendation	Rule 9 offer	Cash	Shares (L/U/A)	Other consideration	Mix and match	Offer***	Partial Offer	Scheme	Offer-related arrangements°	Formal sale process	Non-solicit undertakings****	Matching/Topping rights****	Shareholder vote	Profit forecast/QFBS
Sweett Group plc[19]	Dar Al-Handasah Consultants Shair and Partners Holdings Limited	£29 m	83%	•			•				•			◇[20]					
Wireless Group plc	News Corporation	£220.3 m	70.3%	•			•				•			• C,S			• [21]		
Bond International Software plc	Constellation Software Inc.	£44.2 m	20%		• [22]		•				• [23]								

19. Sweett is also the subject of a firm offer by WSP Global Inc.
20. In order to be in a position to recommend the offer, the Sweett board needed to seek alternative funding since Sweett's current credit facilities expire on 8 July 2016. The bidder therefore made an offer of a term debt facility of £9.45 million which, if accepted by Sweett and on satisfaction of the conditions precedent, may be utilised upon short notice and may be used to refinance Sweett's overdraft facilities and for working capital purposes.
21. Matching right (with a 10% improvement threshold).
22. Bond's directors are considering Constellation Software's offer and will make a further announcement in due course.
23. The bidder and its concert parties own 100% of the non-voting convertible shares outstanding in Bond. The Takeover Panel has accordingly waived the requirement under Rule 14 of the Takeover Code to make a comparable offer for these securities.

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