GIBSON DUNN

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UK TAKE PRIVATES

To Our Clients and Friends:

Bloomberg (here) recently reported that PE firms are increasingly scoping out take privates in the UK and "are fed up with waiting for Brexit". That is consistent with our experience and current mandates, and the recent deals for Merlin Entertainments and BCA Marketplace provide further evidence.

The UK takeover regime brings particular challenges to take private transactions which differ from the US in a number of significant respects. We thought it timely therefore to send out a reminder of a few of the early stage issues described in our client alert last year explaining how they can be overcome.

1. Who can management talk to?

Senior executives owe duties to act in the best interests of their companies and so need to tread carefully. However, they are free to have exploratory conversations with potential bidders provided they comply with a few basic principles:

- they need to be sure they have internal authority and support – keeping the Chairman of the Board informed is usually sufficient during the early stages. Notably in the UK, the role of the Chairman and the CEO are invariably separate roles.

- they must not disclose any confidential information to third parties – but usually there will be enough public information to allow for preliminary discussions.

- the number of people they speak to should be limited, both to minimise the risk of a leak and to ensure compliance with the Panel's rule that there should be no more than six "live" discussions at any one time.

- advice must be taken from financial advisers and lawyers prior to engaging in any discussion around management incentive arrangements or any possible equity participation in the bidder.

Once a bidder is willing to submit a written proposal to the target company, the Chairman will inform the entire board and an independent committee of the board, excluding anyone who might be involved with the bidder, will be established. The independent committee will determine what information can be disclosed to bidders and management have an obligation to share with the board any information they disclose to potential bidders. It should be remembered that any information disclosed to one bidder has to be disclosed to other potentially less welcome bidders.

2. Diligence, costs and timing

The due diligence process will be run by the independent committee so management should avoid disclosing any non-public information without prior approval from the independent committee. Target companies are not permitted to underwrite bidders' costs although if a white knight bid is made in response to a hostile offer then an inducement fee, capped at 1%, is possible.

There is also a rule ("**Put up or shut up**") that requires a formal offer to be announced not later than 28 days following the first public announcement of a possible offer. However, if discussions are ongoing it is usually possible to obtain an extension.

3. Management and other significant shareholdings

Sometimes management will own shares in the target company which are material in the context of an offer. Under the Takeover Code all target shareholders have to be treated equally. Therefore, if management wish to roll over their shares into shares of the bidder then either (i) all target shareholders must be offered the same opportunity to take equity in the bidder (which may result in the financial sponsor having to accommodate unwanted minority shareholders in the bidder) or (ii) independent shareholder approval must be obtained to management being treated differently. The other structural alternative is for the Takeover Panel to agree that those "rolling over" can be treated as joint offerors with the financial sponsor – this is not an easy test to satisfy. For these reasons great care needs to be taken before any discussions take place around management's future interests in the bidder.

It is worth noting that if management own a material interest in the target, a financial sponsor may be able to secure significant deal certainty by negotiating with management either a hard irrevocable undertaking to accept the offer or a hurdle irrevocable (under which management can only accept an alternative offer if the second offer is circa 15% higher than the initial offer).

4. No financing condition and no MAC

It must be remembered that in the UK a formal offer can only be made when there are "certain funds" in place to satisfy the cash consideration. Financing conditions are not permitted and, for all practical purposes, there can be no MAC condition either. The only substantive conditions that are permitted are regulatory and the requirement for acceptances of up to 90% which can be waived down 50% plus one. This means that all financing needs to be in place on an unconditional basis at the time the offer is announced.

5. Finally: "It's good to Talk" – Should we consult the Panel?

The UK Panel on Takeovers and Mergers is responsible for administering the Takeover Code which govern takeovers of UK companies. The Panel Executive (the Panel), which is primarily staffed by current or former corporate finance practitioners, regulates bids on a day-to-day basis.

The UK system of takeover regulation is principles-based. The Panel will seek to ensure that the six General Principles (here) which form the cornerstone of the Code are respected in all cases, and an understanding of the principles is essential to deftly navigate the regime.

Consultation with regulators on takeover bids is not typical nor always helpful under many regulatory regimes. In the UK by contrast, consultation often will prove to be helpful. Derogations, dispensations and waivers are possible from many Code rules subject to consultation with the Panel. The Panel responds on a timely basis to queries and is available for consultation on an "out of office hours" emergency basis.

PS The Political Environment

It is also clear that the growth in take privates will bring private equity more into the public eye. Government and the wider political community are increasingly focusing their attention on private equity. While policy thinking is incomplete, it would not be surprising if at some point private equity hits the front pages again and the old chestnuts of leverage, thin capitalisation and carried interest attract the attention of legislators.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these issues. For further information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Mergers and Acquisitions and Private Equity practice groups, or the following lawyers in London:

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