

Resolving competitive public takeover bids: using the auction procedure

The recent high-profile auction process involving Comcast Corporation and 21st Century Fox for Sky plc has highlighted the provisions to resolve contested competing bids set out in the Takeover Code (the Code) (see box “Background to the auction” and News brief “Bidding wars: the battle for Sky is hotting up”, www.practicallaw.com/w-015-8842).

Code rules on auctions

Rule 32.5 of the Code gives the Takeover Panel Executive (the Executive) two options in the event that there are competing bids that remain capable of revision (that is, not declared final) at the end of the offer period (day 46 in the takeover timetable). The Executive can:

- Apply the default auction procedure, as set out in Appendix 8 to the Code (Appendix 8).
- Agree to an alternative auction procedure proposed by the target company and competing bidders, which may be more tailored to the parties’ preferences.

The Comcast/Fox auction was undertaken under the second procedure.

The Executive has tended to favour open auction procedures over sealed procedures, primarily because it gives the target board a period of certainty in which to decide the outcome of competing offers. However, the Executive has applied auction procedures including sealed or formula bid processes. For example, in the competitive bid between Laragrove Limited and Baroness Retail Limited for Debenhams plc in 2003, an open auction procedure was established but the parties agreed on the submission of sealed bids specifying a fixed-price maximum offer if there was no resolution at the end of the open auction procedure (www.practicallaw.com/7-102-5478).

Traditionally, there has been significant flexibility as regards to the number of bidding rounds and time period of an open auction procedure. For example, during the competitive schemes of arrangement for Corus Group plc in 2007, the Executive and the competing bidders, Tata Steel UK Limited and CSN Acquisition Limited, agreed to an auction procedure involving

Background to the auction

As neither Comcast Corporation’s £14.75 per Sky plc share offer nor 21st Century Fox’s offer of £14 per Sky share had been declared final by the end of the offer period on 20 September 2018, the Takeover Panel Executive (the Executive) published the terms agreed by Comcast, Fox, Sky and the Executive for an auction procedure (www.thetakeoverpanel.org.uk/publication/view/201815-sky-plc). Following a three-round bid, which took place on 22 September 2018, the Executive announced that Comcast’s final offer of £17.28 per Sky share was in excess of Fox’s offer of £15.67 per Sky share. Sky’s independent committee unanimously recommended the offer to shareholders on 24 September 2018.

nine rounds to take place across two auction days (see News brief “Corus scheme: going, going, gone”, www.practicallaw.com/5-226-1955).

The default auction procedure

Appendix 8 was introduced in 2014 as a modified form of the default open auction procedure that the Executive would typically expect to impose to resolve a competitive situation (www.practicallaw.com/8-578-8325). This approach allows for certainty and fairness because parties that are aware of the competing offer can respond to any revision made by the other competing bidder, thereby replicating the first 46 days of the offer timetable (paragraphs 5.12-5.32, Appendix 8). Importantly, the introduction of Appendix 8 does not prevent the parties’ right to discuss with the Executive the possibility of effecting an alternative procedure.

Appendix 8 did not create new rules in themselves but instead provided for a clear framework for the default auction procedure. The main features of the Appendix 8 modified auction procedure include providing for:

- Daily bidding in a transparent manner until one of the bidders fails to announce a revised offer within the time specified.
- A maximum of five rounds of bidding over five business days immediately following day 46.
- Alternate day bidding after auction day 1. The rationale is to ensure that a competing bidder does not incrementally increase its offer in each round where the other bidder has not announced an offer.

- Rules on the announcement of revised offers to allow both bidders to announce on auction day 1 and auction day 5, provided that an offer was announced on day 4. During any of auction days 2 to 4, bidders can only announce a revised offer if a revised offer was announced on the previous auction day.

Conditions and restrictions

The auction process will commence on auction day 1, being the next business day following the 46th day of the offer period. At 5pm on any of auction days 1 to 5, the Takeover Panel (the Panel) may make an announcement to conclude the auction procedure (Appendix 8.2(i)).

The auction will continue to auction day 2 provided that a revised offer was announced on auction day 1. This process is repeated until auction day 5, where either or both of the competing bidders may announce a revised offer, provided that an announcement was made on auction day 4. On auction day 5, which is the final round of bidding, each bidder may submit a revised offer to the Panel before 4pm, conditional on the other bidder also submitting a revised offer. In any event, the auction procedure ends at 5pm (Appendix 8.4). The purpose of this condition is to avoid a competing bidder from bidding against itself.

During the auction, competing bidders and the target company are prohibited from:

- Making public statements that could affect the auction procedure (Appendix 8.2(h)(i)).
- Dealing in securities of the target company or entering into irrevocable

undertakings and letters of intent with the target's shareholders to buy securities without the Panel's consent (*Appendix 8.2(h)(ii)*).

- Making formula bids (*Appendix 8.2(f)*).

Announcements and timing

To the extent that a competing bidder is permitted to make a revised offer during any of the auction days, the Code permits only one offer announcement per auction day (*Appendix 8.2(d)*). In addition, any offer announcement must comply with the provisions of Rule 2.7 of the Code (*Appendix 8.2(e)*).

As a general rule, an announcement of a revised offer made on any of auction days 1 to 4 must be submitted to the Panel by 4pm, followed by an announcement on a regulatory information service before 5pm on the same day (*Appendix 8.3(e) and (f)*).

In the Comcast/Fox bid for Sky, the parties agreed to an alternative procedure rather than using the Appendix 8 default auction procedure. The agreement in the Comcast/Fox bid was for an auction procedure to be conducted under three rounds of bidding taking place over one day.

In the first round, only the bidder with the lowest offer when the auction started would be permitted to increase its price or, in the case where both offers are of equal value, the bidder that made the last bid. Under the second round, only the bidder that did not make a bid during the first round, would be entitled to make an increased bid. The process could be concluded in the second round if no revised offer was made. However, if a revised offer was announced, the auction would continue to the third and final round where both bidders would be allowed to increase their offers. In an

approach similar to that taken under the Appendix 8 default procedure in the final round, each bidder had to submit a revised offer to the Panel before 4pm, conditional on the other bidder also submitting a revised offer. Formula bids were not permitted and all offers were required to be fixed-price cash bids in sterling.

The drawback to Appendix 8

It is perhaps no surprise that the Appendix 8 default auction procedure has yet to be used in practice by parties to a contested bid. Although it provides a useful backstop, the time period to resolve an Appendix 8 procedure is lengthier than necessary and we expect that the parties to a contested bid in future cases may, as in the Comcast/Fox bid, seek to streamline and compress the process.

William Charnley and Marcus Young are partners at King & Spalding International LLP.
