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UK Take Private opportunities for US funds

Many would have thought that potential UK public to private activity would have remained subdued given the regulatory framework implemented following Kraft/Cadbury and the macro headwinds of high, and increasingly volatile, public stock prices and, of course, Brexit. However, we have seen a sustained uptick from a range of US investors looking to take advantage of very good international businesses listed on the UK exchanges, which, notwithstanding sometimes inflated stock prices, provide opportunities to investors outside of the crowded private M&A market to access solid international businesses and management teams desperate to get away from public scrutiny and short term goals at an attractive discount given the relative weakness of sterling. Special situations and opportunities funds have also started to focus on the public markets for many of the same reasons, picking up capital constrained companies who are looking for a shift in strategy and are perhaps no longer looking to continue down the path originally supported by their institutional shareholder base. Of the public takeovers launched in 2018, approximately one third were made by US bidders.

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We have set out below some of the high level considerations we often talk to US sponsors about at the outset of the process:

Secrecy – It may sound obvious but the importance of secrecy when undertaking UK takeover transactions cannot be overstated, as the consequences of a leak can be fatal to a financial sponsor led bid in particular. Following the drawn-out public courting of Cadbury by Kraft in 2011, the UK Takeover Panel made significant changes to the UK Takeover Code which required parties in talks about a bid to be named publicly and for those parties to then be subject to a 28 day period in which to announce their binding bid to the market. The 28 day period can only be extended with target consent and, if a binding bid is not made by the expiry of the period, the bidder is blocked from pursuing the transaction for another six months. This hit financial sponsors particularly hard because of their need to have completed all diligence and secured binding financing on a certain funds basis within the period and also risk their brand in connection with a failed bid if the timetable could not be met. These regulatory changes certainly put a dampner on P2P activity in the UK for a while. However, as it becomes increasingly hard to win in private company auctions at reasonable multiples, sponsors have been forced to get creative and look again. Of all the UK P2P activity over the last two years, only one sponsor has been named publicly as a result of the suspected leak and not gone on to be successful (and in that case a competing sponsor controlled portfolio company succeeded). This shows the risk can be managed and secrecy preserved if appropriate steps are taken.

Financial advisers – Even though a deal may have been sourced directly, bidders are required to appoint a financial adviser in the UK as the UK Takeover Panel places specific responsibilities on financial advisers to ensure compliance by bidders with the UK Takeover Code, particularly so when a bidder is not itself resident in the UK. For example, if an announcement is required to be made to the market, it must be made immediately and the UK Takeover Panel will not be sympathetic to delay because of time zones. Having worked alongside a number of the investment banks on P2P transactions, we can make introductions if needed.

Management Incentivisation – Often locking in management at the time of announcing a binding bid is seen as integral to the value proposition. Whilst the principle is exactly the same in the UK, in practice management team arrangements are deferred until after the deal has completed and the target has been taken private. Under the UK Takeover Code, ‘special deals’ are prohibited. A special deal is an arrangement afforded to one shareholder that is not afforded to all. As key management are often shareholders and/or optionholders in the target, albeit usually with pretty small holdings, they are caught by this rule, and in theory an equity alternative would need to be provided to all shareholders. The UK Takeover Code does recognise P2P transactions as an exception to the general prohibition, but with conditions. Conditions include disclosure, fair and reasonable opinions from the target’s financial adviser, independent shareholder consent and possibly Takeover Panel consent, depending on the significance and structure of the arrangements. As

bidders typically do not want to introduce additional conditionality into the deal and bidco equity arrangements are often sensitive to the managers concerned, parties generally avoid being in a position where compliance with this rule is triggered. Instead, discussions are postponed until after the deal completes and management get comfortable in the interim on the back of diligencing terms offered by sponsors in other deals.

Intentions Statements – Statements made by bidders regarding their intentions for the target’s business and employees going forward are probably the area of most regulatory scrutiny. Rules requiring disclosure of intentions have always been part of the UK Takeover Code but as a result of Kraft/Cadbury (where a manufacturing facility was closed and assets relocated following completion without any prior disclosure having been made) and increased national interest sensitivity, the UK Takeover Panel now takes a heightened interest in testing disclosure in advance of an announcement of a binding bid and continues to monitor compliance for a 12 month period following closing. Generic statements of intentions were once the norm but now much more precise language is required.

The London office of Ropes & Gray is regularly advising our clients on potential take private transactions and other public company investments.