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Takeover Regulation in the UK – Bidding War for Sky plc Resolved by Rare Auction Process

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Yesterday, one of the longest running UK takeovers moved a significant step closer to completion. Comcast Corporation (“Comcast”) has announced, together with the completion of the sale of shares by Twenty-First Century Fox Inc. (“Fox”) that it has secured tenders of shares representing 75% of Sky plc’s (“Sky”) issued share capital, which will facilitate Comcast’s delisting of Sky’s shares from the London Stock Exchange. This relatively quick end to the lengthy bidding was precipitated by the Takeover Panel’s imposition of a rare auction process to resolve the much publicised, contested public takeover battle.

Background

The latest chapter in the Sky takeover story began in December 2016 when Fox announced a firm intention to make a recommended cash offer for the shares in Sky that it did not already own at £10.75 per Sky share. This immediately generated widespread media coverage and political interest in light of Fox’s previous aborted attempt to acquire Sky in 2011, which was derailed at the time by the corporate governance failings exposed in the 2011 phone-hacking scandal at the News of the World.

Following an 18 month period, Fox satisfied the Secretary of State at the Department for Digital, Culture, Media & Sport that the Sky takeover should not be prohibited on public interest grounds by agreeing to make a series of post-offer undertakings to safeguard the independence of Sky News. In the interim, however, two major events occurred which destabilised Fox’s takeover plans for Sky.

First, Fox itself had entered into merger discussions with The Walt Disney Company (“Disney”). This led the Takeover Panel to invoke the chain principle under the UK’s City Code on Takeovers and Mergers (the “Code”), which required Disney, as the acquiring party, to make a mandatory offer to Sky’s shareholders if it successfully acquired Fox. The Panel determined that the chain principle applied because securing control of Sky might reasonably be considered to be a significant part of Disney’s rationale for acquiring control of Fox. This occurrence is noteworthy as it was the first instance in the history of the Code in which a chain principle offer was required where the company being acquired, here Fox, was itself engaged in an offer process for a company subject to the Code.

Second, on 25 April 2018, Comcast sparked a bidding war for Sky when it announced a firm intention to make a cash offer at £12.50 per Sky share, representing an approximate 16% premium to Fox’s offer. The independent committee of Sky’s board subsequently withdrew its recommendation of the initial Fox offer. Fox in turn responded with an increased cash offer of £14 per Sky share on 10 July 2018, representing an approximate 30% premium to its original offer. The next day, Comcast responded again with an increased offer of £14.75 per Sky share.



Rare Auction Process

On 20 September 2018, the Takeover Panel announced that following private discussions with Sky, Fox, and Comcast, in accordance with Rule 32.5 of the Code, it had established an agreed auction procedure for the resolution of the competitive situation in relation to Sky. The auction procedure would consist of a maximum of three rounds that would take place on the same day. The first and second rounds in effect would allow each respective offeror a further opportunity to make a revised offer, if they so desired. If the auction process had not concluded after the second round, the third round would allow both bidders to make a final, higher blind bid, which could only be subject to the event that the other bidder also made a final bid. This procedure, which the Panel and the parties had agreed to, was a slight variation to the auction procedure that the Code would normally provide for as set out in Appendix 8 to the Code.

Rule 32.5 of the Code permits the Panel to implement an auction process if a competitive situation continues to exist in the later stages of the offer period. The rationale for intervention lies at the heart of two of the general principles of the Code; in particular, maintaining the normal functioning in the market for the offeree's securities and ensuring that the offeree company is not hindered in its affairs for longer than is reasonable.

Comcast Successful Bidder

On 22 September 2018, the Panel announced the results of the Sky auction. Comcast had made a final cash bid of £17.28 per Sky share and Fox had made a final cash bid of £15.67 per Sky share. In accordance with the agreed auction procedure, Comcast and Fox each made a Rule 2.7 announcement in relation to their revised bids. The independent committee of Sky's board unanimously recommended that Sky's shareholders accept the Comcast offer given the materially superior value proposition offered which valued Sky at £29.7 billion.

The result of the auction process did not necessarily mean an end to the takeover saga given that Fox would still hold a stake of approximately 39% in Sky. However, on 26 September 2018, Fox announced its intention to accept the Comcast offer and bring to a conclusion its efforts to acquire full control of Sky.

The takeover battle for Sky shall long be remembered by public M&A practitioners and those beyond for giving rise to a myriad of exceptional political and legal issues. It also serves as a reminder of the UK's distinctive regulated approach to public takeovers, in this circumstance demonstrated by the imposition of an auction process to bring the future ownership of Sky to a head.



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