

Admission condition on takeovers

(This is an updated version of a note published on the CLLS website in February 2011)

Section A: Summary

The following wording for takeover documents in respect of the condition that consideration shares are admitted to listing and trading (the “admission condition”) has been agreed with the UKLA and the Takeover Panel. This supersedes the wording posted on the CLLS website in February 2011.

For takeovers by way of scheme of arrangement:

“[The scheme is conditional on]... (i) the UKLA having acknowledged to the Bidder or its agent (and such acknowledgement not having been withdrawn) that the application for the admission of the New Bidder Shares to the Official List with a [premium] listing has been approved and (after satisfaction of any conditions to which such approval is expressed to be subject (“listing conditions”)) will become effective as soon as a dealing notice has been issued by the FSA and any listing conditions having been satisfied and (ii) the London Stock Exchange having acknowledged to the Bidder or its agent (and such acknowledgement not having been withdrawn) that the New Bidder Shares will be admitted to trading;”

For takeover offers:

“[The offer is conditional on]... (a) the admission to the Official List of the new [Bidder] Shares to be issued in connection with the Offer becoming effective in accordance with the Listing Rules and the admission of such shares to trading becoming effective in accordance with the Admission and Disclosure Standards of the London Stock Exchange or (b) if Bidder and Target so determine (and subject to the consent of the Panel) (i) the UKLA having acknowledged to the Bidder or its agent (and such acknowledgement not having been withdrawn) that the application for the admission of the New Bidder Shares to the Official List with a [premium] listing has been approved and (after satisfaction of any conditions to which such approval is expressed to be subject (“listing conditions”)) will become effective as soon as a dealing notice has been issued by the FSA and any listing conditions having been satisfied and (ii) the London Stock Exchange having acknowledged to the Bidder or its agent (and such acknowledgement not having been withdrawn) that the New Bidder Shares will be admitted to trading“

This wording should be used instead of the traditional formulation of “agreeing to admit”, which the UKLA has raised objections to. See Section B below for background.

As a result of considering this issue, the Panel intends to amend the application of Rule 24.9 to schemes. See Section C below for more detail.

In relation to the admission condition in a takeover offer above, if parties intend to rely on limb (b) and announce an offer wholly unconditional before admission occurring, then they would need to discuss this specifically with the Panel and there would need to be a compelling reason to do so. In most cases the Panel expects parties to rely on limb (a) and for the existing practice to continue whereby the offer is declared unconditional save for admission, with admission following the next morning. This means the offer only becomes unconditional upon

admission occurring and not before, and that therefore target shareholders do not take any risk of receiving unlisted securities.

Section B: Background to UKLA's objections

Until mid-2010, it was standard practice to include the following wording, or similar wording, in the conditions to a takeover:

"[The Scheme will be conditional on]/[The Offer will be subject to the following conditions] ...

... the admission to the Official List of the new [Bidder] Shares to be issued in connection with the Offer/Scheme becoming effective in accordance with the Listing Rules and the admission of such shares to trading becoming effective in accordance with the Admission and Disclosure Standards of the London Stock Exchange or if Bidder and Target so determine (and subject to the consent of the Panel) the UKLA agreeing to admit such shares to the Official List and the London Stock Exchange agreeing to admit such shares to trading [subject only to (i) the allotment of such shares and/or (ii) the Offer/Scheme becoming or being declared unconditional in all respects]."

In 2010, the UKLA informed a number of firms that it was concerned that the way in which the admission condition was expressed was not a proper description of the outcome of a successful listing hearing, since it might be incorrectly inferred from the wording above that the UKLA has bound itself to admit the securities.

After some discussions, in April 2011 the UKLA and the CLLS agreed on the formulation set out in the Summary section above (confirmed in a telephone call on 5 April between Hamish Macdonald of the UKLA and Tom Carey of Slaughter and May). (In February 2011, the UKLA agreed to a slightly different formulation, but this has now been superseded following concerns raised by the Panel.)

The new wording follows more closely the form of confirmation that is given after a successful listing hearing. The UKLA confirmed that acknowledgement is sometimes given in a letter from the UKLA to the issuer or its adviser, sent prior to admission occurring, but often the confirmation would instead be given orally over the telephone when the issuer's adviser contacts the UKLA. The agreed wording is therefore not specific about whether the acknowledgement is written or not.

Section C: Approach of the Takeover Panel

Rule 24.9 of the City Code provides that where securities are offered as consideration and it is intended that they should be admitted to listing on the Official List or to trading on AIM, the relevant admission to listing or admission to trading condition should, except with the consent of the Panel, be in terms which ensure that it is capable of being satisfied only when the decision to admit the securities to listing to trading has been announced by the UKLA or the Stock Exchange, as applicable.

Appended to this note is a paper that was sent to the Panel as part of the discussions between the CLLS and the Panel around this issue. For the reasons explained in that note, since August

2009 it has been necessary in all takeover schemes involving listed share consideration for the scheme to be completed without admission having become effective, notwithstanding Rule 24.9.

As a result of those discussions, the Panel has reached the following conclusions, confirmed in an email from Mark Bardell of the Panel to William Underhill and Tom Carey of Slaughter and May on 1 April 2011:

- The wordings in Section A are the forms of the admission condition in the context of a scheme and an offer that the Panel Executive will be expecting to see in the future.
- The Panel accepts that Rule 24.9 of the City Code should not apply to schemes in the same way that it does to offers, and agrees that requiring Panel consent to a dispensation from Rule 24.9 in every takeover scheme is not desirable.
- Therefore it intends to amend Rule 24.9 or Appendix 7 of the City Code (the Panel considers that this is a more appropriate approach than issuing a Practice Statement). It considers that any such amendment would be of a minor nature that need not be widely consulted on and which could be addressed in the Response Statement which will be issued in due course in response to PCP 2011/1 (especially given that the current PCP already includes proposed amendments to Rule 24 and Appendix 7).
- The Panel has invited the CLLS to give its views as to the appropriate form of such amendment. The Panel thinks prima facie that a simple disapplication of Rule 24.9 in the context of schemes would go too far and that there should be an equivalent to Rule 24.9 in the context of a scheme, perhaps included in Appendix 7, along with a disapplication of Rule 24.9 itself in section 14 of Appendix 7.

(The CLLS intends to make a proposal to the Panel to deal with this point shortly.)

On takeover offers where the bidder is issuing listed securities as consideration, the Panel wants practitioners to be reminded that an offeror must not declare its offer wholly unconditional before admission has occurred in reliance on limb (b) of the admission condition, unless the Panel has given its specific consent.

The Panel expects the existing practice of declaring the offer unconditional save for admission, with admission following the next morning, to continue (i.e. relying on limb (a) of the proposed condition). If parties propose to rely on limb (b) there would be a need to discuss this specifically with the Panel and there would need to be a compelling reason to do so.

Tom Carey, Slaughter and May
8 April 2011

Appendix

Note sent to Panel by Tom Carey of Slaughter and May on 17 March 2011

Sequence of events on a typical takeover by way of scheme of arrangement

The order of events for the scheme to become effective and the consideration shares in the bidder to be admitted to listing and trading is typically as follows:

D - [7] ¹	UKLA listing hearing
D - [6]	UKLA gives listing approval, subject to the allotment of the shares and the scheme becoming unconditional. LSE gives approval for admission to trading (the Exchange will in practice follow the approval of the UKLA)
D 0	Court hearing to sanction the scheme Last day of dealings in and for registration of transfers of Target Shares. Target Shares disabled in CREST.
D+1	8 am: Suspension of listing of, and trading in, Target shares During the day: Board meeting of Bidder to approve allotment of new Bidder shares; allotted subject to filing of court orders and admission of shares to listing and trading. [6 pm] Scheme record time
D+2	Court hearing to confirm Target capital reduction; Solicitors file the court orders confirming the scheme and the capital reduction with Companies House ² . Scheme becomes effective.
D+3	8 am : Delisting of Target Shares. Admission of new Bidder Shares to Official List and to trading. CREST accounts credited with new Bidder Shares.

¹ These dates vary but generally the offeror will make sure that it has approval from the UKLA and LSE before going ahead with the court hearing to sanction the scheme so that it can confirm to the court that this has happened.

² Assumes that, on the terms of the order, it becomes effective upon delivery to Companies House, which can be done out of Companies House opening hours. Alternatively the court may order that, for the scheme to become effective, the reduction court order must actually be *registered* by Companies House (as opposed to be simply being delivered). Timing implications of this are discussed below in this note. In this note we refer to the orders being "filed" to cover either route.

	Trading commences in new Bidder Shares.
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1. If the consideration for an offer includes securities that are to be admitted to listing (or trading), Rule 24.9 requires there to be a condition that admission has been announced (i.e. that it has definitely occurred), unless the Panel agrees otherwise.
2. In relation to an offer by way of scheme of arrangement, the legal requirements relating to the scheme process and the procedures of the UKLA and the LSE have to be reconciled in order to achieve unconditionality.
3. In a scheme the parties undertake not to take the necessary actions to make the scheme effective until the conditions, including the admission condition, have been satisfied (or waived).
4. At the court sanction hearing the bidder will confirm to the court that the conditions to the scheme have been satisfied or waived. It will state that admission has not yet occurred but that the UKLA has approved the admission to listing. The court then sanctions the scheme on this basis.
5. The action that makes the scheme and associated reduction of capital effective is the filing of the court orders with Companies House. Filing may involve simply delivery to Companies House, or may require Companies House to register the orders, in which case it can only happen during Companies House opening hours - see section below on section 649 Companies Act 2006.
6. Upon filing, the scheme and reduction of capital become effective. Where, as is usual, the scheme involves a reduction of capital, it is not possible to make its becoming effective conditional on any event. Therefore the target shareholders' shares are cancelled at the moment of filing.
7. At this point in time, however, (on admission) the new Bidder shares will not have been admitted to listing (or trading) - the UKLA will only have approved their admission and the admission will not at this point be effective. This is because the UKLA will not admit the shares on a conditional basis (LR 2.1.5), which means that admission will be the very last thing to happen in the sequence of events.
8. Admission to the Official List is not effective until the UKLA has issued an RNS notice under LR 3.2.7 stating that the new Bidder shares have been admitted. Admission of securities to trading becomes effective only when the decision of the Exchange to admit the securities to trading has been announced by the Exchange via an RNS announcement (ADS 2.1). Both these RNS announcements are issued at 8 am. on the morning of listing.
9. If admission of the consideration shares to listing (and trading) becoming effective was a condition to the scheme, there would be a circularity whereby the scheme could not become effective until the listing has occurred and listing could not occur until the scheme has become effective.

10. Until August 2009, this conundrum was resolved using the comfort letter approach (described at paragraphs 19 and following below) but this is no longer available on takeover schemes. It will therefore be necessary in all takeover schemes involving listed share consideration for the scheme to be completed without admission having become effective.
11. It will therefore also be necessary for the consent of the Panel for the purposes of Rule 24.9 to be sought in all such cases unless the Panel is prepared to agree to this approach in all cases on a blanket basis.
12. The condition that has been used until now provides for the Bidder and the Target to be able to determine (subject to the Panel's consent) that completion can occur if the UKLA has merely agreed to admit the shares to the Official List and the LSE has agreed to admit the shares to trading, in each case subject only to the allotment of those shares or the acquisition becoming or being declared unconditional in all respects.
13. The new wording achieves the same result but refers instead to the UKLA and LSE having given an acknowledgement that the application for admission has been approved. Although this characterizes the outcome of a successful listing hearing slightly differently, it is effectively describing the same situation.
14. Completing a takeover in reliance on an agreement to admit the shares, rather than following admission of the shares, introduces a risk for target shareholders. The risk arises because it is necessary for the scheme to become effective prior to admission occurring (see Timetable above).
15. The risk is that, following the takeover being declared unconditional on the basis of the UKLA's agreement to admit the shares to listing, the scheme becomes effective and shareholders' shares in the target are cancelled and shares in the offeror issued in their place but, owing to some unforeseen event, the listing of new shares does not become effective.
16. In that situation, target shareholders will have swapped their listed target shares for shares in the bidder which are not at that stage admitted to listing. Rule 24.9 was adopted to prevent target shareholders being required to take this risk without consent of the Panel.
17. If the Panel will not give the general consent suggested in 11 above, it will be necessary to add "with the Panel's consent" to the new proposed wording, in which case the Panel will in effect need to be approached for and give their consent on every takeover by way of scheme.
18. The Panel may have more leverage than the CLLS to persuade the UKLA to change its practice so that shares can be admitted conditionally on the filing of the court orders.

Comfort letter approach no longer available on M&A schemes

19. As a concession to the rule that shares cannot be admitted conditionally on any event, the UKLA in the past allowed securities to be admitted to listing on a takeover by way of

scheme of arrangement on the strength of a comfort letter from legal advisers confirming that all conditions to the scheme have been satisfied or waived, subject only to the registration at Companies House of the court orders and the admission of the shares themselves.

20. This approach enabled admission to listing and trading to occur on the same day as the registration of the scheme court order giving effect to the scheme. It was not otherwise possible for admission to listing and registration of the order to take place on the same day because, due to Companies House opening hours, it was not in practice possible to register the scheme court order before 8 am., when admission occurs. The UKLA confirmed this concession in List! 16.
21. Under the comfort letter procedure, completion would not occur until after admission had occurred. The court order bringing the scheme into effect (which includes cancelling the shareholders' shares in target) was registered once all the other conditions had been satisfied.
22. However, in List! 22 the UKLA referred to their statements in List! 16 concerning comfort letters. List! 22 explains that the UKLA is concerned to ensure that trading in shares in listed companies is not suspended longer than is necessary. However, it explains that the approach of providing comfort letters to the UKLA, in connection with a scheme, to ensure that admission can occur on the same morning that the relevant court order is registered at Companies House, is no longer available on schemes relating to mergers and acquisitions where the suspension of shares only affects the target.
23. Instead it states that the comfort letter approach should be recognised as a concession to the usual position under the listing regime that the admission to listing cannot be conditional upon any event and, consequently, this approach is only really appropriate where an existing issuer is undertaking a scheme of arrangement to insert a new holding company (to maintain continuity in trading of the issuer's shares).

Section 649 Companies Act 2006

24. Prior to 1 October 2008, any reduction of capital had to be registered by Companies House before it became effective.
25. Now, where the reduction forms part of a scheme of arrangement, section 649(3)(a) of the Companies Act 2006 provides that it becomes effective either:
 - (A) on delivery of the court order and statement of capital to the Registrar; or
 - (B) if the court so orders, on registration of the Order and the statement of capital by the Registrar.
26. The practice that is developing is that the court usually only requires delivery. This makes it possible to make the scheme and the reduction effective on the same day as the court order confirming the reduction. Admission then occurs the following morning at 8 am. (see Timetable above).

27. Although this expedites the process because it removes the possible delay of one day between the final court hearing and admission, there is still a short period of time (and risk) between the scheme becoming effective through the filing of the court orders, and admission occurring.
28. However, it is still open to the court to order that, for the scheme to become effective, the reduction court order must actually be *registered* by Companies House (as opposed to be simply being delivered). Due to Companies House opening hours, it may not be possible to get Companies House to register the court orders on the same day as the capital reduction hearing, in which case registration will occur after 9 am. on the morning of the following day, with admission occurring at 8 am. the day after that.

Admission condition on an offer

29. The admission condition on a contractual offer is typically phrased in the same way to the traditional admission condition on a takeover by way of scheme, i.e. admission becoming effective (first limb) *or* the UKLA and LSE agreeing to admit the shares to listing and trading (second limb).
30. Unlike on a scheme, it is possible for the admission condition on a contractual takeover offer to be satisfied using the first limb, i.e. by admission becoming effective. When all conditions save for the condition relating to admission to listing and trading have been satisfied:
- (A) the Bidder will announce that the offer is unconditional in all respects except for the admission condition and state that it is anticipated that admission will occur the next day. The offer is not actually at that point unconditional since the admission condition is still unfulfilled.
 - (B) the Board of the bidder resolves to allot the consideration shares subject only to the listing and admission to trading becoming effective.
31. The UKLA (and LSE) will be told that the shares have been allotted on that basis and will post the dealing notice at 8 am. the next morning. At that point (i) the allotment and the listing become unconditional and (ii) simultaneously, the offer becomes wholly unconditional. The bidder will shortly thereafter make an announcement that the offer has become wholly unconditional.
32. It is possible, if the Panel consents, to announce the offer wholly unconditional *before* admission has occurred, on the basis that the UKLA and LSE have agreed to admit the shares to listing and trading. Actual admission will occur as soon as possible following the announcement that the offer is wholly unconditional but there may be a gap of one, two or more days.
33. Having the second limb in the admission condition provides the parties with the flexibility to make the offer wholly unconditional a day or two earlier if this is desirable in the circumstances. The need for Panel consent provides a safeguard against this approach being used to expose target shareholders to an unduly long period of risk that they will have given up their shares in the target in return for unlisted shares in the offeror. For

contractual offers it is therefore desirable to retain the “with the Panel’s consent” wording in the admission condition.