

Partial offers

Time for a revival?

Illustration: Getty Images



Ed Lukins and Aaron Archer of Morrison & Foerster (UK) LLP examine partial offers in the light of Thalassa's offer for Rock Solid Images.

Although partial offers are not particularly common, with only a handful made in the past several years, in some circumstances, they could be an attractive option for companies to consider (*see box "What is a partial offer?"*). One of the most recent was the hostile partial offer by Thalassa Holdings Limited (Thalassa) for Rock Solid Images plc (RSI) in April 2012, which was likely to have been the first partial offer of its kind (*see "Thalassa partial offer" below*).

This article examines the reasons why a company might make a partial offer, the regulation of partial offers, and Thalassa's partial offer for RSI.

REASONS FOR PARTIAL OFFERS

Many partial offers are made in order to acquire a holding in the target company of more than 30% but less than 100% of its total voting rights, but partial offers can also be used to acquire shareholdings of less than 30%.

The consideration in a partial offer can be for consideration other than cash, although such offers are rare. This position can be compared with tender offers, which must be for cash (*see box "Tender offers"*).

Carnival Corporation's partial offer in 2003 made to P&O Princess Cruises Plc's shareholders was considered unusual in that the consideration offered was solely shares, but the offer

was also different in that it was used in conjunction with the exchange of listed securities as part of the parties' dual-listed company transaction (*for background, see News brief "Guinness Peat Group partial offer: breaking the mould", www.practicallaw.com/3-102-7629*).

Thalassa's partial offer, on the other hand, was unique in that the consideration offered to the shareholders of RSI was both cash and shares.

A partial offer may either be recommended by the offeree company's board or may be hostile (as was the case with Thalassa's partial offer).

Partial offers also have the advantage of avoiding the obligation to make a mandatory offer under Rule 9 of the Takeover Code (the Code) (Rule 9) (*see "Rule 9" below*).

REGULATION

Partial offers are governed by the Code. Rule 36 of the Code (Rule 36) sets out the requirements for a partial offer, but other rules of the Code will be applicable in light of the fact that a partial offer requires the same offer document as would be used in a full takeover.

Panel consent

All partial offers require the consent of the Takeover Panel (the Panel). The Panel will normally grant consent in the case of an offer which would not result in the offeror (and persons acting in concert with it) being interested in shares in the offeree company carrying 30% or more of the voting rights of that company (*Rule 36.1, the Code*) (Rule 36.1). On the other hand, it will not normally grant consent to partial offers that would result in the offeror holding 30% or more but less than 100% of the voting rights of the target company where the offeror acquired shares in the target company in the 12 months before the request to the Panel for its consent or at any time after the partial offer was reasonably in contemplation (*Rule 36.2, the Code*).

What is a partial offer?

A partial offer is an offer by a bidder to the shareholders of a company to buy a proportion only of their shares, as opposed to a full takeover whereby 100% of the shares of a company would be sought. It can be used to increase an existing shareholding in a company or to acquire an initial shareholding that could be a controlling stake.

Acceptance condition

Offers which could result in the offeror (and persons acting in concert with it) being interested in shares carrying between 30% and 50% of the voting rights of the offeree company must state in the offer document the precise number of shares required under the offer and state that the offer cannot be considered unconditional as to acceptances until at least this number of acceptances have been obtained (*Rule 36.4, the Code*) (Rule 36.4).

Approval condition

In addition, offers which could result in the offeror (and persons acting in concert with it) being interested in shares carrying 30% or more of the voting rights of the offeree company must be conditional on the approval of the offer by shareholders of the offeree company who, independently of the offeror (and persons acting in concert with it), hold over 50% of the voting rights of the target company (*Rule 36.5, the Code*) (Rule 36.5). However, this requirement may be waived if over 50% of the voting rights of the offeree company are held by one shareholder.

Both the acceptance condition and the approval condition are dealt with in the offer document by means of forms appended to the offer document.

Rule 9

As the Panel's consent is required for a partial offer, the obligation under Rule 9 to make a mandatory offer will not be triggered. Rule 36.6 of the Code contains a specific warning about the control position in a partial offer, and states that where the offer would result in the offeror (either alone or with persons acting in concert with it) holding shares carrying over 50% of the voting

rights of the target company, the offer document must specifically refer to this. The offer document, in such circumstances, must also explicitly state that if the offer were to be successful, the offeror (or persons acting in concert with it) will be free, subject to the restrictions under Rule 36.3 of the Code (Rule 36.3) and Note 4 to Rule 9.1, to acquire further interests in the target company's shares without incurring any obligation under Rule 9 to make a mandatory offer.

Changes since 2006

Since the abolition of the Substantial Acquisition Rules in 2006, the Panel has made a number of amendments to Rule 36 (www.practicallaw.com/9-202-0474). The key amendments include:

Persons acting in concert with the offeror. The situations where the offer is for less than 30% of the voting rights in the offeree company now applies to persons or persons who, pursuant to an agreement or understanding (whether formal or informal) co-operate with the offeror in the conduct of the partial offer (or tender offer). This is because the definition of "acting in concert" applies to persons who co-operate with an offeror to obtain or consolidate control of a company. "Control" is defined as interests in shares carrying in aggregate 30% or more of the voting rights of the target company.

Long derivatives and options. All long derivative and options transactions are treated as dealings in the underlying securities for Code purposes, and Rule 36, therefore, was amended to refer to "interests in shares" carrying 30% or more of the voting rights of the target company.

Schemes of arrangement. Changes were made to the Code generally in 2008 in relation to schemes of arrangement, including changes disapplying certain provisions of Rule 36 in a scheme. However, a subsequent Code Committee review in 2009 resulted in the view that it was not necessary to disapply certain provisions of Rule 36 in the context of a partial offer implemented by a scheme, and Note 4 to Rule 36 was inserted to provide that the Panel should be consulted where it is proposed that a partial offer is to be effected by way of a scheme of arrangement.

Shareholder approval. Pursuant to the implementation of the Takeover Directive (2004/25/EC), Rule 36.5 was amended in 2006 to ensure that, in all cases, a partial offer for 30% or more of the voting rights of the target company would require approval from shareholders holding over 50% of the voting rights in that target company not held by the offeror and persons acting in concert with it.

THALASSA PARTIAL OFFER

Thalassa is involved in the creation and collection of seismic data, and RSI is involved in the interpretation of seismic data. Thalassa believed that, as both companies worked in the seismic industry, there was potential for a successful collaboration between the companies. However, the RSI board did not consider there to be any strategic synergies between the companies and did not believe that Thalassa would be able to bring any economic or industrial assistance to RSI's business. For that reason, the RSI board did not recommend the Thalassa partial offer, but Thalassa made it anyway as a hostile offer.

Structure of the offer

One of the main reasons why the Thalassa partial offer was unique was the shares alternative offered by Thalassa as consideration. Commonly, partial offers allow the target company to maintain a separate listing, and the target company's shareholders are therefore able to participate in any future growth of the target company. However, RSI had already announced, before Tha-

Tender offers

Tender offers are restricted to the acquisition of interests representing less than 30% of the voting rights of the target company. Tender offers have generally been more popular than partial offers, largely due to the fact that partial offers were, up to 2006, subject to the restrictions imposed by the Takeover Code (the Code) while tender offers were subject to the less restrictive Substantial Acquisition Rules (SARs). Following the abolition of the SARs in 2006, the provisions governing tender offers were incorporated into the Code at Appendix 5, which, for the most part, replicated the provisions of SAR 4 that dealt with tender offers.

As with partial offers, the Takeover Panel's (the Panel) consent is required for a tender offer, but the principal document is a circular to shareholders rather than an offer document. Although this means offeree shareholder approval is required in all cases, there are far fewer Code obligations on a tender offer than on a partial offer.

This is in line with the Panel's view that tender offers should take the form of straightforward offers to shareholders to sell their shares for cash, while more complex transactions should be done by means of a comprehensive offer document issued under the Code. Because of this, tender offers still remain more popular than partial offers, with eight taking place in the UK in 2012, compared to two partial offers during the same period.

However, there are two main restrictions with a tender offer:

- The consideration must be for cash.
- The shareholding stake sought must be less than 30% of the company.

lassa's partial offer, that it was seeking to de-list from AIM, and Thalassa believed that RSI shareholders would welcome the opportunity to:

- Have a realistic ability to realise their investment in RSI, particularly considering the fact that matched bargain facilities that are available following a de-listing rarely deliver any real value to shareholders. (This is a system of share trading which matches sale orders with corresponding orders to buy).
- Continue to have both a direct access to trading on AIM in a company in the same industry.
- Have the ability to continue to be part of RSI.

Despite the fact that the offer was hostile, Thalassa had no intention of making any changes to the existing

RSI board or the employment rights of RSI's management and employees, as would often be the case in hostile offers.

Thalassa's partial offer was for 25.89% of the entire issued share capital of RSI which, if accepted in full by the RSI shareholders, would, when combined with Thalassa's existing shareholding of 4.01%, represent a maximum of 29.9% of RSI's entire issued share capital. Thalassa deliberately structured its partial offer to be less than 30% of the voting rights of RSI in order to avoid the need for the approval condition under Rule 36.5 (*see "Approval condition" above*). It also meant that the partial offer did not have to have an acceptance condition under Rule 36.4 (*see "Acceptance condition" above*), but Thalassa decided to include an acceptance condition in any case, and this figure represented 11.99% of the RSI issued share capital.

Lapse of the offer

Following the end of the period in which the partial offer could be accepted, the 11.99% acceptance condition had not been met. Thalassa was still interested in acquiring RSI shares, but rather than revising its offer, Thalassa allowed it to lapse. The risk here was that under Rule 36.3, Thalassa might be restricted from acquiring any further interest in RSI shares for a 12-month period.

Under Rule 36.3, the offeror and persons acting in concert with it may not acquire any interest in shares of the offeree company during the offer period. In addition, in the case of a successful partial offer, neither the offeror, nor any person acting in concert with any of them, may, except with the consent of the Panel, acquire any interest in shares during a period of 12 months after the end of the offer period.

The key issue is that the Rule 36.3 restriction only applied to a “successful partial offer”, which the Thalassa partial offer was not, because the acceptance condition in the offer document had not been met.

Thalassa was free, therefore, to continue to acquire shares in RSI and did so by approaching the RSI shareholders who had accepted the partial offer and acquiring 92% of those RSI shareholders’ RSI shares, representing 4.34% of the issued share capital of RSI.

Thalassa was also not subject to the restrictions in acquiring shares for a 12-month period under Rules 35.1 and 35.2 of the Code.

The Panel was consulted over the application of Rule 36.3 to Thalassa’s proposed further purchase of RSI shares following the lapse of its partial offer, and the Panel conceded that, on the strict wording of Rule 36.3, Thalassa was indeed not prevented from further purchases of RSI shares.

Thalassa is still free to continue to purchase shares in RSI, but would be subject to Rule 9 if it acquired 30% or more of the voting rights of RSI.

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Admission condition

The Panel gave its consent to the Thalassa partial offer under Rule 36.1 (*see “Panel consent” above*).

The Panel does not usually have a significant involvement following this consent, but in Thalassa’s case, it wanted to be kept informed of developments and wanted to review the offer document before it was posted.

Where securities are being offered as consideration which are to be admitted to the Official List or to trading on AIM, an admission condition must be included in the offer document, in order that the parties receiving such securities can be sure that the securities are so admitted (*Rule 24.10, the Code*) (Rule 24.10).

This condition should be in terms which ensure that it is capable of being satisfied only when the decision to admit the securities to listing or trading has been announced by the UK Listing

Authority (UKLA) or the London Stock Exchange (LSE), as applicable.

This is slightly different in a scheme of arrangement under section 15 of Appendix 7 to the Code, which states that the admission condition should be in terms which ensure that it is capable of being satisfied only when all steps required for the admission to listing/trading have been completed, other than the UKLA and/or the LSE, as applicable, having announced their respective decisions to admit the securities to listing/trading.

Following the Panel’s review of the Thalassa offer document, the Panel specifically requested that the admission condition in the offer document be as follows: “the submission by the market operations team at the London Stock Exchange of an AIM trading notice in respect of the New Thalassa Shares pursuant to which the admission to trading on AIM shall become effective on the following business day.”

This wording is unusual in that it focuses on admission following the internal submission by the LSE itself of the AIM trading notice. This is a process that the parties have no involvement in and should be automatic in any case following submission by a party of the AIM trading notice to the LSE.

The only other readily accessible example where this wording has been used for the admission condition is the full share offer by Quindell Portfolio plc to acquire the entire issued share capital of Mobile Doctors Group plc in December 2011.

The use of this language appears to depart somewhat from the requirement under Rule 24.10. It may be that this language is preferable as it means there is no requirement for the UKLA or the LSE to announce the decision to ad-

mit the securities to listing/trading, as is required under Rule 24.10, and to word it as a submission by the market operations team of the LSE gives the Panel more comfort that admission will take place on the business day following submission of the AIM trading notice, rather than submission of the AIM trading notice to the LSE by the issuer of the securities, where it is possible that admission on the following business day cannot be guaranteed.

The offers we have seen subsequent to the Quindell and Thalassa offers where shares are being offered as consideration have predominantly been structured as schemes of arrangement.

However, the admission condition in the offer document for Porta Communications plc's offer for WFCA plc in September 2012, as set out as below, ap-

pears a more standard condition, and more in line with Rule 24.10:

"The offer is conditional upon, among other things, the admission to trading on AIM of the new Porta shares to be issued in connection with the offer becoming effective in accordance with the AIM Rules, or if Porta and WFCA so determine (and subject to the consent of the Takeover Panel), the LSE having acknowledged to Porta or its agent (and such acknowledgement not having been withdrawn) that the new Porta shares will be admitted to trading on AIM."

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Morrison & Foerster (UK) LLP advised Thalassa on its partial offer for RSI.