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City code on takeover and merger in UK with case study and court rulings

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Abstract
India Inc. has been small in the previous years but ever-growing force in the global market. Many Indian companies are trying beyond borders to boost their growth with international mergers to obtain popularity. In India if any of the takeovers of a company which is listed in the stock exchanges is required to made as per the takeover code of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011. In UK there are approx. over more than 65,000 owned companies and out such companies over 655 companies have been calculated for having a combined takeover of more than £ 36.84 billion.
Just like India, UK too has their own laws for any company who are willing to take over a company in UK and for which the code have to be followed. The code comprises of general principles and rules that is required for conducting takeovers and mergers with the registered offices in UK. The code is known as City Code on Takeovers and Mergers developed in the year 1968 for reflecting the collective opinion of the professionals who are involved in the takeovers field for appropriating business standards and for achieving fairness for the shareholders and orderly framework towards takeovers. Further, the case of Sky plc where the Walt Disney Company were trying for acquiring by initially acquiring the 21st Century Fox and by their stakes of 39% in the Sky Plc. There was a turning point where Comcast showed his interest for acquiring the Sky plc and started bidding and at the end acquired the Sky plc with the highest bid. There were various ruling and appeal before the Takeover Panel which has been taken place during the time of bidding by the Disney. This paper will try to understand the code of takeover and merger in UK as well as the case study on the how the Sky plc was acquired and the judgment by the take over panel relating to the issues.

Keywords: takeover panel, mergers, city code on takeovers and mergers

Introduction
The aim is to understand the concept of City Code on Takeovers and Mergers which will help to understand the role of the Takeover Panel Board, who are designated as the supervisory authority for carrying out some regulatory function with respect to takeovers and mergers. This study also focuses on the case with respect to the Walt Disney Company and Sky plc where the rules of the code were seen as well how the bidding took place and at the end Comcast took over the Sky plc will be stated.

Statement of Problem
City Code on Takeovers and Mergers, 1968 known for the takeovers and mergers of registered offices in UK through a broad principles and rules has been a very important part for every big mergers and acquisitions happened in UK for having a proper laws on it so that it binds the company who are taking over or merging a company that is registered in UK. The nature and the purpose of the code is for ensuring that the stakeholders in an offeree company are been treated in a fair manner and their opportunity are not denied for deciding on the merits of such takeover and also such shareholders of an offeree company to have same class and equal treatment by the offeror.
Additionally in the case of the Walt Disney Company and Sky plc where there was high profile bids which were taken place in the year 2018 and also which involved competitive offers by 21st Century Fox and Comcast. The process which commenced in December, 2016 did not conclude till October, 2018 and so the takeover code came into focus where the transactions have been seen with various facets of the rules. The provision of Rule 9 known as the Chain Principle, attracted attention and which resulted in appeals for both the Panel's Hearing Committee and afterwards to the Takeover Appeal Board against the ruling which is made by the Panel Executive.

Research Question/Hypothesis
- Whether the takeover Panel Board facilitates the entire takeover or concerned with the financial advantages or disadvantages of takeover?
- Why is it necessary for Disney for making the Chain Principle Offer of its acquisition of Fox at the price more than each ordinary share of Sky?

Research Methodlogy
This research is a doctrinal study relating to City Code on Takeovers and Mergers, 1968. Further, along with this UK code there would be a case study of Sky Plc and the Walt Disney Walt. This paper will be based on various readings, observations, from different authors, journal as well as research articles. The Library-based research method will be followed for deriving the answer for the Hypothesis. The search will be conducted on the basis of primary sources such as statutes and secondary sources such as books, online articles available freely as well as on legal databases. The paper is based on pure theoretical research.

Principles and rules
There has been an ever growing force of the India Inc. in the

international market. For accelerating the growth with the cross border mergers, various Indian companies have always looked beyond borders to gain popularity. UK in terms of ease of doing business is ranked 8th by the World Bank. Some of the remarkable acquisitions by the Indian entities of UK companies are the Tata group acquiring Corus, Tetley, Land Rover; ONGC's acquiring Imperial Energy Corp and the HCL Technology acquisition of Axon.

Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 is the takeover code of applicable in India if any company is taking over a company which is listed on stock exchange. The exercise to acquire 25% or more of the voting rights in the company which is been acquired is necessary for the acquirer for making an open offer of minimum 26% to allow shareholders exit the company. Such is the case in UK where the City code on Takeovers and Mergers which sets the voting rights at 30% and when the acquirer is interested to acquire where he has more than 30% of the voting share of a company he needs to make a cash offer to other shareholders at the highest price which is paid in the past 12 months before any such offer was announced.

The City code is generally a set of principles and rules to govern the conduct of takeovers and mergers of the companies who are having offices that is registered in UK, the Channel Islands and the Isle of Man. The Takeover Panel is an independent body who are made up of representatives from the financial institutions of UK and professional associations as well as other members that are appointed by the panel. The day to day business of the Panel is carried out by an Executive who comprises of full time employees, law firms, accountancy firms and the civil service and is headed by a Director General.

The Panel can enforce and also give direction which appears to be necessary for restraining any person from acting and who is trying to breach the code. The Panel can order compensation and it also has disciplinary powers. The code applies to all mergers and takeover transactions with respect to relevant companies.

Principles

There are six principles in the code which are essential statements of standards of commercial behaviour and such principles are the same as the general principles which is set out in Part 1 of the Schedule 1C to the Companies Act, 2006 and are as follows –

a. All the securities holders of an offeree company must be given equal treatment, also, if control is acquired of a company than such other holders should be protected.
b. All the securities holders of an offeree company should have enough time as well as information for enabling them to reach at a proper decision on the bid; and where the securities holders is been advised by the Board of such offeree company, such Board shall give its views on the implementation of the bid on conditions, employment as well as the company's location for the place of business.
c. The offeree company's Board shall act in the interests of the company and should not deny the securities holders for deciding on the merits of the bid.
d. Any sort of false markets shall not be created in the offeree company's securities, of the offeror company's securities or other company which are concerned by the bid in such manner that the rising or the falling of prices of the securities become artificial and the functioning be misleading.
e. After ensuring to fulfil the cash consideration the offeror shall announce the bid and if once it is offered, reasonable measures must be taken for securing the implementation of any other consideration.
f. Also, the offeree company must not be delayed during the conduct of its affairs for longer than is reasonable by bid for securities.

Provisions

When any person is acting in concert the offeror shall have to disclose dealings in shares as well as other securities. A public opening position disclosure must be made by the offeror after the announcement which identifies it as an offeror and also which identifies a competing securities exchange offeror. Further, an offeror shall also disclose any arrangements such as indemnity or option arrangements which is entered by a person who is acting in concert.

Comparable offers must be made by the offeror to each class holders of share capital. Further, no particular shareholder has to be more favoured by the offeror than the rest such special deal is not allowed. The offer value shall not be less than the highest price of purchase which is paid during this time. If during the commencement of the period of offer, the offeror acquires interest which will be above the offer price, then normally there will be increase in the offer not less than the previous price. Also, persons who accepted the original offer will also be entitled to be paid the revised price.

The code obliges both offeror and offeree for ensuring that the shareholders receives enough information to enable them in reaching proper informed decision relating to the merits or demerits of an offer and also in enabling them for making decision in good time. The offeror shall disclose its intentions relating to the target's business, its location, employees and even benefit in the pension scheme, also with respect to its intentions in regard to the future contributions to the employer, the existing members accrual benefits as well as new members. If no such intention is there by the offeror, a negative statement relating to the effect shall be made.

For ensuring a correct flow of information, the City code needs an offeror for disclosing the progress of the offer. Thus in three stages, it is set out below –

Pre– announcement stage

There must be absolute secrecy which shall be maintained by the persons before an announcement is made, who are involved so that the chances for any leak of information would be less, also such information must be confined for those within the offeror and the offeree who must know about it. The Panel had specified, for example, during such stage the pre-bids talks with the customers, creditors, trading partners and the suppliers must not take place.

Announcement stage

An announcement has to be made once a firm intention for making an offer is notified, obligation for making a mandatory bid should arise, during the discussion of pre-announcement, the persons who are aware of the offer can be increased beyond a restricted number. The main object of this rule is for avoiding an opportunity for any type of speculation as well as insider dealing. It is necessary for consulting the Panel if any speculation or rumour or if the share price starts moving beyond the normal market movements. The Panel is vigilant with respect to such rule and are ready for disapprove the company advisors who delay any such making any announcement or consulting them. Such potential offer or are subject to a mandatory “put up or shut up” period and shall within a period of 28 days have to take one of the actions i.e. making a firm announcement or announcing that offer will not be made and following will be subject to restrictions. Additionally, if there is an amended which is made than it needs to be immediately announced.

Post-announcement stage

Once announcement has been made of the proposed offer as per the City Code’s requirements it will come under an obligation for announcing all interests or short position in target securities by noon on the tenth business day after an opening position disclosure. Additionally, dealing by persons who were not the party to the offer or persons who were acting in concert or are interested in 1% or more of the target shares shall also needs to be reported by 3.30 pm on the business day.

If the offeror have interest in shares and acquires for cash which carries 10% of more of the voting share in a period of 12 months preceding the commencement period of offer or also during the period, than such offer will also include a cash offer for not less than the highest cash price during such relevant period. Further, under the Disclosure and Transparency Rules (DTRs) any person who is holding as a shareholder or by holding a financial instrument and having 3% or more voting share shall within a period of 2 trading days of acquiring that holding, must have to disclose such amount of its holding to that respective company and if such company is listed in London then it is obliged for notifying in anyone of the Regulatory Information Services who have to publish such information.

Under the City code, restrictions are generally given to the offeror either before or after the announcement offer to acquire interests in shares which carries 30% or more of the voting share. Nevertheless, there are exceptions such as –

1. Before the offer announcement, within a seven-day period a single shareholder has only acquired.
2. Before the offer announcement, if such offer is suggested by the target and such acquisition is only possible based on the condition upon the offer announcement.
3. If it is by the target about the acquisition after the offer announcement.
4. After the announcement of offer, if any competing offer or an offer is suggested.
5. After the offer is commenced and the first date of closing is passed which is usually 21 days and the relevant EU and UK competition authorities have also cleared such offer or if it does not within the relevant legislation scope.
6. After the offer announcement, such offer became unconditional with all respects.
7. After the offer announcement, if the acquisition is done by way of accepting the offer.

Mandatory Bid

One of the most important rules in the code is with respect to the mandatory bid. It states that if there is an acquisition of interest of shares by a person which carries 30% or more voting share of a company, then such offer or shall have to make a cash offer within a period of 12 months at the highest target price and before any announcement is made. According to the Panel’s view, this is required to be treated as a change in the control and that shareholders must be given an opportunity for selling their shares. Also, the objective is even to give equal treatment to all the shareholders. Most importantly, such mandatory offer can be conditional only on the offer or to obtain shares to carry 50% or more of the voting shares. Such obligation would also apply for making a mandatory offer if a person who will together with the persons who are acting in concert are interested in shares to carry between 30 to 50% of the voting shares of the company.

Responsibility

Any advertisement or document which are issued to the shareholders with the information in relation to the offer shall have to satisfy the highest accuracy and have to be fairly presented as well. Also, the standards will also apply to offer-related information which a company have to put in the website.

Frustrating action

The code also recognises that the interest of the shareholders and the Board will not be always the same. Therefore**,** board shall not from time to time when any offer is communicated or there are reasons to believe that such offer can be imminent and take any action which can result in frustrating the offer or shareholders are being denied for giving opportunity on deciding the merits unless it is been approved by the shareholders in the general meeting. Some of the examples are issue of new shares, grant option of unissued shares, to sell the assets of material amount, enter in contracts otherwise in the ordinary course of the business. Additionally, when an offer is withdrawn or lapsed, nor the offeror or any other person who are acting in concert can within a period of 12 months can do the following things except with the Panel’s consent such as making an offer, acquiring interest in shares which leads to mandatory bid, acquiring interest in such target shares which would take the average interest to 30% or more. Consent is normally given if an offer has been lapsed because reference to Competition Commission is been cleared.

Competition Law

The competition law provisions are also required to be taken care of while acquiring any company. The Enterprise Act, 2002 in UK is the legislation which governs anti-trust issues relating to mergers situations and enforced by the Office of Fair Trading (OFT). If such OFT feels that an arrangement will result in lessening the competition in the markets in UK with respect to goods and services, then it will be referred to the Competition Commission. The threshold comes into force when the turnover of the enterprise in UK is taken over crosses £70 million (approx. 723 crore) with respect to the supply of goods and services. Investigation is conducted by the Competition Commission after any transaction is been referred by the OFT. Once a case is being referred to the commission than the parties will have to adhere to its suggestions, thus it is necessary for acquirers to ensure that their acquisition is as per the provisions of the Enterprise Act, 2002. The Competition Act, 2002 will be applicable in

India and will come into play so the acquirer is required to be careful of that also.

Case study on the walt disney company and the star plc

As one of the oldest producers in animation, the Walt Disney Company created a world or imagination with intellectual properties. In the year November, 2017 Financial press reported that Rupert Murdoch of 21st Century Fox held discussions with the CEO of the Walt Disney Company, Robert Iger. There were multiple bidders for Fox's assets and in addition along with Disney, Comcast made the formal bid. The starting bid of Disney was $51.4 Billion which topped up with the subsequent bid of Comcast to $65 billion. Further, Disney than responded by increasing the bid and also changing the form of consideration from all stock to a 50-50 stock and cash mix, of $71 billion (around 516 crore) and Comcast withdrew itself from the bid and the Disney's bid was than accepted by the Fox shareholders on 27th July, 2018. Such events created huge amounts of value between Disney and Fox shareholders.

On 9th December, 2016 21st Century Fox announced about making an offer to acquire the Sky plc for £11.7 billion at a value of £10.75 per share. Disney stated to the Fox about having an expression of interest to acquire Sky News which shall not be conditional on proposal for acquiring 21st Century Fox. The effect of the acquisition by a merger and after the spin-off some assets of Fox into the new company which was owned by the Fox shareholders. Fox owns about 39% of the ordinary shares of Sky which is treated under the City Code of Takeovers and Mergers as the controlling interest. The issue was brought before the Committee relating to the price at which Disney needs to make an offer for the ordinary shares which is hold by the Sky holders in following to the completion of Disney acquiring the Fox. As per Rule 9 of the code the shareholders are protected and therefore when a company is acquired by having a shareholding of 30% or more and intends for increasing such voting shares by acquiring shares i.e. more than 30% and less than 50%. Whereas, any such acquisition will need to be made by making a mandatory offer for the remaining shares in the offeree company. So, Disney shall have to make an offer which will arise under the 'chain principle' and with respect to the previous ruling of the Executive of the Takeover Panel that the control in security is reasonably needed of Sky for considering a significant purpose of Disney to acquire Fox. The chain principle recognises that in some circumstances, a person or group of persons who are acquiring a controlling interest in one company, which not necessarily itself be the company towards which the code applies i.e. Company A can thereby acquire control of code to other company on which the code apply i.e. Company B. This case arises when Company A owns more than 30% stake in Company B. Sky had been originally formed out of British Sky Broadcasting.

The chain principle became relevant in the year December 2017 when Disney and 21st Century Fox announced that had separate terms agreed upon relating to 21st Century Fox by Disney for cash consideration of $28 per share of Fox and after such transaction Disney would be able to acquire interest in the Sky plc as per the Chain principle. The Panel announced on April, 2018 about the ruling of Chain Principle and the mandatory offer should be at a price of £10.75 per Sky share by Disney. Further, the situation became more interesting when the rival of Disney i.e. Comcast announced its intention for making an offer for Sky at £12.50 per share. Also, to complicate the things, Comcast also made a pre-conditional offer since it is subject to regulatory approvals that it will be interested to acquire 21st Century Fox as per the same terms like Disney and on the higher cash price of $35 per share. At the end it made Disney to acquire the 21st Century Fox's share to $38 per share from the original $28 per share. Thus, it made the panel to re-evaluate the 21st Century Fox in Sky.

The Panel made the ruling that within 28 days of acquisition of Fox, Disney's offer must be for each ordinary share of Sky be £14 per share and unless Fox acquired 100% of the ordinary shares of the Sky, or Comcast acquire more than 50% of the shares of Sky. Than Comcast again increased the offer to £14.75 per share. During this stage Comcast had withdrawn its interest for acquiring 21st Century Fox and focus mainly to acquire Sky. Since it was against the background of the Panel it announced ruling that, the result for the revised terms which were agreed to acquire the 21st Century Fox by Disney, also the revised price which is necessary for Disney to make mandatory offer for Sky shall be £14 per share. Sky further notified the Panel for reviewing the ruling before the Panel's Hearing Committee which will include Panel's Executive, Sky, 21st Century Fox, Disney and also number of Sky shareholders. The Hearing committee upheld the decision of Panel Executive with respect to the Chain Principle and which resulted in further appeal before the Takeover Appeal Board. The Board re-heard all the hearings of the of the Hearing Committee and Panel Executive and the decision which was given originally by the Panel Executive was upheld. The Code Committee in the year 2008 consulted whether the chain principle must be amended for introducing formulae to calculate the appropriate price where it was concluded stating that it should not do so since every case have to dealt in the merits of that case.

Therefore, on September 2018, the Panel ordered for making an auction as per the orderly framework towards the resolution of competitive situation. In such process, Fox followed the Comcast, made cash bids and after two rounds of such bidding the third round of both companies could make new offers. Thus, Comcast had won the auction with £17.28 per share beating the bid of Fox's of £15.67.

With the victory in the auction, Comcast started to acquire the shares of Sky from the open market and subsequently, the Fox announced to sell all its shares in Sky to Comcast for £12 billion. Finally, after the completion of the sale of shares by the Fox, which gave Comcast stake of 76.8%. Afterwards, Comcast announced for mandatorily acquiring the rest of the bid of Sky which gained acceptance from 95.3% of the shareholders and then Sky was delisted after Comcast could over a period of time acquire all the shares.

Conclusion

It can be seen from the success of the Disney that in the recent years the Walt Disney continuously were focusing on Merger and Acquisition transactions. Today, Disney is successful for expanding its content towards the streaming market by accessing to Marvel, Pixar, Star Wars and Fox movies. No doubt, the process for acquiring Sky was also tremendously tried by Disney, but Comcast gave a good competition and at the end it could possibly acquire the Sky plc. During the process of such acquisition the chain principle was brought into effect by the Panel for bringing control in the security of the Sky which is required by voting share of 30% or more which the Disney could possibly have due to the acquisition of 21st Century Fox.

The City Code of Takeovers and Mergers gives a broad principles and rules relating to the takeovers and mergers of the registered UK companies and any person who violates the provisions of the code is liable to be compensated as well as disciplinary action can also be taken. Thus, due to this code there is a proper process which can take place so that, the shareholders can be protected when the takeover are conducted. Till date there is only 6 Chain Principle offers which could take place by the direction of the Panel. Day by day the laws are getting more stringent all over the world and it is necessary for proper takeover or the merger operations which take place and where huge amount of value transactions are done. Thus, in UK the City Code of Takeovers and Mergers has been always a code for proper valuation of offers which is been made by the company who is taking over a UK company so that all the process is done as per the rules of the code.

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