



M&A STANDPOINT

Formal sale processes:

A useful tool to solicit offers or a last resort?

FSPs were created to encourage a competitive and confidential sale process under the Takeover Code, but often they may signal that a company has run out of options. As a number of companies have launched FSPs in recent months, in this article we look at when an FSP is the right choice for a company

What is a formal sale process?

A formal sale process (FSP) is a sell-side sale process run by a public company which is similar to a private company auction, but subject to the UK Takeover Code. A company launches an FSP by announcing, with the consent of the Takeover Panel, that it is putting itself up for sale and inviting interested parties to make an offer. There is no set procedure for an FSP under the Code and companies generally have the flexibility to run the auction process as they wish. That said, the Code continues to apply, and any firm offer announced will be subject to the usual Code timetable for a scheme of arrangement or a contractual offer, as the case may be.

A key advantage of an FSP is that the Takeover Panel will usually grant dispensations from specific Code rules which may help to foster interest among prospective bidders. An FSP is distinct from a strategic review (which is a more wide-ranging review by a listed



company of its business looking at multiple strategic options and outcomes, one of which could be a takeover), although it is possible for a strategic review to incorporate a formal sale process.

Since the concept of an FSP was introduced in September 2011, over 85 FSPs have been launched. To date, they have often been undertaken by companies either in financial distress or which have reached the limits of their ability to operate independently, often because it would require significant capital to develop to the next stage (examples include companies in the oil and gas sectors). This has meant that FSPs can be perceived by investors or the wider market as a sign of failure or surrender. There has however been a recent trend of companies using FSPs to run a competitive process where they have received multiple expressions of interest, demonstrating the wider potential of the process.

Code dispensations on an FSP

The key advantage of an FSP is that a target can seek dispensations from the following Code rules:

- the requirement to identify publicly all bidders who approach a target about a possible offer;
- the automatic put-up-or-shut-up (PUSU) 28 day deadline by which a potential bidder must, once it has been publicly identified, either (i) announce a fully financed offer or (ii) announce that it does not intend to make a bid, in which case it will be restricted by Rule 2.8 of the Code from announcing an offer within six months; and
- the prohibition on a target company agreeing a break fee (and, in exceptional circumstances, other offer-related arrangements) with a potential bidder.

These dispensations are not automatic and so the Panel must be consulted when the dispensations are sought. Would-be bidders should also be aware that dispensations will only apply for as long as they participate in the FSP process and are not available to prospective bidders who withdraw from the FSP or launch an offer outside the process.

Launching an FSP

An FSP is launched by the target making an announcement. The launch announcement must include certain specific information (see the adjacent box) and the Takeover Panel must be consulted, and their consent sought, before an FSP is announced.

The target will require potential bidders to enter into specific arrangements as a condition to participation in the FSP, such as a non-disclosure agreement (NDA) which will often include a standstill provision preventing the acquisition of target shares. The target can enter into different arrangements with different prospective bidders.

FSP launch announcement: contents requirements

- the phrase "formal sale process" in the heading
- an explanation of how the FSP will be conducted
- details of which documents an interested party must enter into as a condition of participation
- an indicative timeline (or a commitment to announce a timeline)
- confirmation of whether the target has received an approach or is in discussions with a potential bidder at the date of the announcement



Process following launch of an FSP

There is no prescribed timeline or process for an FSP. Two particular points to note are:

Offer period

From launch, the target is in an offer period until it announces that the FSP has terminated or an offer completes. Shareholders will therefore be subject to Code dealing requirements and the target will have to comply with various Code rules and restrictions which, as we explain further below, may affect its ability to pursue alternative solutions.

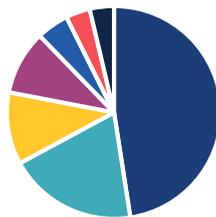
Termination

An FSP ends either with the announcement of a firm intention to make an offer, or when the target announces that the process has been terminated. There is no deadline for either, so a target company could potentially be in an offer period for several months without any guarantee that a transaction may be forthcoming.

FSP trends

Since being introduced in September 2011, over 85 FSPs have been announced. The most common reason given for launching an FSP is "maximising shareholder value", a fairly meaningless phrase. In practice, as discussed above, FSPs are most commonly used by companies which are in financial distress, and use an FSP to seek to elicit an offer for the company as a means of rescuing the company, and by companies which have reached the limits of their ability to develop as an independent company.

Formal sale processes: reasons given for launch



- Maximise shareholder value
- Expressions of interest in target or assets
- Strategic reasons
- Financing issues
- Growth
- Underperformance
- Company undervalued



Since being introduced in September 2011 only around 20% of announced FSPs have to date ended with a completed takeover, with around 25% later completing a substantial business or asset sale. A further 20% recapitalised or refinanced.

Nine companies which announced FSPs have since become insolvent.

When is an FSP the right choice?

Deciding whether to launch an FSP is highly subjective, and much depends on the target company's own circumstances and its reasons for undertaking the process.

Companies in financial distress

The Code dispensations are one of the headline advantages of an FSP for a company in financial distress as they may encourage possible bidders to express an interest and help to foster interest without some of the risks a bidder faces on a conventional takeover. However, set against that is the fact that, if it launches an FSP (as opposed to investigating other options), the company may face certain obstacles.

| Advantages of an FSP | Potential drawbacks |
|---|--|
| <p>No PUSU deadline</p> <p>Removing the PUSU deadline is generally seen as attractive to prospective bidders as it gives them more time to put together a credible bid, undertake due diligence and arrange financing, without the risk of being prematurely named or having to clarify their intentions before they are ready. Whilst a target company can always ask the Panel to extend a PUSU in a conventional bid situation, and it may be in their commercial interests to do so, a bidder has no guarantee that an extension will be given until shortly before the deadline, which creates uncertainty and requires extra time and resources to be spent planning for both scenarios.</p> | <p>Code rules on "frustrating action" may restrict other options</p> <p>A company in financial distress is likely to want to continue exploring other options in case an offer is not forthcoming, such as asset sales and recapitalisations. Although announcing an FSP does not limit a company's ability to explore alternatives, the Code prohibits a target, during the course of an offer or if an offer may be imminent, from taking "frustrating action" which may impede a bid or deny shareholders the opportunity to decide on its merits. The implementation of an asset sale or an equity issue could therefore require shareholder approval before they can be implemented.</p> |
| <p>Publicity around the process</p> <p>By making the sale process public from launch, the target and its financial adviser are able to reach the widest possible number of prospective participants and a much larger group than would otherwise be possible.</p> | <p>Publicity around the process</p> <p>Whilst a possible offer that announces but does not proceed is often seen as a successful defence by a target company, an FSP which does not result in a successful transaction often taints the target as having gone through a failed sale process.</p> |



No Rule of Six

Bidders may also be encouraged that the usual prohibition on extending discussions about a possible bid beyond a very restricted number of people (known as the "Rule of Six") does not apply in an FSP, allowing greater flexibility to consult with possible partners, investors and stakeholders. This is also a significant advantage for the target, allowing it greater freedom and flexibility to explore alternatives and discuss their feasibility with stakeholders than would ordinarily be possible.

Anti-trust and regulatory approval regimes continue to operate

The target will have to consider whether any regulatory approvals will be required for a change of control as that may well impact the timetable. It will also have to assess if any of the proposals by interested parties carry an increased risk of anti-trust issues. Again, that may affect the transaction timetable and, ultimately, the deliverability of a transaction.

Break fees permitted

The ability for the target to get permission from the Panel to grant a break fee, which is otherwise prohibited under the Code, is also likely to prove attractive to bidders, although in practice it has only been used on a small number of bids.

FSPs are not a golden bullet

Although helpful, the dispensations are unlikely to encourage or persuade many more bidders into the process.

Multiple interested parties

For a target which has received one or more expressions of interest, an FSP offers an opportunity to foster competitive tension among prospective bidders by allowing them a greater degree of anonymity than on a conventional takeover. As discussed above, removing the risk of being prematurely named can encourage bidders to express an interest and they may also find it beneficial to be able to consult with a wider number of stakeholders than would usually be possible on a conventional transaction.

A key attraction for a sought-after target is that an FSP can offer them a greater degree of control over the process before Code timelines apply. The target is also empowered under the Code to impose different conditions of participation on different prospective bidders, putting it in a stronger position to manage and decide between the competing interested parties.

Each of these advantages needs to be balanced against the fact an FSP is a public process and effectively puts a target company "in play". Companies and practitioners have been wary of FSPs in the past, with concerns that launching an FSP signals failure or financial difficulty. Some prospective bidders may use the FSP to make an opportunistic offer and there are examples of targets ending their FSP having only received offers which fundamentally undervalued the company. A failed FSP therefore may be a worse outcome than no FSP at all.

An FSP may provide a number of advantages, but target companies and their advisers should consider carefully if the dispensations offered by the Panel are a sufficient incentive and if the additional publicity is likely to bring forward credible additional bidders to compensate for the possible negative investor and market perception.



Conclusion

Whilst the public nature of the formal sale process and the Code dispensations are valuable in fostering interest among bidders for companies, the negative connotations of a listed company hoisting the "for sale" sign mean that we expect that FSPs will continue to be used sparingly and most often as a possible solution for companies in financial distress.

| Takeover Code provisions on FSPs | |
|---|---|
| Dispensation from requirement for potential bidders to be named and be subject to automatic PUSU deadline | <i>Where, prior to an offeror having announced a firm intention to make an offer, the board of the offeree company announces that it is seeking one or more potential offerors for the offeree company by means of a formal sale process, the Panel will normally grant a dispensation from the requirements of Rules 2.4(a) and (b) (but see Note 12 on Rule 8) and Rule 2.6(a), such that any potential offeror which agrees with the offeree company to participate in that process would not be required to be publicly identified under Rule 2.4(a) or (b) and would not be subject to the 28 day deadline referred to in Rule 2.6(a), for so long as it is participating in that process. (Note 2 on Rule 2.6)</i> |
| Dispensation allowing a target to agree a break fee with a bidder which was a participant in an FSP | <i>Where, prior to an offeror having announced a firm intention to make an offer, the board of the offeree company announces that it is seeking one or more potential offerors by means of a formal sale process, the Panel will normally grant a dispensation from the prohibition in Rule 21.2, such that the offeree company would be permitted, subject to the [provisos set out in Note 1(a) and (b) on Rule 21.2], to enter into an inducement fee arrangement with one offeror (who had participated in that process) at the time of the announcement of its firm intention to make an offer. In exceptional circumstances, the Panel may also be prepared to consent to the offeree company entering into other offer-related arrangements with that offeror. (Note 2 on Rule 21.2)</i> |
| Requiring a bidder not to request information shared with competing offerors | <i>A target may require a potential offeror to undertake not to request any information under Rule 21.3 (Equality of information to competing offerors) (Commentary in Panel Practice Statement No. 31)</i> |
| <i>Additional commentary on the FSPs can be found in Panel Practice Statement No.31</i> | |



Robert Moore

robert.moore@hsf.com

+44 20 7466 2918



Lucy Robson

lucy.robson@hsf.com

+44 20 7466 2848



Antonia Kirkby

antonia.kirkby@hsf.com

+44 20 7466 2700