

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 28: Takeovers Etc

Detail of changes made to the operation of provisions previously contained in Part 13A of the 1985 Act

Shares that the offeror has “contracted to acquire” ([section 975](#))

1251. Clarificatory amendments are made on this issue. Section 428(5) of the 1985 Act dealt with the offeror’s position at the start of the bid, for the purpose of determining which shares could not be counted towards the achievement of the 90% threshold (at which point shares may be compulsorily purchased). It was unclear as to whether the phrase “contracted to acquire” in section 428(5) covered conditional as well as unconditional contracts. It is, therefore, clarified that, in ascertaining the offeror’s position at the start of the bid, the shares he has conditionally contracted to acquire (other than those subject to irrevocable undertakings (see below), as under the 1985 Act) should be treated as being shares already held by the offeror. This means that only shares that the offeror has either acquired or unconditionally contracted to acquire will count towards the 90% total needed to exercise squeeze-out. Consequential changes are also made to the provisions on joint offers and associates of the offeror to bring these into line with the above.
1252. Under the 1985 Act, the registered holder of shares could give an irrevocable undertaking to accept a takeover bid, and if he did this for no consideration or only in exchange for a promise to make the bid, his shares were still treated for the purposes of squeeze-out as included within the offer. This is extended to include undertakings given for only negligible consideration and undertakings the effect of which is to require the registered holder to accept the offer (where the undertaking is given by a person who is not the registered holder of the shares but can contract to bind the registered holder, such as the manager of shares held by a bare nominee). (“Irrevocable undertakings” are contractual agreements entered into by a bidder usually with major shareholder(s) of a proposed target company. Such agreements aim to give the bidder certainty – he will know that support for the offer can be guaranteed from shareholders party to the contract – so that his bid has a greater prospect of success. Such undertakings would normally prevent the giver of the undertaking from selling their shares or exercising voting rights to prevent the takeover from becoming successful.)