KEY POINTS:
- There is the potential for 'go-shop' provisions to play a role in transactions.
- However, the attitude and bargaining position of buyers is likely to determine how often 'go-shop' provisions are agreed upon.
- There are certain distinct limitations and costs inherent in the use of 'go-shop' provisions that must be considered.

Authors Leon Ferera, Tom Rowley and Andrew Levine

The sale of Barclays Global Investors and the use of 'go-shop' provisions in English M&A deals

The recent disposal of Barclays Global Investors ('BGI'), Barclays' asset management division, an important component of which is the lucrative iShares business, highlighted the use of a deal term which, although not uncommon in the US in recent years, has hitherto rarely been seen in English mergers and acquisitions ('M&A') deals: the 'go-shop' provision[1]. In contrast to the US where the 'go-shop' came to prominence during the 2005–2007 boom, this, the most high-profile instance of a 'go-shop' being used in England, has come during a downturn in M&A activity.

This feature looks at whether, with directors in England having a keener eye on their fiduciary duties following the recent codification of those duties and at a time of depressed valuations but growing shareholder scrutiny, Barclays' deployment of this provision is a sign of things to come in the English M&A market.

WHAT IS A 'GO-SHOP' PROVISION?

A 'go-shop' provision allows a seller to solicit offers for the target business for a period following signing of the transaction. In return for agreeing to the inclusion of a 'go-shop' provision in the sale and purchase agreement, a buyer will usually be granted a break fee that becomes payable if the seller agrees to sell to an alternative buyer and consequently terminates the original agreement.

In England it would be usual for a buyer to require a seller to undertake not to solicit alternative offers once a contract had been signed (often referred to as a 'no-shop' provision) or, particularly where the seller or the target is a listed company, to undertake not to seek alternative offers whilst reserving the right to enter into negotiations with buyers who have made unsolicited approaches (a 'window-shopping' provision that is necessary for directors to comply with their fiduciary duties). Go-shop provisions, on the other hand, have always been extremely rare in English deals.

In situations where the target is a public company, one could argue that there is less of a need for the target board to require an express go-shop provision. There are two main reasons for this. First, it is a requirement of the City Code on Takeovers and Mergers (the 'Takeover Code') that a target board must obtain competent independent financial advice on any offer. Such advice will often involve the financial adviser carrying out a detailed valuation analysis which will usually take into account exit valuations of comparable companies and the commercial assessments of the target directors. In theory, such an analysis should serve as a market check on whether or not the price being offered is a fair one and, if it is, it arguably mitigates the need for a 'go-shop' right.

Secondly, contrary to the situation with the sale of a private company, a public takeover offer is not generally capable of being concluded or of being binding upon the buyer and the seller(s) instantaneously upon signing. It must first be announced to the market and then posted to target shareholders. Shareholders must then assent a sufficient proportion of the target's shares to the offer in order for the offer to become binding on target shareholders. Unless and until a sufficient proportion of shares has been assented to the offer, it will not be binding upon target shareholders who are therefore free to sell their shares to an interloper. Consequently, once an offer has been announced to the market, it is generally open to a competing offeror to come along and trump the original offer. Obviously, this is subject to the level of irrevocable undertakings given by target shareholders to accept the original takeover offer and to whether those undertakings are hard (ie binding in all circumstances) or soft (ie they fall away if a higher offer is made).

A private company deal is, of course, different in that it may be capable of being concluded instantaneously: once the seller has signed the sale and purchase agreement, it will (usually) be bound to sell the target asset to the buyer, subject to any applicable conditions precedent. Because of this and the consequent inability of an interloper to supplant the original purchaser once the deal has been signed, there is more of a case for a seller to seek to retain the ability to solicit alternative offers for the asset (assuming that it had not already done so before signing the agreement).

However, for the same reason (ie that the deal is one that is capable of being binding upon the seller(s) instantaneously without having first to seek broad shareholder approval), there is also more of a case for buyers to argue against a 'go-shop' provision, and it is the buyers that have almost always prevailed in English law transactions.

THE ISHARES 'GO-SHOP' PROVISION

The background to the deal was as follows. In the midst of the current economic crisis and the difficult conditions facing the banking sector, Barclays, in common with various other banks, sought to shore up its capital position by selling assets.

Biog box

Leon Ferera is a partner based in Jones Day's London office. He advises on M&A transactions and has particular experience in public takeovers, having previously been seconded for two years to the Takeover Panel. Email: lnferera@jonesday.com

Tom Rowley is an associate based in Jones Day's London office. His practice focuses principally on private company mergers, acquisitions, disposals and private equity investment transactions. Email: trowley@jonesday.com

In April 2009, it agreed to sell its iShares business (a discrete part of BGI) to CVC Capital Partners for approximately $4.4bn. As part of the deal, Barclays negotiated a period of 45 days in which it would be allowed to solicit proposals for a superior alternative offer for iShares and 'other related businesses'. The *quid pro quo* imposed by CVC for agreeing to the 'go-shop' right was that it would be entitled either to match the superior offer within five business days or to require the payment of a break fee of $175m if Barclays terminated the agreement and agreed to sell iShares to another party. A few days before the expiry of the 45-day period, US fund manager BlackRock agreed to buy the entire BGI division, including iShares, for $13.5bn in cash and shares.

Although some commentators argued that the price agreed with CVC for iShares was low, Barclays was nevertheless lauded at the time for obtaining the right to continue to solicit offers from other interested parties whilst at the same time having the certainty of a deal with CVC as a backstop. Crucially, Barclays had preserved the flexibility to pursue a parallel strategy of disposing of the entire BGI division, much speculated as being its preferred option from the outset.

THE FUTURE FOR 'GO-SHOP' PROVISIONS IN ENGLISH DEALS

In trying to examine what the future holds for 'go-shop' provisions in England, it is perhaps instructive to look at the situation in the US (where 'go-shop' provisions originated and where their use was most prevalent) since many US innovations in M&A practice have eventually made their way across the Atlantic.

Although not standard, 'go-shops' were not uncommon in leveraged buyouts of public companies during the boom years of private equity transactions in 2005-2007. Public company acquisitions in the US had traditionally been structured to include a window shopping provision that prevented the target from soliciting other offers but that permitted it to negotiate unsolicited offers which the target board determined could lead to a superior proposal. However, a variety of factors contributed to the rise of 'go-shops' in the US. Easily available financing drove up the premia that private equity firms were willing to pay and these compelling offers were frequently made on the basis that the target would agree to move quickly without conducting a full pre-signing market testing process. In addition, the intensity of the private equity boom resulted in a highly competitive environment which increased the negotiating leverage of sellers when faced with the decision of whether to accept such offers.

> "Public company acquisitions in the US had traditionally been structured to include a window shopping provision."

Another important factor was that, under Delaware law, once directors make the determination to sell control of a company, their fiduciary duties oblige them to seek the best price reasonably available for the shareholders (called the 'Revlon' duty after the case of *Revlon Inc v MacAndrews & Forbes Holdings Inc*).[2] In the *In re Topps Co Shareholders Litigation*[3] case of 2007, the Delaware Chancery Court upheld the use of a 'go-shop' clause in that transaction as being consistent with (although not a requirement of) that duty to maximise value, as the clause effectively set a minimum 'floor' price for the target and provided sufficient leeway for other bidders to participate effectively.

In this way, 'go-shop' provisions in the US came to serve a similar function to other dealmaking devices, such as fairness opinions and fiduciary outs, namely to help ensure that fiduciary duties are satisfied, that the sale process was undertaken properly and that the consideration paid or received was the highest reasonably available.

Although we are no longer in a boom market, there could be said to be certain parallels in England that give rise to similar concerns about ensuring compliance with fiduciary duties that helped contribute to the rise in the use of 'go-shops' in the US.

The first of these developments is the coming into force in October 2007 of the provisions of the Companies Act 2006 which codified directors' duties. Although these provisions were not intended to be inconsistent with the common law fiduciary duties of directors which existed prior to the implementation of this legislation, the fact of their codification has led to a heightened awareness of those duties and directors may now generally be more circumspect in their decision making in order to evidence the discharge of those duties. The use of a 'go-shop' provision could be seen as an important component in discharging that duty in a sale situation.

In addition, the combination of an increased focus on corporate governance and critical scrutiny by shareholders generally currently prevailing in England (and the US) makes for a climate in which 'go-shop' provisions could be particularly pertinent. This will particularly be the case for directors, who, mindful of their newly codified duties, currently find themselves confronted with the need to sell assets. As the prices that buyers are willing to pay for assets have generally decreased, the potential for complaints and challenges from disgruntled shareholders has increased. The incorporation of a 'go-shop' provision in a deal would assist a board in addressing any potential criticism from shareholders that it had failed to seek the best price for the asset in question.

On the other hand, just as there is recognition of the fact that US courts, in particular Delaware, will focus on the factual circumstances when analysing whether directors have discharged their duties in the context of the sale process, it is likely that an English court would adopt the same approach. Whilst a 'go-shop' provision combined with a post-signing

Biog box

Andy Levine is a partner based in Jones Day's New York office. He advises companies in a wide range of industries on M&A and private equity transactions. His experience covers public and private mergers, acquisitions, and divestitures; joint ventures; and distressed and other investments. Email: amlevine@jonesday.com

market check can certainly be persuasive in demonstrating compliance by directors with their fiduciary duties, the mere inclusion of a 'go-shop' provision in a deal is not of itself conclusive that those duties have actually been complied with, and nor is the absence of a 'go-shop' sufficient to demonstrate a failure to comply. Indeed, there are certain distinct limitations and costs inherent in the use of 'go-shop' provisions that must be considered. A lower price may be offered as a result of a target's insistence on such a provision, and, obviously, the 'go-shop' provision does not guarantee increased value for shareholders, even in a buoyant market, as further bids may simply fail to materialise. Also, even where alternative bids do emerge during the 'go-shop' period, it should be borne in mind that a competing bid that beats the original bid in terms of headline price might not necessarily turn out to be sufficiently 'superior' in terms of its conditionality or other aspects. It is also worth mentioning that, as a practical matter, a 'go shop' may end up being no more likely to result in a higher bid than the already common 'window-shop' provision. With this in mind, well-advised boards will continue to give consideration to the respective costs and benefits of the full range of sale processes and devices in seeking to achieve maximum value.

Furthermore, the attitude and bargaining position of buyers is likely to determine how often 'go-shop' provisions are agreed upon in transactions and, at least for the moment, it is no longer the sellers who are calling the shots. There are many forced sellers of assets in an environment where buyers are generally more risk averse and acquisition finance less readily available. Consequently, levels of M&A activity are low in relative terms, prices are depressed and there is less competition amongst buyers chasing the same assets than there was during the boom times.

Further limiting factors that are likely to influence the attitude of buyers in England are issues surrounding the use of break fee arrangements. Prior to the recent relaxation of the position for private companies in England,[4] break fee arrangements needed to be structured to avoid falling foul of the rules prohibiting the giving of unlawful financial assistance, and accordingly the quantum of any such break fees was set at a low level (a break fee must not reduce net assets to a material extent – 'materiality' for these purposes is customarily set at 1 per cent or less). These rules were repealed with effect from 1 October 2008 for private companies and it is therefore conceivable that larger break fees may be agreed to by some private companies. However, so far as public companies are concerned, the financial assistance rules continue to apply, and in the case of takeover offers for public companies (where, as mentioned, 'go-shop' provisions are arguably less relevant), the Takeover Code and the UK Listing Rules, limit break fees to 1 per cent of the offer price in any event. In the case of asset sales by companies listed on the main market, the UK Listing Rules require that shareholder approval be obtained for a break fee exceeding 1 per cent of the seller's market capitalisation. By contrast, in the US, break fee arrangements vary, but typically end up at around 3 per cent of total transaction value. As a consequence of all this, of those buyers who are actively pursuing M&A transactions, there will be many who take the position that they are not willing to accept either the uncertainty or the potential for wasted costs and embarrassment at being the loser that are associated with 'go-shop' provisions.

Finally, in assessing whether the iShares deal will start a trend towards a more widespread use of 'go-shop' provisions in England, it is worth noting the following features of the transaction which perhaps made the 'go shop' provision palatable for CVC (in spite of the potential for its role to become solely that of a stalking horse) and which might set it apart from other deals. First, CVC was seeking an investment opportunity offering strong potential for growth amidst a general dearth in substantial private equity deals. Secondly, the terms offered to CVC (and, ultimately, to BlackRock) included substantial vendor-financing provided by Barclays.

"A 'go shop' may end up being no more likely to result in a higher bid than the already common 'window-shop' provision."

CONCLUSION

The current economic climate combined with recent legislative changes in England which have given rise to a greater focus on directors' duties mean that there is certainly the potential for 'go-shop' provisions to play a role in transactions and, as the Barclays deal has shown, they can be used to great effect. However, their inclusion is dependent on sellers having a strong bargaining position and they will not be appropriate in all situations. It seems unlikely therefore that they will become a common feature of English M&A deals but rather they will be seen from time to time when the circumstances permit. ■

1 Interestingly, Barclays was involved in another high-profile transaction involving a go shop provision, namely the competitive takeover of ABN Amro in 2007 (in which Royal Bank of Scotland was ultimately the victorious bidder). At the time of Barclays making its offer, it agreed, conditional upon its offer becoming unconditional, to procure that ABN Amro would sell it subsidiary Lasalle Bank to Bank of America for US$21bn. The contract with Bank of America (which was governed by New York law) included a 14-day go-shop period and a $200m break fee.

2 506 A.2d 173 (Del 1986)

3 2007 WL 1732586 (Del.Ch. June 14, 2007).

4 The Companies Act 2006 repealed the restrictions on the giving of financial assistance by private companies with effect from 1 October 2008.