Chapter 10

Significant transactions: Premium listing

10.2 Classifying transactions

Classifying transactions

10.2.1 G A transaction is classified by assessing its size relative to that of the *listed company* proposing to make it. The comparison of size is made by using the *percentage ratios* resulting from applying the *class test* calculations to a transaction. The *class tests* are set out in ■ LR 10 Annex 1 (and modified or added to for specialist companies under ■ LR 10.7).

10.2.2 R Except as otherwise provided in this chapter, transactions are classified as follows:

(1) [deleted]

(2) Class 2 transaction: a transaction where any *percentage ratio* is 5% or more but each is less than 25%; and

(3) Class 1 transaction: a transaction where any *percentage ratio* is 25% or more.

(4) [deleted]

10.2.2A G If an *issuer* is proposing to enter into a transaction classified as a *reverse takeover* it should consider ■ LR 5.6.

10.2.3 R [deleted]

Indemnities and similar arrangements

10.2.4 R (1) Any agreement or arrangement with a party (other than a wholly owned *subsidiary undertaking* of the *listed company*):

(a) under which a *listed company* agrees to discharge any liabilities for costs, expenses, commissions or losses incurred by or on behalf of that party, whether or not on a contingent basis;

(b) which is exceptional; and

(c) under which the maximum liability is either unlimited, or is equal to or exceeds an amount equal to 25% of the average of the *listed company's* profits (as calculated for classification purposes) for the last three financial years (losses should be taken as nil profit and included in this average);

is to be treated as a *class 1 transaction*.

(2) Paragraph (1) does not apply to a *break fee arrangement* (see ■ LR 10.2.6A R, ■ LR 10.2.6B G and ■ LR 10.2.7 R which deal with *break fee arrangements*).

10.2.5 G For the purposes of ■ LR 10.2.4R (1), the *FCA* considers the following indemnities not to be exceptional:

(1) those customarily given in connection with sale and purchase agreements;

(2) those customarily given to underwriters or placing agents in an underwriting or placing agreement;

(3) those given to advisers against liabilities to third parties arising out of providing advisory services; and

(4) any other indemnity that is specifically permitted to be given to a *director* or auditor under the Companies Act 2006.

10.2.6 G If the calculation under ■ LR 10.2.4R (1) produces an anomalous result, the *FCA* may disregard the calculation and modify that *rule* to substitute other relevant indicators of the size of the indemnity or other arrangement given, for example 1% of market capitalisation.

Break fee arrangements

10.2.6A R An arrangement is a *break fee arrangement* if the purpose of the arrangement is that a compensatory sum will become payable by a *listed company* to another party (or parties) to a proposed transaction if the proposed transaction fails or is materially impeded and there is no independent substantive commercial rationale for the arrangement.

10.2.6B G (1) The following arrangements will meet the definition of *break fee arrangements* in ■ LR 10.2.6A R (although this list is not intended to be exhaustive): 'no shop' and 'go shop' type provisions, which require payment of a sum to a party in the event the seller finds an alternative purchaser; a requirement to pay another party's wasted costs in the event a transaction fails; non refundable deposits.

(2) In contrast, payments in the nature of damages (whether liquidated or unliquidated) for a breach of an obligation with an independent substantive commercial rationale, for example the typical business protection covenants that will apply between exchange and completion of a share or asset acquisition agreement or co-operation and information access obligations relating to obtaining merger or other clearances, are not *break fee arrangements*.

10.2.7 R (1) Sums payable pursuant to *break fee arrangements* in respect of a transaction are to be treated as a *class 1 transaction* if the total value of those sums exceeds:

(a) if the *listed company* is being acquired, 1% of the value of the *listed company* calculated by reference to the offer price; and

(b) in any other case, 1% of the market capitalisation of the *listed company*.

(1A) The total value of sums payable pursuant to *break fee arrangements* for the purpose of paragraph (1) is the sum of:

(a) any amounts paid or payable pursuant to *break fee arrangements* in relation to the same transaction or in relation to the same target assets or business in the 12 months prior to the date the most recent arrangements were agreed unless those arrangements were approved by shareholders; and

(b) the aggregate of the maximum amounts payable pursuant to *break fee arrangements* in relation to the transaction;

save that if the arrangements are such that a particular sum will only become payable in circumstances in which another sum does not, the lower sum may be left out of the calculation of the total value.

(2) For the purposes of paragraph (1)(a):

(a) the 1% limit is to be calculated on the basis of the fully diluted *equity share capital* of the *listed company*;

(b) any VAT payable is to be taken into account in determining whether the 1% limit would be exceeded (except to the extent that the VAT is recoverable by the *listed company*); and

(c) for a securities exchange offer, the value of the *listed company* is to be fixed by reference to the value of the offer at the time the transaction is announced (and is not to be taken as fluctuating as a result of subsequent movements in the price of the consideration securities after the announcement).

10

Issues by major subsidiary undertakings

10.2.8 R If:

(1) a *major subsidiary undertaking* of a *listed company* issues *equity shares* for cash or in exchange for other *securities* or to reduce indebtedness;

(2) the issue would dilute the *listed company's* percentage interest in the *major subsidiary undertaking*; and

(3) the economic effect of the dilution is equivalent to a disposal of 25% or more of the aggregate of the gross assets or profits (after the deduction of all charges except taxation) of the *group*;

the issue is to be treated as a *class 1 transaction*.

10.2.9 R ■ LR 10.2.8 R does not apply if the *major subsidiary undertaking* is itself a *listed company*.

Aggregating transactions

10.2.10 R (1) Transactions completed during the 12 months before the date of the latest transaction must be aggregated with that transaction for the purposes of classification if:

(a) they are entered into by the *company* with the same *person* or with *persons* connected with one another;

(b) they involve the acquisition or disposal of *securities* or an interest in one particular *company*; or

(c) together they lead to substantial involvement in a business activity which did not previously form a significant part of the *company's* principal activities.

(2) Paragraph (1) does not apply in relation to a *break fee arrangement* (see ■ LR 10.2.6A R, ■ LR 10.2.6B G and ■ LR 10.2.7 R which deal with *break fee arrangements*).

(3) If under this *rule* aggregation of transactions results in a requirement for shareholder approval, then that approval is required only for the latest transaction.

(4) Paragraph (1) does not apply to a transaction where:

(a) the *listed company* has obtained shareholder approval for it; and

(b) it has been completed.

10.2.10A G One effect of ■ LR 10.2.10R(1) is that if a transaction is aggregated with a *class 2 transaction* completed during the 12 *months* before the date of the latest transaction, the latest transaction must (depending on the aggregated *percentage ratios*) be classified as either:

a *class 2 transaction*, in which case the *listed company* must comply with the requirements in ■ LR 10.4 (Class 2 requirements); or

a *class 1 transaction*, in which case the *listed company* must comply with the requirements in ■ LR 10.5 (Class 1 requirements).

10.2.11 G The *FCA* may modify these *rules* to require the aggregation of transactions in circumstances other than those specified in ■ LR 10.2.10 R.

Note: If an *issuer* is proposing to enter into a transaction that could be a *Class 1 transaction* or *reverse takeover* it is required under ■ LR 8 to obtain the guidance of a *sponsor* to assess the potential application of ■ LR 10.