

## Poison Pills: Ways a BVI company can avoid a hostile takeover

In recent months companies have been faced with an increasingly challenging business environment. It is undeniable that now more than ever ‘cash is king’ but the sources of cash are becoming harder to access as banks have become less willing to lend and stock prices have been engaged in an unpredictable decline towards unexpected lows.

For the right investor with the right resources this is a time of unprecedented opportunity. Many companies are therefore becoming unwilling targets of takeover bids and with BVI companies having been frequently used in the last five years as listing vehicles, they, like others, may have to take steps to fend off unsolicited offers.

### The advantages of poison pills

A useful weapon in a BVI company’s arsenal is the ‘poison pill’. A poison pill usually takes the form of provisions which are included in the constitutional documents of the company, which have the effect of making the target company’s shares unattractive to an unwanted suitor. This article will look at some types of poison pills that have been adopted by BVI companies and highlight several of the BVI law provisions which need to be borne in mind when incorporating these strategies into the target company’s memorandum and articles.

In the absence of a takeover code or similar legislation in the BVI, there are no blanket prohibitions on poison pills (as there are under the takeover rules in the UK). This gives the directors and shareholders of a company much more flexibility when looking at ways to defend themselves from a hostile approach.

### Directors’ duties

The first major issue to be considered before looking at particular provisions is that any kind of amendment to the company’s memorandum and articles carried out by the directors to adopt a poison pill must be done well in advance of any proposed takeover. Otherwise, if the poison pill is only adopted when an offer is on the table or on the horizon, there is a chance that the actions of the directors may be called into question as to whether they are truly acting in the best interest of the company or are merely acting to preserve their own position. The directors will need to ensure therefore that whilst protecting the company from unsolicited acquisition by a third party, they are not in breach of their statutory or fiduciary duties. It must be further noted that under BVI law, in a takeover situation, the directors of a company owe a duty not only to the company but also to the shareholders as a whole (i.e., not only in their capacity as sellers).

## Types of poison pills

Although they will be wrapped in specially worded provisions of the memorandum and articles of association of a BVI company, there are many forms that a poison pill may take. Four of the most common forms are set out below:

*A 'shareholder rights plan'.* In this instance the company's memorandum and articles are amended so that the company may issue rights to existing shareholders to acquire a large number of additional shares (usually for minimal consideration). The new rights typically allow holders (other than the unwanted bidder) to convert the right into a large number of registered shares in the event that anyone acquires more than a set amount of shares in the target company (usually 20-30 percent). The rights are not usually marketable and wouldn't have a value that can be traded unless there is a trigger event. Once the rights are issued and exercised, this would dilute the percentage of the target company owned by the bidder and would make it more expensive to acquire control of the BVI company.

*The issue of preferred shares.* In this case, the target company would be able to issue shares of a separate class which confer inflated voting rights and privileges on their holders generally speaking or only upon the occurrence of certain specified events, such as an unwanted takeover bid.

*A bonus issue.* Similar to the rights issue, additional shares would be issued to existing shareholders but on a pro-rata basis and for no consideration. This would have to be implemented prior to the bidder acquiring a large number of the target company's shares as otherwise it would be entitled to receive extra shares along with the company's other shareholders.

*The issue of shares with increased distribution rights to specific shareholders.* The company's memorandum and articles of association would contain the power to issue shares which in the event of a takeover would typically give increased dividends to their holders or give them rights of redemption for a higher than market price or a right to be converted into shares of the new controlling company arising from a takeover. This may not necessarily prevent a hostile bid but may nonetheless mean that the bidder has to purchase the shares at an inflated price or pay higher dividends in the future, making the target company unattractive.

For the target company to be able to implement any of the above poison pill strategies it is imperative that its memorandum and articles provide for the issue of shares by the directors without any shareholder approval. Fortunately there are no automatic pre-emption rights under BVI law and many BVI companies' memorandum and articles of association do not contain any such pre-emption rights on a new issue of shares. Where such rights are provided for, these rights would need to be suspended in the event that the bidder is a current shareholder. In addition, it would be best if the target BVI company was authorised to issue shares with no par value.

## **Conclusion**

As demonstrated in this article, poison pills are worth considering in the current economic climate where hostile takeover activity is on the rise. Although the use of poison pills may be disliked in certain jurisdictions (and indeed prohibited under the takeover code in the UK), they are nonetheless becoming more prevalent in the constitutions of companies around the world. They may not all ultimately thwart a takeover but they can give the directors of a company an improved opportunity to get a better price for the company's shares and ultimately benefit and protect the current shareholders who would otherwise lose out in such a bear market.

**If you would like further information on poison pills, please contact Jacqueline Daley-Aspinall ([jacqueline.daley@harneys.com](mailto:jacqueline.daley@harneys.com)) or Erica Mandryko ([erica.mandryko@harneys.com](mailto:erica.mandryko@harneys.com)) at our British Virgin Islands office or your usual Harney Westwood & Riegels lawyer. Alternatively, you may visit our website at [www.harneys.com](http://www.harneys.com).**

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