Public mergers and acquisitions in the UK (England and Wales): overview

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2. What are the main means of obtaining control of a public company?

There are two principal mechanisms to effect a takeover in the UK:

- A contractual offer to all of a target company’s shareholders to acquire their shares.
- A court approved scheme of arrangement, which is a statutory mechanism involving a shareholder vote and court approval, under which 100% of the target company’s share capital is acquired by the bidder.

Contractual offer

For a contractual offer to succeed, a bidder must secure acceptances in respect of shares in the target company carrying more than 50% of the voting rights in the target company but it may choose a higher threshold.

The advantages of a contractual offer are that effective control (with more than 50% acceptances) can be achieved more quickly and there is greater flexibility to amend terms in a competitive situation. Although it may be technically possible to require a target company to facilitate a hostile acquisition by scheme of arrangement, the degree of cooperation required between a bidder and the target company means that hostile bidders invariably elect to make contractual offers.

Scheme of arrangement

A scheme of arrangement requires the approval of a majority in number, representing 75% in value of each share class, of shareholders attending and voting at the relevant shareholder meeting, together with court approval.

The advantages of a scheme of arrangement include the fact that all target company shareholders will be bound by the scheme, if it is approved by the required majority of shareholders and by the court.

Following a change to the Companies Act 2006, since March 2015 public takeovers can no longer be effected by a "cancellation" scheme of arrangement under which, to avoid a transfer of target shares to the bidder and therefore the stamp duty/stamp duty reserve tax payable on that, target shares were cancelled and new shares issued to the bidder (see Question 24).

A statutory merger alternative is also available under the Companies (Cross-Border Mergers) Regulations 2007 (see Practical Law Corporate, Practice note, Cross-Border Mergers Regulations) for transactions involving at least one UK incorporated company and at least one company incorporated in another EEA member state.
HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common?

Hostile bids are generally a minority feature of the UK public M&A market, although 2016 was notable for an increase in the number of hostile bids with four firm offers being hostile from the outset. Of the 52 firm offer announcements made in 2016, 40 (78%) were recommended by the target board and continued to be recommended as at the year end (two of these firm offers lost their recommendation following the announcement of a higher competing offer for the target, but subsequently regained the recommendation after making an increased offer for the target).

It is also not uncommon for takeovers that start with a hostile approach or bid, ultimately to gain the recommendation of the target board.

To help give greater protections to target companies, the City Code on Takeovers and Mergers (Code) has, since 19 September 2011, required earlier disclosure of the identity of potential bidders, who have been required to clarify their intentions early on in the takeover process. In addition, deal protection measures, provided by targets, such as inducement fees, have been prohibited and greater disclosure has been required regarding the financing of the offer and the intentions of the bidder towards the target's employees with enhanced information rights about the impact of the bid for target employees (or their representatives) and, more recently, target pension scheme trustees. These measures, in particular the requirement that bidders must announce their firm intention to make an offer within 28 days of being identified as a bidder unless the Takeover Panel extends this period (which it would only do at the request of the target board), are designed to help level the playing field between bidder and target.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated, and by whom?

Principal regulations

The principal legislation and rules regulating takeovers and mergers are:

- **Code.** The Code (in its 12th edition, as of 12 September 2016) has statutory force and applies to takeover bids and other merger transactions (however effected) for:
  - companies and Societas Europaeae with their registered offices in the UK, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market in the UK (which includes the main market of the London Stock Exchange) or (following the amendments made to the Code in September 2013 (see Question 29)) on a multilateral trading facility in the UK (such as AIM), or on any stock exchange in the Channel Islands or the Isle of Man; and
  - public companies which do not have securities traded on a regulated market (or a multilateral trading facility in the UK), and certain private companies (primarily those whose equity share capital has previously been publicly held within the last ten years), with their registered offices in the UK, Channel Islands or the Isle of Man and which are considered by the Takeover Panel to have their central place of management and control in one of those jurisdictions.

In certain circumstances the Takeover Panel shares responsibility for the regulation of a transaction with foreign regulators, including a regulator in another EEA member state, including where either a target company's:

- registered office is located in the UK but its securities are admitted to trading on a regulated market in another EEA member state (in which case the Code will apply with respect to employee information and company law matters in connection with the bid); or
- securities are admitted to trading on a regulated market in the UK but its registered office is located in another EEA member state (in which case the Code will apply with respect to the consideration offered and procedural matters, with employee information and company law matters being dealt with by the takeover regulator in the other EEA member state).

The Code includes six General Principles, which are essentially statements of standards of commercial behaviour, the most important of which is that all shareholders of the same class must be treated equally in relation to takeovers. In addition to the General Principles there are a series of 38 detailed rules. The Takeover Panel requires the General Principles and Rules to be interpreted in accordance with their spirit, in order to achieve their underlying purpose.

From time to time, the Takeover Panel also publishes certain Practice Statements with the Code, which provide informal guidance in relation to the Code but do not form part of the Code itself and so are not binding on the Takeover Panel.

- **The Companies Act 2006.** This provides the statutory force to the Code and to the regulatory activities of the Takeover Panel. It also includes:
  - the procedures relating to compulsory acquisitions of minority shareholdings (and the right of a minority to be bought out) (see Question 20);
  - provisions granting a public company the right to investigate who has an interest in its shares;
  - a prohibition as to unlawful financial assistance for the purpose of the acquisition of a public company's shares;
  - the procedures relating to schemes of arrangement; and
  - a very rarely (if at all) used statutory procedure for the merger (and division) of UK public companies.

- **Regulation (EU) 596/2014 on market abuse (Market Abuse Regulation).** This prohibits insider dealing, unlawful disclosure of inside information and market manipulation. It also imposes significant disclosure, reporting, record-keeping and other requirements with respect to inside information and certain other matters.

- **The Financial Services and Markets Act 2000.** This empowers the Financial Conduct Authority (FCA) to require information from issuers and their directors or senior managers in connection with certain disclosure requirements under the Market Abuse Regulation for the purposes of protecting users and the orderly operation of financial markets and exchanges in the UK (see Question 8).

- **The Financial Services Act 2012.** The Act creates an offence of making certain misleading statements or impressions for certain investments.

- **The Criminal Justice Act 1993.** This makes it a criminal offence to engage in certain dealings in securities while in possession of inside information, or to encourage others to deal and/or to pass on inside information (see Question 8).

- **Companies (Cross-Border Mergers) Regulations 2007.** These govern mergers between or involving a UK company and another company incorporated in a different EEA member state.

- **The Listing Rules.** These apply to public companies with securities admitted to the UK Listing Authority's Official List and, in the case of a company with equity shares having a

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premium (as opposed to a standard) listing, require shareholder approval for related party transactions and substantial acquisitions (relating to 25% or more of a company's gross assets, profits, gross capital or market capitalisation).

- The Prospectus Rules. These require (subject to certain exceptions) the issue of a prospectus (or equivalent document) for an offer of transferable securities (for example, bidder shares) to the public in the UK or where transferable securities are to be admitted to trading on a regulated market in the UK.

- The Disclosure Guidance and Transparency Rules (DTRs). These require disclosures of substantial holdings of target company voting shares traded on a regulated market (see Question 8).

- Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation). The Merger Regulation requires that concentrations with an EU dimension be notified and cleared before implementation (see Question 25).

- The Enterprise Act 2002 (as amended by the Enterprise and Regulatory Reform Act 2013). Transactions that are not automatically reviewable under the Merger Regulation may fall within the ambit of the UK Enterprise Act (see Question 29).

**Principal regulators**

The principal regulators relevant to takeovers and mergers are:

- The Takeover Panel. The Takeover Panel issues and administers the Code and is the supervisory authority for takeovers. The members of the Panel are drawn from major financial and business institutions from the City of London and British industry. The day-to-day work of takeover supervision and regulation is carried out by the Panel Executive, which gives rulings on the interpretation, application and effect of the Code, conducts investigations and monitors dealings in companies that are subject to Code regulation. Parties to a takeover can expect to have frequent contact with the Panel Executive whose decisions can be appealed to the Hearings Committee, which principally reviews rulings provided by the Panel Executive. Appeals against rulings of the Hearings Committee are heard by the Takeover Appeal Board (an independent body) (see box, The regulatory authority).

- The FCA. The FCA is the competent authority for listing in the UK. The FCA has responsibility for administering the Listing Rules, Prospectus Rules and Disclosure Guidance and Transparency Rules relevant in the context of a takeover of a company with shares listed on the Main Market.

- The European Commission. Under the Merger Regulation, the European Commission has exclusive jurisdiction over concentrations with an EU dimension (see Question 29).

- The Competition and Markets Authority (CMA). The UK operates a voluntary two-phase merger review procedure (see Question 29). Qualifying mergers may be notified to the CMA. The CMA can refer cases for an in-depth "Phase 2" investigation by an independent group of at least three experts selected from a panel appointed by the Secretary of State (the Inquiry Group) or, in public interest cases, the Secretary of State. It is possible to secure conditional clearance in Phase 1 by offering a remedy to address concerns that would otherwise warrant an in-depth Phase 2 investigation. At the end of its investigation, the Inquiry Group will clear, impose conditions on, or block entirely, a transaction which has been referred to it.

- The Pensions Regulator. The Pensions Regulator has wide-ranging powers to intervene in the running of occupational pension schemes.

**PRE-BID**

**Due diligence**

5. **What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?**

**Recommended bid**

The due diligence exercise in respect of a recommended bid consists of a review of publicly available information and any non-public information the target company is willing to disclose. The process will likely be more limited than for the acquisition of a private company because a greater amount of publicly disclosed information will be available and a target company will be conscious of its obligation under the Code to provide, on request, equal access to such information to any other bona fide competing bidder.

**Hostile bid**

The due diligence exercise on a hostile bid will initially be limited to reviewing publicly available information. However, the Code requires a target company to provide, on request, equal access to information to a competing bidder which may enable a hostile bidder to obtain non-public information that would otherwise be inaccessible to it in the absence of a competing (for example, recommended) bidder being granted access to non-public information.

**Public domain**

Publicly available information regarding listed companies incorporated in the UK includes:

- Information accessible through the target company’s website.
- Items filed with the Registrar of Companies, including the articles of association.
- Analyst reports.
- Prospectuses, shareholder circulars and recent public announcements issued by the target company.

**Secrecy**

6. **Are there any rules on maintaining secrecy until the bid is made?**

Secrecy is a fundamental principle of the Code. Before the announcement of an offer or possible offer, the Code requires that anyone in possession of confidential information, particularly price-sensitive information, regarding an offer or possible offer must treat that information as secret and it must only be disclosed to others where necessary and if the recipient is made aware of the need for secrecy (Rule 2.1, Code). The Panel Executive must be consulted if more than six parties are to be approached about an offer, excluding the bidder, the target company and their respective advisers and employee representatives (Practice Statement 20).

Where leaks result in a target company being the subject of rumour and speculation, or an untoward movement in its share price (for example, 10% or more after an offer is first actively considered or an approach has been made, or 5% in a single day (Note 1(a) to Rule 2.2)), the Takeover Panel may require an announcement which would identify the bidder and commence a 28-day “put up or shut up” period (see Question 12).
Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

Irrevocable commitments to accept an offer once it is made, or to vote in favour of a shareholder resolution relating to a scheme of arrangement, are commonly obtained from key target shareholders and, in a recommended transaction, target directors.

Key shareholders and target directors (in their capacity as shareholders) may give “hard” undertakings (falling away only on a rival bid being declared unconditional or becoming effective). To the extent they can be obtained, institutional shareholders will usually give “soft” undertakings (falling away where a competing offer is made, often at a higher price, or the proposed transaction is no longer recommended by the target board), although institutional shareholders will often only be willing to give non-binding letters of intent.

For reasons of secrecy, the Code requires that negotiations or discussions relating to a possible offer must be restricted to a very limited number of people, which limits a bidder’s ability to obtain irrevocable commitments before announcing an offer. The Panel must also be consulted before individuals or small companies are approached with a view to seeking an irrevocable commitment (Rule 4.3, Code).

The details of any irrevocable commitment or letter of intent must be publicly disclosed (Rule 2.10, Code).

The Panel’s Practice Statement (No. 29) confirms the sort of commitments that can and cannot be given by a target’s directors.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

Dealings in a target company’s shares are not suspended during a bid and acquisitions in the market made by a bidder are counted toward the 50% minimum acceptance threshold for an offer but do not count toward satisfying shareholder voting requirements for approving a scheme of arrangement. However, certain restrictions apply to stakebuilding, and disclosure obligations may arise under the DTRs.

Restrictions

Restrictions on stakebuilding may arise under the Market Abuse Regulation and the Criminal Justice Act provisions on market abuse and insider dealing or trading. The Market Abuse Regulation also contains provisions which (legitimate behaviour that could otherwise be treated as insider dealing in the context of stakebuilding and, separately, in relation to public takeovers or mergers. This is subject to certain conditions, including for disclosure of any inside information.

Dealings in target company securities (including derivatives) by anyone (other than a bidder) in possession of confidential price-sensitive information are prohibited between the time when there is reason to suppose an offer is contemplated and the announcement of an approach (or the termination of discussions). In addition, no one with confidential price-sensitive information may recommend anyone else to deal in target company securities (Rule 4.1, Code).

Before the first closing date, the Code prohibits anyone acquiring an interest in target company voting shares (including irrevocable commitments to accept or approve a bid) that would cause the person (together with their concert parties) to hold 30% or more (but less than 50%) of the voting shares or, if more than 30% (but less than 50%) of the voting shares are already held, to increase that interest (Rule 5.1, Code).

Dealing in target company shares on the basis of special deals that are not extended to all target company shareholders is also prohibited (Rule 16, Code).

In addition to disclosure obligations (see below), dealings in connection with a bid can also have consequences on the terms of the bid (see Question 17 and Question 18).

Following a Phase 2 referral, the Enterprise Act prohibits, except with the consent of the CMA, any party to a completed merger from undertaking further integration or any party to an anticipated merger from acquiring an interest in shares in another. The CMA will rarely grant its consent. The CMA also now has power to restrain closing and order the unwinding of integration steps at any point in the merger review process.

A bidder with a premium listing under the Listing Rules requires shareholder approval to acquire shares for a consideration that is equal to, or greater than, 25% of its gross assets, profits, gross capital or market capitalisation or to engage in a related party transaction.

Confidentiality agreements may impose a standstill obligation on a bidder preventing the acquisition of target company shares.

Disclosure obligations

Regardless of whether a takeover of a listed company is contemplated, a notification must be made to an issuer where a person holds (or is deemed to hold through his direct or indirect holding of shares or other financial instruments) aggregate voting rights in (DTR 5.1):

- An issuer with shares admitted to trading on a regulated market, or a UK public company with shares admitted to a prescribed market (for example, AIM), in excess of 3% and where a subsequent acquisition or disposal causes that person’s holding to increase or decrease through a whole percentage.
- A non-UK issuer whose home member state is the UK and whose shares are admitted to trading on a UK regulated market, where these threshold percentages are 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.

The notification to an issuer must be made as soon as possible but not later than within two trading days for a UK issuer (and four trading days for a non-UK issuer) of learning of the acquisition or disposal. The notification must be disclosed by the issuer to a Regulatory Information Service as soon as possible and in any event within one trading day in the case of an issuer with shares admitted to trading on a regulated market, or three trading days, in the case of a non-UK issuer or an issuer with shares admitted to trading on a prescribed market.

The disclosure regime under the Code applies once an offer period begins (that is, once the possibility of a bid is publicly disclosed). By noon on the tenth business day after an offer period begins, and after the announcement that first identifies a competing paper bidder, a bidder must make an opening position disclosure in respect of its interests (and those of its concert parties) in relevant securities of the target and also of the bidder in respect of an exchange offer (Rule 8.1 and Note 2 to Rule 8, Code). If an announcement of a firm intention to make a bid is made before the deadline, then an opening position disclosure must be made with the announcement.

A bidder must also make a public dealing disclosure if it deals in any relevant securities of any party to the offer (other than a cash bidder) during an offer period either for its own account or for the
account of any non-discretionary investment clients (Rule 8.1, Code). Concert parties of a bidder must make their own dealing disclosures (Note 2 to Rule 8, Code).

The disclosures must include specified information regarding long and short positions, rights to subscribe, dealing arrangements, securities borrowing and lending positions, irrevocable commitments and letters of intent.

Further disclosure obligations may arise under the:

- **Companies Act.** Public companies can investigate the beneficial holdings of their shares resulting in certain holdings having to be disclosed to the company. Recent changes to the Companies Act in connection with the introduction of a new requirement for companies to keep a register of “persons with significant control” over it, effectively extend this power of investigation (and introduce an obligation to investigate) to most private and public companies not subject to the DTR disclosure obligations above.

- **Listing Rules.** A bidder subject to the Listing Rules will be required to announce the details of any transaction where the price paid is 5% or more of the bidder’s gross assets, net profits, market capitalisation or gross capital.

**Agreements in recommended bids**

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

Subject to certain exceptions regarding auction processes and “white knights”, a target company and its concert parties cannot enter into any offer-related arrangement with a bidder, or any of its concert parties, during an offer period or when an offer is reasonably in contemplation (Rule 21.2, Code) (see Question 10). This prohibition is intended to include:

- Implementation agreements (for example, in relation to schemes of arrangement).

- Non-solicitation (or “no shop”) agreements.

- Notification undertakings in respect of the receipt of unsolicited approaches.

- Matching or topping rights granting a bidder a period of time to decide whether to match or top an unsolicited offer.

- Break fees (or any arrangement which has a similar financial or economic effect even if no cash is payable), except in limited circumstances.

However, certain arrangements are permitted by the Code, including:

- Confidentiality agreements (not containing provisions that breach the Code).

- Employee, customer and supplier non-solicitation agreements.

- Commitments to co-operate in satisfying regulatory clearance.

- Irrevocable commitments and letters of intent (in relation to any commitments provided by a target’s directors) (see Question 7).

- Those that place restrictions on the bidder.

Despite the Code’s prohibition on implementation agreements, co-operation, bid or conduct agreements have been a feature of certain transactions involving schemes but they must be very carefully structured so as not to go further than the Panel intended by including impermissible offer-related arrangements.

**Break fees**

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

Break fees, inducement fees and work fees of any size, and other arrangements that have a similar or comparable financial or economic effect (no matter how they are structured) in connection with a bid that are payable by the target company are prohibited except in the following limited circumstances:

- Following a hostile bid, payable to one “white knight” for up to 1% of the value of the white knight’s competing bid.

- Following a formal auction process, payable to the preferred bidder for up to 1% of the value of its bid.

In both cases, a fee is permitted where it is only capable of becoming payable if a bid becomes or is declared wholly unconditional (Notes 1 and 2 to Rule 21.2, Code).

The Panel has also indicated that break fees may be permitted in respect of a target company where it is in financial distress.

A bidder may agree to pay a break fee to a target company. This may be suitable in circumstances in which a bid carries significant risk of rejection by regulatory authorities or where the approval of the bidder’s shareholders is required, provided that any such fee satisfies the requirement that obligations are only imposed on the bidder.

**Committed funding**

11. Is committed funding required before announcing an offer?

An announcement of a firm intention to make an offer should only be made by a bidder after careful consideration and when it has every reason to believe that it can and will continue to be able to implement the offer. This responsibility is also shared with the bidder’s financial advisor (Rule 2.7, Code).

This means that, in practice, where an offer is for cash, or includes an element of cash, any financing arrangements must be executed before release of the firm intention announcement. The announcement must include a confirmation from the bidder’s financial adviser (or another appropriate third party) that the bidder has the resources available to satisfy full acceptance of the offer (Cash Confirmation) (Rule 2.7(d), Code), which must be repeated in the offer document (Rule 24.8, Code). Subject to a due diligence defence, the party making the Cash Confirmation may be required to produce the cash itself if the bidder does not in fact have the resources available to satisfy full acceptance of the offer.

Documents relating to the financing of the offer must be published on a website by no later than 12 noon on the business day following a firm intention announcement (Rule 26.1, Code). The offer document must contain a description of how the offer is to be financed (Rule 24.3(f), Code) and an estimate of the aggregate fees and expenses expected to be incurred by the bidder in relation to financing arrangements (Rule 24.16, Code).

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ANNOUNCING AND MAKING THE OFFER
Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

Requirement to make an announcement
An announcement may be required before a bidder has formed a firm intention to make an offer, including:

- Where there is an acquisition which gives rise to an obligation to make a mandatory offer under Rule 9 (see Question 16).
- Where the target company is the subject of rumour and speculation or there is an untoward movement in its share price.
- When negotiations or discussions relating to a possible offer are about to be extended to include more than a very restricted number of people (that is, six institutions other than the parties to the offer, their immediate advisers and their employee representatives) (Rule 2.2, Code).

The announcement must identify any potential bidder with which the target company is in talks or from which an approach has been received (and not unequivocally rejected). Except following the announcement of a firm intention to make an offer, any subsequent announcement by the target company referring to the existence of a new potential bidder must identify that bidder.

Once a bidder has formed a firm intention to make an offer, it (or its advisers) must notify the target board (or its advisers) (Rule 1, Code). Having made that notification, an announcement must be made by a bidder irrespective of the attitude of the target board to the offer (Rule 2.2(a), Code).

A bidder must announce a firm intention to make an offer only after careful consideration and when it has every reason to believe that it will be able to implement the offer. Following such an announcement, the bidder must proceed to make the offer unless it is permitted to invoke a pre-condition to the making of the offer (Rule 2.7, Code).

An announcement of a firm intention to make an offer must include, among other things:

- The terms of the offer.
- The identity of the bidder.
- All conditions or pre-conditions of the offer.
- A cash confirmation.

The Panel should be consulted if there is any doubt as to whether an announcement is required. Additionally, a potential bidder must not attempt to prevent the target company’s board from making announcements.

Responsibility for making an announcement
If, before the bidder has approached the target board, the target company is the subject of rumour and speculation, or there is an untoward movement in its share price, requiring an announcement, the bidder has responsibility for making any announcement (Rule 2.3(a), Code). If such circumstances arise following an approach to the target board by the bidder, the target company has responsibility for making any announcement.

The bidder is also responsible for making an announcement when obliged to make an offer under Rule 9 (see Question 16).

Offer timetable
To prevent a bidder laying siege to a target company, the Code imposes a strict timetable for the bidder and target company to make disclosures and satisfy conditions. The following are key dates in a typical timetable, where complications do not arise,

- Day minus 56. Date on which the potential bidder is identified and offer period commences (Rule 2.4, Code).
- Day minus 28: put up or shut up deadline. Latest date following its identification for a bidder to announce either:
  - its firm intention to make an offer (subject to any request for extension from the target company);
  - its intention not to make a bid (in which case, except in very limited circumstances, for example, with the agreement of the target or if another bidder makes an offer, it will be precluded from announcing another offer for the target for the next six months) (Rule 2.6, Code).
- Day 0 (no later than 28 days after the firm intention announcement). Offer document sent to the target company’s shareholders, made available to employee representatives of the bidder and target company, to trustees of the target’s pension schemes and loaded onto a website and publication announced (Rule 24.1, Code).
- Day 14 (H). Latest date for publication of defence documents (Rule 25.1, Code).
- Day 21. Earliest date on which the offer may be declared unconditional as to acceptances (which may be extended by the bidder) (Rule 31.1, Code).
- First business day after first closing date (and all subsequent closing dates) by 8.00am. Announcement of acceptance levels and of any extension to the offer (including the next closing date) (Rule 17.1 and Rule 31.2, Code).
- Day 39 (H). Last date for release of material new information by the target company (Rule 31.9, Code).
- Day 42 (assuming first closing date is Day 21) (H). First date on which shareholders can withdraw acceptances if the offer has not become or been declared unconditional as to acceptances (Rule 34, Code).
- Day 46 (H). Last date for publication of an improved offer or information which may increase the value of an exchange offer. This date is extended if Day 39 is extended (Rule 32.1c), Code).
- Day 53. Last date for potential competing bidder to clarify its position (Rule 2.6(d) and (e), Code).
- Day 60. The last date for fulfilment of the acceptance condition. This date is extended if Day 39 is extended (Rule 31.6, Code).
- Day 74. The earliest date on which the offer can close (assuming the offer became unconditional as to acceptances on Day 60) (Rule 31.4, Code).
- Day 81. The last date by which all other conditions to the offer must be satisfied (assuming the offer became unconditional as to acceptances on Day 60) (Rule 31.7, Code).
- Day 95. Consideration for the offer must be posted by this date (assuming the offer becomes unconditional in all respects on Day 81) (Rule 31.8, Code).
- Three months from the date following the last day on which the offer can be accepted. This is the last date for the bidder to send compulsory acquisition notices to minority shareholders to activate the squeeze-out procedure (see Question 20). This is subject to a long-stop date of six months from the date of the offer if this is shorter than the three-month period in the case of offers where the target company shares are not admitted to trading on a regulated market (such as the main market of the London Stock Exchange).

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Competing offers

Where competing possible offers are announced they will each have “put up or shut up” deadlines to satisfy and the target company may seek deadline extensions for different potential bidders or may request an extension in relation to one potential bidder but not others (Note 1 to Rule 2.6, Codé).

A potential competing offeror’s “put up or shut up” deadline will cease to apply if another offeror announces a firm intention to make an offer, in which case the potential competing offeror will become subject to a new “put up or shut up” deadline (5.00 pm on the 53rd day following the publication of the firm offeror’s initial offer document) (Rule 2.6(b), (d) and (e), Codé).

Where a competing bidder emerges after a firm intention to make an offer has been announced, the timetable is normally altered so that both bidders are bound by the timetable established by the publication of the new bidder’s offer document (Note 4 to Rule 31.6, Codé). If a competitive situation continues to exist in the later stages of the offer period, the Takeover Panel normally initiates an auction procedure (pro-forma terms for which are now set out in Appendix 8 to the Code) and may consider any alternative procedure agreed between competing bidders and the target company. It may also impose a final time limit for announcing revisions to competing offers (Rule 30.5, Codé).

Schemes of arrangement

Appendix 7 to the Code contains provisions regarding the expected timetable for a scheme of arrangement, which must be set out in the scheme circular. A target company must implement the scheme of arrangement in accordance with the published expected timetable, subject to limited exceptions (including a change of recommendation by the board of the target company).

Offer conditions

13. **What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?**

The minimum acceptance condition for a contractual offer is a simple majority of the voting rights of the target company (in that the Code does not permit an acceptance condition of 50% or less) (Rule 10, Codé. This is also the maximum acceptance condition for mandatory offers (when taken together with shares acquired or agreed to be acquired before or during an offer) (Rule 9.3, Codé). However, for voluntary offers, the acceptance condition is commonly set at 90%, subject to waiver, to meet the requirement for the statutory minority squeeze-out procedure (see Question 20) and is often waived down to the minimum acceptance condition to avoid the offer failing through non-satisfaction of the acceptance condition by Day 60.

For a scheme of arrangement to be declared effective the approval of a majority in number, representing 75% in value of each class, of shareholders attending and voting at the relevant shareholder meeting is required, together with court sanction. However, a bidder commonly retains the right to change from a scheme of arrangement to a contractual offer to take advantage of the minimum acceptance condition in the event that a competing offer arises.

A mandatory condition of all bids is that they lapse if there is a referral for an in-depth Phase 2 investigation by the CMA (including following a referral back) to the UK from the European Commission under Article 9(1) of the Merger Regulation or the European Commission for a Phase II investigation under the Merger Regulation.

A bid must not normally be subject to conditions or pre-conditions which depend solely on the subjective judgements of the bidder or target company or the fulfilment of which is in their control.

However, the Takeover Panel may be prepared to accept an element of subjectivity in certain circumstances where it is not practicable to specify all the facts on which satisfaction of a particular condition or pre-condition may depend (Rule 13, Codé).

Common conditions include:

- Any approval of shareholders that may be required.
- The listing of any shares that are offered by the bidder.
- All regulatory filings and notifications being made in relevant jurisdictions.
- Various conditions relating to the condition of the target company’s business, including:
  - that all authorisations for undertaking the business of the target company are in full force and effect;
  - the absence of any material litigation;
  - the absence of any material adverse change in the target company’s financial or trading position; and
  - the absence of any material inaccuracy being discovered in the target company’s accounts or public announcements.

The Code requires that a bidder use all reasonable efforts to ensure the satisfaction of any conditions or pre-conditions to which the bid is subject. Except with respect to the acceptance condition, the Takeover Panel will not permit a bidder to invoke any condition or pre-condition so as to cause the bid not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the bidder in the context of the bid (Rule 13.5, Codé). In practice, this is an extremely high hurdle, analogous to something that would justify frustration of a legal contract.

Bidders commonly reserve the right to waive certain of the conditions so that a bid may be declared wholly unconditional.

Bid documents

14. **What documents do the target’s shareholders receive on a recommended and hostile bid?**

**Recommended bid**

In addition to the announcement of a firm intention to bid, if a recommended bid is to be implemented by contractual offer, an offer document must be sent to target company shareholders. This is a joint document issued by the bidder and the target company and includes a recommendation from the target company’s board to accept the offer, with reasons for their recommendation.

The Code specifies the content to be included in the offer document, including:

- An explanation of the long-term commercial justification for the offer.
- The bidder’s intentions with regard to the future business of the target company and its strategic plans (including their likely impact on employment and location of the target company’s business).
- Its intentions with regard to the continued employment of the employees, any material change proposed to the employment conditions and redeployment of fixed assets.
- If the bidder has no intention to make any changes in relation to these matters or its plans have repercussions on employment at the target or the location of the target’s places of business, the bidder must make a statement to this effect.
- Certain financial information (Rule 24, Codé).
The Code effectively requires statements about a bidder’s intentions on these matters to remain true for at least 12 months or such other period of time as the bidder may specify (Rule 19.6(b), Code) and requires the Panel to be consulted if this is not to be the case.

In addition, a bidder prepares a form of acceptance to be used to accept the offer (and/or instructions on how the offer may be accepted electronically) and, if securities are to be offered to the target company shareholders or admitted to trading on a regulated market, a prospectus (or equivalent document).

If the recommended bid is to be implemented by scheme of arrangement, the target company will prepare a scheme document (setting out details of the bid that would otherwise appear in an offer document, a notice of the necessary court meeting(s) and notice of the general meeting of the target company shareholders) and a form of proxy for use at such meeting.

Hostile bid

On a hostile bid (which will invariably be implemented by contractual offer), the bidder prepares the announcement regarding a firm intention to make an offer and the offer document without input from the target company. The target company publishes a press announcement in response to the Rule 2.7 announcement (see Question 12) and, within 14 days of the publication of the offer document, must send a defence document to target company shareholders (and other persons with information rights) setting out the reasons why it is not recommending the bid, its view on the effect of implementation of the bid on the target company shareholders and the strategic plan for the target company (Rule 25.2(a), Code).

In most cases, there will be a series of revised offer documents and defence documents provided to target company shareholders.

Employee consultation

15. Are there any requirements for a target’s board to inform or consult its employees about the offer?

Subject to the obligation to maintain secrecy, the Code permits consultation with employees before and during a bid. A bidder or target company may pass information on a confidential basis to employee representatives or employees in their capacity as such (Note 3 to Rule 20.1, Code). The Takeover Panel has indicated that it will not normally count employee representatives of the target company toward the six parties that may be approached regarding an offer, or possible offer, before a bidder has been publicly identified.

Copies of the announcement commencing an offer period and the firm intention to make an offer announcement (or a circular summarising the terms and conditions of the offer) must be sent to a target company’s employee representatives (or, where there are none, to the employees themselves) and they must be told that an opinion on the effects of the bid on employment can be appended to the target company board’s circular (provided that such opinion is obtained in sufficient time) (Rule 2.11(d), Code). If such an opinion is not received in sufficient time before publication of a target company circular, the target company must promptly publish the employee representatives’ opinion on a website and announce the publication through a Regulatory Information Service (Rules 25.9 and 32.6, Code).

The offer document, and any defence document, must also be made readily available to the target company’s employee representatives (or employees as the case may be) at the same time as it is sent to target company shareholders (Rules 24.1 and 25.1, Code).

On 20 May 2013, the Code was amended to give the target’s pension scheme trustees similar information rights as those in relation to the target’s employee representatives. Specifically, among other things, these new information rights:

- Apply on a group-wide basis, without being limited to UK pension schemes, in respect of funded pension schemes sponsored by a target company or its subsidiary, providing any pension benefits on a defined benefit basis with trustees (or managers in the case of non-UK pension schemes).
- Apply whether or not the target company’s pension scheme may be regarded, on certain measurements, as being material.
- Require a bidder to state its intentions with regard to employer contributions into the pension scheme (including funding any deficit), the accrual of benefits for existing pension scheme members and the admission of new members to the scheme (Rule 24.2(a)(iv), Code).
- Require a bidder and a target company to make available to the trustees of a target company’s pension scheme all of the documents that are required to be made available to the target company’s employee representatives, including the firm intention announcement and offer document (Rules 24.1 and 25.1, Code).
- Permit pension trustees to provide the target board with an opinion on the effects of the offer on the pension scheme which, if received in good time, must be appended to the circular relating to the offer or else be published on a website, with details announced through a regulatory information service.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

A mandatory cash offer, or offer with a cash alternative, must be made where a person, together with its concert parties, either (Rule 9, Code):

- Acquires an interest in voting shares (including options, derivatives and agreements to purchase) resulting in an aggregate holding of 30% or more of the target company’s voting rights.
- Increases the aggregate percentage interest it has in target company voting shares when it is already interested in not less than 30%, but not more than 50%, of the target company’s voting rights.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

The Code does not generally impose restrictions on the type of consideration that may be offered in connection with a voluntary offer, but it does require that cash or securities are offered in certain circumstances (see below). It is therefore generally open to a bidder to offer cash, shares, loan notes or other securities or a combination of different types of consideration. Where a mandatory offer must be made, a bidder must offer cash, or a cash alternative, (Rule 9.5, Code) and comply with the requirements to provide for a minimum level of consideration (see Question 18).

However, where a bidder (or its concert parties) acquires for cash any interests in a target company during the offer period, and within the 12 months preceding the offer period, carrying 10% or more of the voting rights of a particular class of target company shares, a cash offer must be made, or cash alternative provided (Rule 71.1, Code). Where interests in shares carrying 10% or more of the voting rights of a class of the target company have been acquired in exchange for securities during the offer period and in

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the preceding three months, a securities offer is normally required (Rule 11.2, Code).

Target company shareholders may prefer loan notes or shares in the bidder as an alternative to cash consideration so that liability to UK capital gains tax may be deferred. Loan notes are generally unlisted, unsecured securities with a low rate of interest which are offered as a pound-for-pound alternative to cash consideration and are usually redeemable at the holder’s option at six-month intervals over approximately five years thereby permitting target company shareholders to utilise their annual tax allowances. The bidder’s obligations in respect of the loan notes may be supported by a bank guarantee. So as to avoid the need to produce a prospectus, loan notes are typically structured as non-transferable securities.

As in the case of loan notes, target company shareholders may be able to defer liability to UK capital gains tax by receiving consideration shares. Share consideration is a common feature of mergers of equals where no premium for control is offered and may also be attractive where it is perceived that there is a substantial prospect of share value appreciation as a result of the bid.

If a combination of cash and securities is offered, a bidder may fix the relative proportions of each that the target shareholders receive, or provide a mix and match facility where target company shareholders can make elections regarding the proportions of cash or securities they would prefer to receive, subject to limitations on the aggregate amount of cash and securities that are available in connection with the offer.

18. Are there any regulations that provide for a minimum level of consideration?

Except with the consent of the Takeover Panel, the offer price must not be on less favourable terms than the price paid by the bidder, or its concert parties, for an interest in target company shares in the three months before the offer period, or during the period between the start of the offer period and the announcement of a firm intention to make an offer. The Takeover Panel may also consider acquisitions made more than three months before the offer period if doing so would be necessary to ensure that all shareholders are treated equivalently (Rule 6.1, Code). The value of an offer must be increased to the highest price paid for any acquisition of interests in shares by a bidder or its concert parties above the offer price following the announcement of a firm intention to bid (Rule 6.2, Code).

In the case of mandatory bids, a bidder must make a cash offer, or provide a cash alternative, at not less than the highest price paid by the bidder, or any of its concert parties, during the 12 months before the announcement of the offer (Rule 9.5(a), Code) and is also required to increase its offer to not less than the highest price paid for an interest in shares acquired after the announcement of a mandatory offer and before the offer closes for acceptances (Rule 9.5(b), Code).

Similarly, where a cash offer, or a cash alternative, is required (see Question 17), the offer must be at not less than the highest price paid by the bidder or any of its concert parties for any interest in shares of a relevant class during the offer period and during the 12 months before the offer period (Rule 11.1, Code).

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

The Code does not impose restrictions on the form of consideration that a foreign bidder can offer to shareholders. However, while there is no obligation that consideration shares be listed in the UK, where consideration shares are offered, many institutional shareholders will be subject to restrictions regarding the types of shares they may hold. Therefore, if the shares are not listed in the UK, such institutional shareholders will not be as receptive to the bid and could be forced to dispose of consideration shares on completion of the bid. In addition, where consideration shares are offered a bidder will likely have to comply with the UK public offer rules, including producing a prospectus (or equivalent document).

POST-BID

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

A bidder has the right to compulsorily purchase the shares of remaining minority shareholders once, by virtue of acceptances of a contractual offer, it has acquired or unconditionally contracted to acquire both:

- Not less than 90% of the voting rights of the offer relates.

- Not less than 90% of the voting rights carried by those shares.

In practice, the same shares will fall within each limb of the test. Where a contractual offer relates to more than one class of share capital, the 90% test is applied, and the right to acquire is exercisable for each class of shares (section 979, Companies Act).

For the compulsory purchase right to be available:

- There must have been an offer to purchase the entire share capital, or all the shares in the relevant class, other than those shares already held by the bidder at the date of the offer (section 974(2), Companies Act).

- All shareholders of the relevant class must be offered the same terms, subject to certain exceptions for overseas shareholders to accommodate their local securities laws (section 974(3), Companies Act).

The latter requirement is likely only to be a cause for consideration if the Takeover Panel has permitted a bidder to enter into a special deal with a shareholder that would result in the offer not having been made on the same terms in respect of all shares in the relevant class.

Shares held (or contracted to be purchased) by a bidder and its associates at the time of the offer (that is, the date of mailing the offer document) are excluded from the calculation (sections 974(2) and 975(4), Companies Act). Shares purchased by a bidder or its associates once the offer may be accepted at a price equal to, or below, the offer price, will be counted toward the 90% calculation (section 979(8) to (10), Companies Act). For these purposes, an associate includes nominees, holding companies and subsidiaries in which the bidder has a substantial interest.

Shares in respect of which a bidder has received an irrevocable commitment (for no or negligible consideration) from a target company shareholder before the time when the offer may be accepted are not considered to be shares held by a bidder and so are counted toward satisfying the thresholds (section 975(2), Companies Act).

To exercise the squeeze-out right, a bidder must send compulsory acquisition notices to the minority shareholders before the expiry of either:

- Three months from the last day on which the offer can be accepted.

- If earlier, six months from the date of the offer where the target company shares are not admitted to trading on a regulated
market (such as the main market of the London Stock Exchange) (section 980(2), Companies Act).

The compulsory acquisition regime is not relevant in the case of a scheme of arrangement which, if successful, ensures that there will not be any minority shareholders.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

For 12 months after the date on which an offer is withdrawn or lapses, a bidder and its concert parties cannot, among other things, launch a new offer or make a statement raising or confirming the possibility that an offer may be made. However, the Takeover Panel may consent to such actions where:

- More than three months have elapsed since the original offer expired or was withdrawn and a new offer is recommended by the target company board.

- A third party has made an offer.

- Clearance has been obtained from a regulatory authority which had caused the original offer to lapse (Rule 35 and Notes to Rules 35.1 and 35.2, Codé).

Where an offer is declared unconditional in all respects (and so the bidder, together with any concert parties, holds more than 50% of the target company's voting shares) but the bidder fails to acquire all of the outstanding shares, except with the consent of the Takeover Panel, for a period of six months from closing the original offer a bidder, and its concert parties, cannot acquire further shares on terms that are more favourable than those that were available under the bidder's original offer or make any special deal with favourable conditions with any of the minority shareholders (Rule 35.3, Codé).

Where an offer lapses or is withdrawn, a bidder is generally not restricted from acquiring shares in the target company except where the offer had been one of two or more competing offers. In such circumstances, neither a bidder nor its concert parties, can acquire any interest in target company shares on more favourable terms than those that were available under the bidder's original offer until the competing offers have either been declared unconditional in all respects or have lapsed or been withdrawn (Rule 35.4, Codé).

In November 2014, the Takeover Panel issued a new Practice Statement (No 28). This sets out the practice of allowing, in certain limited circumstances, bidders that are restricted from acquiring the target's shares or taking other actions that might indicate that another bid for the target is proposed, to make a “single confidential approach” to the target's board, to see if it would be prepared to discuss and recommend a new bid. However, the target company has full control of any such discussions and can either:

- Bring discussions to an end and prevent the bidder from making another approach.

- Initiate further contact with the bidder.

The Practice Statement and the related restrictions also apply to bidders that have announced that they will not be making a bid by the Day minus 28 “put or shut up deadline” (see Question 12, Offer timetable).

De-listing

22. What action is required to de-list a company?

Normally, an issuer that proposes to cancel its listing on the premium segment of the main market of the London Stock Exchange must:

- Send a circular (approved by the FCA) to the holders of the securities specifying the anticipated date of cancellation, which must be not less than 20 business days following the passing of the relevant shareholder resolution mentioned below.

- Notify a Regulatory Information Service, at the same time as the circular is despatched to the relevant shareholders, of the intended cancellation and of the notice period and meeting.

- Obtain the prior approval of not less than 75% of the shareholders who vote in person or, where permitted, by proxy at a general meeting (and a majority of votes attaching to shares held by independent, that is, non-controlling with less than 30%, shareholders).

- Notify a Regulatory Information Service once the relevant shareholder resolution has been approved.

However, where a company is the subject of a takeover offer (and the bidder is interested in 50% or less of the voting rights of the target before the announcement of a firm intention to bid), the relevant offer document (or a subsequent circular to target shareholders) can provide that the 20 business day notice period for de-listing the target shares will begin on obtaining acceptances in respect of 75% of voting rights (or on the first date of issue of compulsory acquisition notices), in which case there is no requirement to obtain any approval of the de-listing by the target shareholders.

Standard listed companies do not need to obtain shareholder consent to de-listing but must notify a Regulatory Information Service of the intended cancellation not less than 20 business days before the proposed de-list (except where required by the terms of the relevant securities or the company's constitution) date.

AIM listed companies must notify their intention to cancel and separately inform the London Stock Exchange of the preferred cancellation date at least 20 business days before this date. Unless the London Stock Exchange agrees otherwise, cancellation of a listing is conditional on the approval consent of not less than 75% of the holders of the securities voting in person or, where permitted, by proxy at a general meeting.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre-and post-bid)?

The Code requires that the target board act in the interests of the target as a whole and not deny shareholders the opportunity to decide on the merits of a bid (General Principle 3, Codé). Therefore, during the course of an offer, or once a target company board has reason to believe that a bona fide offer is imminent, the Code prohibits the target company board (without the approval of target company shareholders) from:

- Taking any action that may frustrate an offer.

- Issuing shares.

- Granting options (other than in the ordinary course under existing option schemes).

- Creating convertible securities.

- Selling or purchasing material assets.
• Entering into contracts other than in the ordinary course of business.

The Takeover Panel must be consulted if there is any doubt as to whether any action could be prohibited by the Code or where the proposed action is pursuant to a pre-existing obligation, has already commenced or is in the ordinary course of business (Rule 21.1, Code).

Fiduciary and statutory duties requiring that target company directors act in a manner expected to promote the success of the company may also impose restrictions on the actions that can be taken to defend a hostile bid.

Despite the restrictions imposed by the Code and subject to the statutory duty to act in a manner expected to promote the success of the company, in response to an unsolicited offer a target company board can:

• Reject the offer.
• Publish a defence document.
• Lobby for a reference to the competition authorities.
• Concede that the target company should be sold and seek a white knight.

In addition, the Code contemplates that in giving its opinion the target board is not required to consider the offer price as the determining factor and is not precluded by the Code from taking into account any other factors which it considers relevant (subject to its fiduciary duties) (Note 1 to Rule 25.2, Code).

So that a target’s response to any approach can be formulated quickly, a company will often:

• Maintain a defence manual containing:
  - key information about the target company’s substantial institutional shareholders;
  - contact information for key advisers;
  - draft announcements;
  - the principal strategic arguments that would be included in a defence document; and
  - a list of potential white knights.

• Instruct the target company’s registrars to monitor substantial movements in shareholdings and make enquiries to determine the underlying ownership through a notice under section 793 of the Companies Act.

• Maintain good relations with substantial institutional shareholders, leading financial analysts and the financial press so that the target company’s strategy can be effectively communicated to the market.

• Ensure that financial information is up to date with an understanding of:
  - how quickly management accounts, budgets and projections can be produced and whether profits forecasts or asset valuation could be prepared and reported on within the timeframes permitted by the Code;
  - comparable valuations and relative performance of competitors;
  - valuations of the target company’s divisions in case proposals are made to breakup the company.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

On the sale of shares in a UK incorporated company, UK stamp duty (if there is a written stock transfer form effecting the sale) or UK stamp duty reserve tax will generally arise at the rate of 0.5% of the consideration for the transfer. These transfer charges can no longer be mitigated on a public takeover carried out through a target company scheme of arrangement coupled with a capital reduction (and the issue of new shares to the bidder) (see Question 2). The Finance Act 2014 abolished stamp duty on shares quoted on certain growth markets recognised as such by HMRC, including the:

• London Stock Exchange’s AIM.
• High Growth Segment of its Main Market.
• NEX Exchange.
• Irish Stock Exchange’s Enterprise Securities Market.

Outside the context of recognised growth markets, the UK stamp duty and UK stamp duty reserve tax position does not generally depend on whether the shares are listed.

The 0.5% stamp duty reserve tax charge has not generally applied when interests in shares are transferred in the form of depositary receipts (such as Global Depositary Receipts (GDRs) or American Depositary Receipts (ADRs)) or in a clearance service. The 1.5% “season ticket” charge, imposed on the introduction of shares into a depositary receipt system or clearance service, has been held to be incompatible with EU law in many circumstances. As a result, HMRC have taken the position that they would not seek to collect the 1.5% charge on new issues of UK company shares into such a system or service (while still generally applying it to transfers of existing shares into such a system or service). However, given that the 1.5% charge remains on the UK statute books, HMRC may seek to apply it again following Brexit to new shares issued in this way, unless equivalents to the relevant EU rules are enacted in UK law (as is currently proposed) and subsequently preserved.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Regulated industries

The Merger Regulation applies to all industries. In addition, the UK can intervene to take appropriate measures to protect legitimate interests (such as public security, media plurality and prudential supervision of financial institutions) in parallel with the European Commission’s review of the competition aspects of a transaction. There are specific statutory regimes in place and further regulatory consents may be required for certain industries such as defence, energy, rail, financial services and broadcasting.

EU competition law

There is a mandatory notification and clearance requirement for concentrations with an EU dimension. The jurisdictional thresholds for notification are either:

• Where both of the following conditions are satisfied:
  - combined worldwide turnover of the parties exceeds EUR5 billion; and

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- EU-wide turnover of at least two of the parties exceeds EUR250 million.
- Or all of the following conditions apply:
  - combined worldwide turnover exceeds EUR2.5 billion;
  - EU-wide turnover of at least two of the parties exceeds EUR100 million each;
  - combined turnover in each of at least three member states exceeds EUR100 million; and
  - turnover in each of those three member states by each of at least two of the parties exceeds EUR25 million.

These thresholds apply unless, in either case, each of the parties achieves two-thirds of its EU turnover in one and the same member state.

The substantive test for clearance is whether the concentration will significantly impede effective competition in the EU or a substantial part of it, in particular by creating or strengthening a dominant position.

**UK competition law**

The UK authorities have jurisdiction where either one of the following tests is satisfied:

- The UK turnover of the target exceeds GBE70 million.
- The merger creates or enhances a 25% share of supply (or purchases) of any goods or services in the UK (or in a substantial part of it).

Notification is voluntary; a merger can be completed without making any notification to, or obtaining clearance from, the CMA. However, the CMA has a market intelligence function whose role is to identify potentially problematic transactions. The CMA has the power to refer a transaction for an in-depth investigation up to four months after the transaction becomes unconditional and is made public.

The CMA has a duty to refer mergers (anticipated or completed) for an in-depth Phase 2 investigation by an Inquiry Group (see Question 4, Principal regulators) where it believes that it is, or may be, the case that a relevant merger situation has resulted or may be expected to result in a substantial lessening of competition in a UK market or markets.

On such a reference, if the Inquiry Group finds the merger has resulted or may be expected to result in a substantial lessening of competition, it must determine how to remedy, mitigate or prevent the adverse effects.

**Other merger control jurisdictions**

A merger may trigger notification obligations in jurisdictions other than the UK or the EU. The laws of any such jurisdiction should be checked on a case by case basis for suspensory effect and timing implications.

**Effect on timetable**

A takeover may be completed while it is being considered by the CMA. However, the bid must lapse if there is a Phase 2 reference (including following a referral back to the UK from the European Commission under Article 9(1) of the Merger Regulation) or if the European Commission launches a Phase II investigation before either the later of the:

- First closing date.
- Date when the offer becomes unconditional as to acceptances.

The Takeover Panel has discretion to extend the bid timetable (usually at Day 39) if there is significant regulatory delay in a decision (see Question 12). The CMA recognises that parties may be subject to other regulatory processes in addition to UK merger control. Parties should therefore inform the CMA if the merger is subject to such processes and of any associated timing constraints. The CMA takes into account such constraints when conducting its review.

**26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?**

Other than in connection with certain regulated industries (see Question 29), overseas investors are not restricted from investing in UK companies. However, overseas investors may be treated differently in certain circumstances. For example, the bidder's ability to send documents and offer consideration to overseas shareholders may be limited due to local laws and, accordingly, overseas shareholders' ability to accept the offer may also be restricted.

The UK Industry Act 1975 does, however, grant the Secretary of State the power to prohibit a change of control of an important manufacturing undertaking to an overseas person that would be contrary to the interests of the UK, although the power has never been used.

**27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?**

There are no restrictions on the repatriation of profits or exchange control rules for foreign companies.

**28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?**

Bidders, target companies and persons acting in concert with them must make public dealing disclosures in respect of all dealings in any relevant securities on their own account or the account of discretionary investment clients of any party to the offer (other than a cash bidder) during an offer period. This disclosure must be made no later than 12 noon on the business day following the date of the dealing.

Dealing disclosures are also required during an offer period where a person is, or becomes, interested (directly or indirectly) in 1% or more of any class of relevant securities of any party to the offer (other than a cash bidder). This disclosure must be made no later than 3.30pm on the business day following the date of the dealing.

Various restrictions also apply to dealing with respect to insider dealing, market abuse and under the Code (see Question 8).

In addition, opening position disclosures must be made by bidders, target companies, persons acting in concert with them and persons interested in 1% or more of any class of relevant securities.

**REFORM**

**29. Are there any proposals for the reform of takeover regulation in your jurisdiction?**

On 12 July 2017, the Panel issued a consultation paper (PCP 2017/1) on how the Code should apply in certain cases to asset sales as well as covering other changes. The consultation closed on 22 September 2017 and a response statement is now awaited.

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The proposed changes to the Code would stop bidders circumventing various prohibitions under the Code from making offers (for example, Rule 2.8 (no bid statements), Rule 12.2 (competition reference periods) and Rule 35.1 (delay of 12 months following a lapsed or withdrawn offer)) by instead purchasing “significant assets” (50% of target’s assets). It has also been proposed that:

- There should be changes to rules in relation to the treatment of asset sales (not just “significant asset” sales) and other transactions as “frustrating” actions under Rule 21.1.
- There should be changes to rules to ensure that the “quantified financial benefits statement” requirements and price restrictions applicable to bidders acquiring interests in target shares that apply to share bids will also apply where the target proposes a sale of all, or substantially all, of its assets in competition with an offer for its shares.

Finally, in relation to PCP 17/1, there are proposals that:

- Bidder announcements made under Rule 2.8 (no bid announcements) should specify the circumstances in which the announcement can be withdrawn (currently, note 2 to Rule 2.8 sets out the circumstances when the restrictions preventing the bidder going back on its “no bid” announcement will no longer apply).
- Social media might be used for information about a party to an offer (but not the offer itself) and could be used for videos approved (under Rule 20.3) by the Panel.
- The Panel’s existing practice of also applying the discretionary dispensation for making a mandatory Rule 9 bid (under note 5 to Rule 9) where the holders of 50% or more of the target’s voting rights state in writing they will not accept a mandatory offer (or such shares are already held by one other person), in the case of a new issue of securities, should be written into the Code.

On 19 September 2017, the Panel published another consultation (PCP 2017/2), which closed for comment on 31 October 2017. This covers three areas:

- The first is to expand on the matters in relation to which the offeror should make a statement of its future intentions. These matters currently include the target’s business and employees and must be commented on in the offer document. However, it is now proposed that a statement as to the offeror’s future intentions with respect to these matters (and certain additional matters) should also be disclosed upfront in its firm offer announcement. The additional matters in relation to which the bidder should be required to make a statement of its future intentions would include:
  - the target’s research and development functions;
  - any change to the balance of the skills and functions of the target’s employees and management after the bid; and
  - any change to the location of the target’s headquarters and/or to the headquarters’ functions.
- If the bidder has no plans with respect to any of these matters, this will have to be stated.
- The second significant proposed change is that, except with the target’s consent, bidders will not be allowed to post their offer documents until 14 days after their firm intention announcement. This is to allow the target to have more time (14 + 14 days instead of just 14 days under Rule 25.1(a)) to prepare its defence to the bid and will also increase the period under Rule 5.1 when the bidder is restricted from acquiring interests in the target’s voting rights which would take it to or above 30% (except from one shareholder). This latter period will now be a minimum period of 35 days from the date of the Rule 2.7 announcement.
- The last proposed change is to codify the existing discretionary practice of the Panel to require bidders to make a public disclosure of their compliance with any post-offer undertakings and also to require bidders to make a public disclosure as to whether any action covered in their post-offer intention statement has or has not been taken.

THE REGULATORY AUTHORITY

The Takeover Panel

W www.thetakeoverpanel.org.uk

Main area of responsibility. The Takeover Panel issues and administers the Code, and supervises and regulates takeovers and other matters to which the Code applies with the objective of ensuring fair treatment for all shareholders in takeover bids.
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Professional qualifications. England and Wales, Solicitor, 1988
Areas of practice. Public and private M&A; joint ventures; restructurings; privatisations; equity capital markets; general corporate advisory transactions.

Recent transactions
- Advising Liberty Global on its acquisition of Cable & Wireless Communications plc at an enterprise value of US$8.2 billion.
- Advising Fairfax Financial Holdings on its GBE1.2 billion offer for Brit.
- Advising Qatar Investment Authority on its GBE2.6 billion offer for Songbird Estates and the follow-on GBE4.1 billion offer for Canary Wharf Group.

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Professional qualifications. England and Wales, Solicitor, 2003
Areas of practice. Public and private M&A; joint ventures; restructurings; equity capital markets transactions.

Recent transactions
- Advising Fairfax Financial Holdings on its GBE1.2 billion acquisition of Brit.
- Advising Liberty Global on its acquisition of Virgin Media in a stock and cash mergertransaction valued at about US$23.3 billion.
- Advising Liberty Global plc on its acquisition of Cable & Wireless Communications plc at an enterprise value of US$8.2 billion.

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Professional qualifications. England and Wales, Solicitor, 1980
Areas of practice. Public and private M&A; joint ventures; cross-border mergers; equity capital markets; corporate knowhow management.

Recent transactions
- Delek Group in connection with its offer to purchase the entire issued share capital of Ithaca Energy (other than shares already owned by Delek Group) for Can$1.95 per share, or about Can$681 million.
- Liberty Global on its acquisition of Cable & Wireless Communications at an enterprise value of US$8.2 billion.
- Advising Singapore Airlines on the sale of its 49% stake in Virgin Atlantic to Delta Airlines.

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