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PUBLIC MERGERS AND ACQUISITIONS

SHEARMAN & STERLING

Public Mergers and Acquisitions in the United Kingdom: Overview

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M&A ACTIVITY

1. What is the current status of the M&A market in your jurisdiction?

Looking at the last full year of recorded activity in the UK, 2021 saw a noticeably increased level of public M&A deal activity compared to 2020, with 55 firm offers for UK targets (traded on the London Stock Exchange's Main Market and AIM) announced in 2021, compared to 40 in 2020. This increase reflected, in part, the recovery of economic activity and optimism as the impact on deal-making caused by the novel coronavirus disease (COVID-19) pandemic started to lessen.

There was one more firm offer for targets traded on the Main Market (28 offers) than for those traded on AIM (27 offers) in 2021. In 2020, this difference was more marked with 23 firm offers for targets traded on Main Market compared to 17 firm offers for targets traded on AIM.

The most active sectors for these offers in 2021 were:

- Real estate, financial, and computer and electronic equipment (with seven offers in each of those sectors).
- Retailers (with six offers).
- Pharmaceuticals, biotechnology, and healthcare (with five offers).
- Support services (with five offers).

The target board recommended 44 of the firm offers in 2021 (80%), from or shortly after the date of announcement of the offer (and continued to recommend them as at the end of 2021). This represented a decrease in the proportion of recommended offers from those in 2020 (93%). Two offers lost their initial recommendation but regained it when the offers were increased. Four offers lost their recommendation when a competing bidder announced a higher recommended offer.

In 2021, there was an increase of private equity-backed bids, and bids backed by other funds and investment companies, including private equity bolt-on acquisitions, with 33 firm offers (60% of the total firm offers) falling into this category. These firm offers comprised of:

- 17 offers for Main Market targets.
- 16 offers for AIM targets.

Schemes of arrangement remained by far the preferred deal structure for the firm offers announced during 2021, with 45 of the 55 announced firm offers being structured this way and those 45 included 18 offers with a deal value of over GBP1 billion.

Another notable feature of bid activity in 2021 was the prominence of competing bid situations which led to more auction procedures being implemented under the Code to resolve those situations than have been seen for a long time.

1H 2022 got off to a better start than 1H 2021, with 27 firm offers announced as compared to 24. As with 1H 2021, seven of those offers had an offer value of over GBP1 billion. In both 1Hs, there was a very clear majority of offers adopting a scheme structure, receiving the target board's recommendation, and having (or including an element of) cash as the consideration type.

2. What have been the largest or most noteworthy sector-specific public M&A transactions in the past 12 months?

There was a significant increase in the number of bids above GBP1 billion in 2021, 21 as compared to ten in 2020. The five largest deals were in the following sectors.

Retail

Clayton, Dubilier & Rice, LLC's successful offer for Wm Morrison Supermarkets PLC (GBP7.1 billion) trumping Fortress Investment Group, LLC's unsuccessful offer for Wm Morrison Supermarkets PLC (GBP7.04 billion).

Aerospace and Defence

Parker-Hannifin Corporation's offer for Meggitt PLC (GBP6.3 billion).

Computer and Electronics

NortonLifeLock Inc.'s offer for Avast PLC (GBP6.2 billion).

Automobiles and Transportation

The Blackstone Group Inc., Global Infrastructure Partners, and Cascade Investment, L.L.C.'s offer for Signature Aviation PLC (GBP3.46 billion).

Travel and Leisure

Bally's Corporation's offer for Gamesys Group PLC (GBP2.026 billion).

Each of the five deals listed above used cash as consideration though two of them included shares or a share alternative. Looking at public M&A deal activity in the UK more broadly, cash (only) consideration deals made up 42 of the 55 firm offers announced in 2021 with only three bids having shares as the only consideration. The remainder comprised a mixture of cash and shares, a share alternative, or other unlisted securities (including loan notes).

3. How were the largest or most noteworthy public M&A transactions financed?

The most popular method of financing public M&A transactions in the UK in 2021, opted for in 30 (58%) of the firm offers, was the use of debt facilities. The bidder's available cash resources alone were used to finance 13 (25%) of those firm offers.

The five largest bids in 2021 (see *Question 2*) were financed as follows:

- Both Clayton, Dubilier & Rice, LLC's and Fortress Investment Group, LLC's offers for Wm Morrison Supermarkets PLC were financed by equity subscription to the bidco vehicle and debt facilities.
- Parker-Hannifin Corporation's offer for Meggitt PLC was financed by bidder's available cash resources, debt facilities, and a debt securities issue.
- NortonLifeLock Inc.'s offer for Avast PLC was financed by bidder's available cash resources and debt facilities.
- The Blackstone Group Inc., Global Infrastructure Partners, and Cascade Investment, L.L.C.'s offer for Signature Aviation plc was financed by equity subscription to the bidco vehicle and debt facilities.
- Bally's Corporation offer for Gamesys Group PLC was financed by debt facilities and an equity issue.

OBTAINING CONTROL

4. 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 scheme offer effected by 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 (and at the outset often does) choose a higher threshold.

The advantages of a contractual offer over a scheme offer are that effective control (with more than 50% acceptances) can be achieved more quickly (though the time taken to achieve 100% ownership is likely to be longer) 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 co-operation required between a bidder and the target company means that hostile bidders invariably elect to make contractual offers.

Scheme Offer

A scheme of arrangement requires the approval of a majority in number, representing 75% in value of each share class, of the target's 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 (including any "dissentients") if it is approved by the required majority of shareholders and sanctioned 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 or stamp duty reserve tax payable on that, target shares were cancelled and new shares issued to the bidder (see*Question 26*).

The Corporate Insolvency and Governance Act 2020 introduced a new type of restructuring arrangement or plan into the Companies Act 2006 designed to assist companies which need to restructure because they are in financial difficulty. Although similar in several respects to the existing scheme of arrangement, this new plan has some important differences including:

- The absence of the above mentioned majority in number approval requirement.
- The ability for a dissenting class of creditors or shareholders to be crammed down by the court's sanctioning of the approval of the plan by the other classes affected by it.

Since the new plan is only available where the company faces financial difficulties (broadly construed by the courts), in practice it is not likely to be relevant to most public takeovers.

Trends in Deal Structures

Following Brexit and completion of the withdrawal of the UK from the EU, the statutory merger alternative of a cross-border merger as a means of effecting a takeover in the UK is no longer available. As regards scheme offers versus contractual offers, scheme offers still remain very clearly the preferred option for many bidders (see *Question 1*) and this continued to be the case in 2021 even while some challenges under the COVID-19 pandemic restrictions remained with respect to holding shareholder meetings to approve schemes.

HOSTILE BIDS

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

Hostile bids are generally a minority feature of the UK public M&A market and this remained the case during 2021 (with 80% of the firm offers being recommended (see *Question 1*)). It is also not uncommon for takeovers that start with a hostile approach or bid, ultimately to gain the target board's recommendation and for recommended bids to lose their recommendation following the emergence of a competing bid.

While a scheme of arrangement can technically be available for a bidder considering launching a hostile bid, in view of the co-operation required from the target for implementing the scheme, hostile offers will invariably be implemented by way of a contractual offer. A bidder must consult the Takeover Panel if it is considering announcing an offer or possible offer to be made by means of a scheme but will not have the support of the target prior to such announcement (*Section 13, Appendix 7, City Code on Takeover and Mergers*).

To help give greater protections to target companies, the City Code on Takeovers and Mergers (Code) requires early disclosure of the identity of potential bidders, who are also required to clarify their intentions early in the takeover process. In addition, deal protection measures, provided by targets, for example inducement fees, are prohibited and detailed disclosure is 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 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.

More recently (in 2018), the Code has been amended so as to restrict a bidder from publishing its full offer document within 14 days of the announcement of its firm intention to make a bid, except where the target's board consents. In the context of a hostile or non-recommended offer, this gives the target some extra time in which to prepare and publish its response to the bidder's offer document.

REGULATION AND REGULATORY BODIES

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

Principal Regulations

The principal legislation and rules regulating takeovers and mergers are:

- **The Code.** The Code (in its 13th edition, as updated on 13 June 2022) has statutory force and applies to takeover bids and other merger transactions (however effected) for:
  - companies and UK Societates (formerly EU Societates Europeas which, prior to Brexit, had been registered in the UK) 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 UK regulated market (which includes the Main Market of the London Stock Exchange), a UK multilateral trading facility (for example the London Stock Exchange's AIM), provided the company has approved that trading, 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 UK regulated market, UK multilateral trading facility, or stock exchange mentioned above 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 (the residency test).
- A UK company subject to the Code can also be subject to the dual jurisdiction of both the Takeover Panel and the relevant overseas takeover authority where its securities are traded on a market outside of the UK.
- 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, 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.
- Details of a number of the more important changes introduced by the new 13th edition of the Code in July 2021 are discussed in answers to relevant questions below.
- **The Companies Act 2006.** This gives 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 22*);
  - provisions granting a public company the right to investigate who has an interest in its shares;
  - a prohibition on unlawful financial assistance for the purpose of the acquisition of a public company's shares;
  - the procedures relating to schemes of arrangement (and, following amendments introduced by the Corporate Insolvency and Governance Act 2020, a new restructuring plan, similar in some respects to a scheme of arrangement but with a focus on resolving financial difficulties and so unlikely to be of relevance in the usual takeover context); and
  - a very rarely (if at all) used statutory procedure for the merger (and division) of UK public companies.
- **The UK Market Abuse Regulation (UK MAR).** This is the version of EU Market Abuse Regulation (*596/2014*) (MAR) that has been onshored following Brexit and which is in largely the same form as MAR. 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 UK MAR for the purposes of protecting users and the orderly operation of financial markets and exchanges in the UK (see*Question 10*).
- **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 10*).
- **The Listing Rules.** These apply to public companies with securities admitted to the FCA's Official List and, in the case of a company with equity shares having a 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 FCA's Prospectus Regulation 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 10*).

- **The National Security and Investment Act 2021 (NSIA).** The NSIA came into full force and effect on 4 January 2022, empowers the government to call in for review, from a national security perspective, transactions which satisfy certain control threshold tests. Transactions in prescribed potentially sensitive sectors must be notified to the government; others can be voluntarily notified. The government will have powers to impose conditions on, or even block, transactions that give rise to national security concerns (see *Question 27*).
- **The EU Merger Regulation (*139/2004*) (EUMR).** Since the end of the UK's Brexit implementation period, EUMR no longer applies in the UK. However, concentrations with an EU dimension that meet the jurisdictional thresholds must continue to be notified and cleared by the European Commission before implementation (see*Question 27*).
- **The Enterprise Act 2002 (as amended by the Enterprise and Regulatory Reform Act 2013).** The Enterprise Act is the key source of merger control legislation in the UK and is enforced by the UK's Competition and Markets Authority (CMA) (see*Question 27*).

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 Takeover 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 Takeover 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 Takeover Panel Executive whose decisions can be appealed to the Hearings Committee, which principally reviews rulings provided by the Takeover Panel Executive. Appeals against rulings of the Hearings Committee are heard by the Takeover Appeal Board (an independent body) (see*www.thetakeoverpanel.org.uk*).
- **The FCA.** The FCA is the UK's financial services and securities regulator and has responsibility for administering the Listing Rules, Prospectus Regulation Rules, and DTRs, and for monitoring and investigating market abuse under UK MAR. All these regulated areas can be relevant in the context of a takeover of a company with shares listed on the Main Market and market abuse regulation also extends to unlisted companies traded on other public markets (for example AIM).
- **The European Commission.** Under the EUMR, the European Commission has exclusive jurisdiction over concentrations with an EU dimension and member states cannot apply their national merger control regimes to these transactions (see*Question 27*). As the UK's Brexit implementation period has ended, the European Commission's exclusive jurisdiction does not apply to the UK and the CMA has the power to investigate mergers with an EU dimension if the relevant jurisdictional thresholds are met. Mergers may therefore be subject to review by both the European Commission and the CMA.
- **The CMA.** The UK operates a voluntary two-phase merger review procedure (see *Question 27*). Qualifying mergers can 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 and will have additional regulatory responsibilities under the Pension Schemes Act 2021 when it comes into force, particularly in relation to defined benefit schemes in respect of which takeovers are likely to trigger certain prescribed notifications to the Pensions Regulator.

PRE-BID

Due Diligence

7. 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 that 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 can 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 about listed companies incorporated in the UK includes:

- The information accessible through the target company's website.
- The items filed with the Registrar of Companies, including the articles of association.
- Analyst reports.
- The prospectuses, shareholder circulars, and recent public announcements issued by the target company.

Secrecy

8. 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, about 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 Takeover 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 No. 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(b) 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 14*).

Agreements with Shareholders

9. 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 Takeover 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 Takeover Panel's Practice Statement No. 29 confirms the sort of commitments that can and cannot be given by a target's directors.

Stakebuilding

10. 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?

Except for a bidder making a mandatory bid in the later stages of the bid, dealings in a target company's shares are not suspended or restricted during a bid and a bidder's acquisitions in the market 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 can arise under the DTRs as well as under the Code.

Restrictions

Since 13 June 2022, the Code prevents a bidder (and its concert parties) which has been required to make a mandatory bid under Rule 9 from stakebuilding in the target in the 14 days up to and including the unconditional date (or, as the case may be, the expiry of an acceptance condition invocation notice (see Question 14, *Offer Timetable*). Restrictions on stakebuilding can arise under the market abuse and insider dealing provisions of UK MAR and under the insider dealing provisions of the Criminal Justice Act. UK MAR also contains provisions which legitimise behaviour that could otherwise be treated as insider dealing in the context of public takeovers or mergers. This is subject to certain conditions, including the disclosure of any inside information held by the bidder when the takeover or merger comes to be approved or accepted by target shareholders.

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 of the termination of discussions). In addition, no one with confidential price-sensitive information can recommend anyone else to deal in target company securities (*Rule 4.1, Code*).

Before day 21 of the offer (see *Question 14* below for the Code's offer timetable), 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*Disclosure Obligations*), dealings in connection with a bid can also have consequences for the terms of the bid (see*Question 19 and Question 20*).

Following a Phase 2 referral, the Enterprise Act 2002 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 has the 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 can impose a standstill obligation on a bidder preventing the acquisition of target company shares although care must always be taken to ensure that any standstill restriction does not give rise to any concert party implications under the Code and in appropriate cases the Takeover Panel must be consulted (see "Acting in concert" definition, note 5 of the Code).

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 their direct or indirect holding of shares or other financial instruments) aggregate voting rights in:

- An issuer with shares admitted to trading on a UK 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 shares are admitted to trading on a UK regulated market, where these threshold percentages are 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 75%.

(*DTR 5.1*.)

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 a UK issuer with shares admitted to trading on a UK regulated market, or three trading days, in the case of a non-UK issuer or a UK 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 12.00 noon on the tenth business day after an offer period begins, and after the announcement that first identifies a competing paper bidder (that is, a bidder offering its securities as consideration), 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.

Since 13 June 2022, bidders have also had to make minimum offer consideration disclosures where they are required by the Code to offer a minimum level or type of consideration (see *Question 19* and *Question 20*). These disclosures have to be made, both:

- At the time the bidder is publicly identified as a potential offeror.
- Immediately during an offer, if any acquisition of an interest in the target forces the bidder under the Code to have to offer a minimum (or new minimum) level of offer consideration.

There are modifications as to the timing when these new disclosure obligations must be made, as they apply to target share acquisitions by a bidder's concert parties and to acquisitions by potential bidders (even if not publicly identified) that take place during an offer period.

Further disclosure obligations can arise under the:

- **The Companies Act 2006.** 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

11. 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 12*). 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) payable by the target, 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 9*).
- 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 Takeover Panel intended by including impermissible offer-related arrangements.

Break Fees

12. 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 Takeover 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 fee satisfies the requirement that obligations are only imposed on the bidder.

Committed Funding

13. 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 agreements 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 26.2, 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*).

ANNOUNCING AND MAKING THE OFFER

Making the Bid Public

14. 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 18*).
- 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(e), Code and Practice Statement No. 20, para 8.2*).

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 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(b), 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 long-term commercial justification for the offer, including the bidder's intentions with regards to the target's business, employees, and pension schemes.

The Takeover 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 these 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 18*).

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. A major overhaul of the Code's timetable for contractual offers was introduced by the 13th edition of the Code on 5 July 2021. The following are the key dates under the new Code in a typical timetable for a contractual offer, ignoring the impact on the timetable where it is suspended to deal with delays, for example obtaining regulatory approvals. Days are calendar days unless otherwise indicated and "H" indicates those dates normally only relevant in the case of a hostile bid:

- **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); or
- 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 2.8, Code*).

- **Day 0 (no later than 28 days and (except with the consent of the target) no earlier than 14 days after the firm intention announcement).** Offer document:
  - sent to the target company's shareholders;
  - made available to the bidder and target companies' employee representatives and trustees of the target's pension schemes; and
  - put online and publication announced.
- (*Rule 24.1, Code*.)
- **Day 14 (H).** Latest date for publication of defence documents (*Rule 25.1, Code*).
- **Day 21.** Minimum period for which the offer must remain open for acceptances (*Rule 31.2(a), Code*).
- **First business day after Day 21, every seventh day thereafter, when the offer is revised, each day in the week leading up to (and including) the Unconditional Date and Long Stop Date (see below) and when acceptances pass through certain thresholds (for example 75%).** Announcement by 8.00 am of acceptance levels (*Rule 17.1, Code).*
- **Day 32.** Date in offer timetable when the timetable resumes following a suspension to deal with outstanding regulatory clearances (see below, *Suspension of the Offer Timetable*) *(Rule 31.4(b), Code)*.
- **Day 37.** Date by which a request must be made to the Takeover Panel for a suspension of the offer timetable if a regulatory clearance remains outstanding *(Rule 31.4(a), Code).*
- **Day 39 (H).** Last date for release of material new information by the target company (unless the bidder has brought forward the Unconditional Date for its bid by making an Acceleration Statement prior to Day 39) (*Rules 31.8 and 31.5(c), Code*).
- **Day 46 (H).** Last date for publication of an improved offer or information which may increase the value of an exchange offer *(Rule 32.1(c), Code)*.
- **Day 53.** Last date for potential competing bidder to clarify its position (*Rule 2.6(d) and (e), Code*).
- **Day 60 (or the Unconditional Date).** The last date for fulfilment of all conditions (including the acceptance condition) to the offer. This date can be brought forward by a bidder serving an Acceleration Statement (see below, *Acceleration Statements*) and may be extended where permitted by the Takeover Panel (including in the case of competing offers and where the target agrees) *(Rules 31.1 and 31.3, Code*).
- Under the previous Code, the acceptance condition had to be satisfied by Day 60 and all other conditions had to be satisfied by Day 81. That timing difference between the satisfaction of conditions has been removed in the new Code with the result that there is no longer a concept of an offer becoming unconditional as to acceptances and becoming wholly unconditional. Under the new Code, an offer must become unconditional in all respects at the same time and since acceptances are now capable of being withdrawn at any time, this means that the acceptance condition will always be the last condition to be satisfied.
- **Day 74.** The earliest date on which the offer can close for acceptances if it becomes unconditional on Day 60 (that is, offers must remain open for acceptance for not less than 14 days following becoming unconditional) (*Rule 31.2, Code*).
- **Day 74.** Consideration for the offer must be posted by this date (assuming the offer becomes unconditional on Day 60) (that is, consideration must be sent to target shareholders no later than 14 days of the offer becoming unconditional) (*Rule 31.9, 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 22*). 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 UK regulated market (for example, the Main Market of the London Stock Exchange). In practice, since bidders will typically not close their offers for acceptance once they have become unconditional, these time periods are usually irrelevant for most bidders.

Suspension of the Offer Timetable

The new Code includes new rules on when and how the contractual offer timetable can be suspended if a regulatory clearance remains outstanding part way through the bid. These allow the bidder more time to seek to obtain the relevant clearance so as to avoid the bid lapsing if the clearance cannot be obtained and the Takeover Panel allows the clearance condition to be invoked or, if the condition cannot or is not invoked, the bidder having to waive the clearance condition on the Unconditional Date *(Rule 31.4, Code)*.

If that condition remains outstanding by 5.00 pm on Day 37, the Takeover Panel will normally suspend the timetable if both bidder and target request this or at the request of either party if the outstanding clearance condition relates to a material official authorisation or regulatory clearance (that is, the Takeover Panel is satisfied that the failure to obtain the clearance could give rise to circumstances which are of material significance to the bidder in the context of the offer).

If the timetable is suspended, it will be resumed on the date that the last condition relating to the regulatory clearance is satisfied or waived and that date will be treated as being Day 32 for Code timetable purposes.

It is important to note that the fact that the Takeover Panel may be prepared to accept that a regulatory clearance satisfies this "material significance" test so as to allow the offer timetable to be suspended does not mean that if, on the Unconditional Date, the clearance remains outstanding the Takeover Panel will necessarily treat the condition as still satisfying the "material significance" test and so allow the bid to lapse. The circumstances then surrounding the outstanding condition and their significance will be reconsidered by the Takeover Panel.

Long Stop Date

The new Code introduced a new requirement that contractual offers must include a Long Stop Date by which the offer will lapse if the acceptance condition has not then been satisfied or, with the consent of the Takeover Panel, if a regulatory clearance condition has not been satisfied or waived *(Rule 12, Code)*. The Code already included provisions for scheme offers to set out long stop dates by which the scheme must have become effective.

Except with the consent of the Takeover Panel, the Long Stop Date can only be extended with the agreement of the target.

Acceleration Statements

The new Code allows a bidder to bring forward the Unconditional Date of its bid (Day 60 unless, following consultation with the Takeover Panel, it has fixed an earlier date as the Unconditional Date in its offer document), but not to a date earlier than Day 21. At least 14 days' notice of the new Unconditional Date must be given. The bidder can do this by serving an Acceleration Statement *(Rule 31.5, Code)*. Where this happens, Day 46 becomes the date 14 days before the new Unconditional Date and the bidder must waive all conditions to its bid other than the acceptance condition. Once made, an Acceleration Statement cannot be set aside except in "wholly exceptional circumstances" agreed by the Takeover Panel or in circumstances (which the bidder must consult on with the Takeover Panel) specified in the statement.

If an Acceleration Statement is made before Day 39, the restrictions under the Code on the target releasing any material new information will fall away. Competing bidders' Day 53 obligation to clarify their intentions will also no longer apply after an Acceleration Statement is made

These statements are likely to be made by bidders wanting to see their bids succeed.

Acceptance Condition Invocation Notice

Another innovation introduced by the new Code allows a bidder to publish a notice invoking its acceptance condition earlier than Day 60 but not earlier than Day 21 *(Rule 31.6, Code)*. At least 14 days' notice of the new date for satisfaction of the acceptance condition must be given and the notice must be irrevocable and specify a non-waivable level of acceptances required by the bidder for its offer. If the acceptance condition is not satisfied on this new date, the bid will lapse. If the condition is satisfied, the bid will remain outstanding and will continue until all conditions (including the acceptance condition) are (or remain) satisfied on the Unconditional Date. These notices are likely to be given by bidders keen to see their bids fail through insufficient acceptances being received by the notified new date.

Withdrawal of Acceptances

Another big change introduced by the new Code is to allow target shareholders to withdraw their acceptances of a bid at any time after the posting of the offer document *(Rule 34.1, Code)*. Previously, acceptances could only be withdrawn from Day 42 (that is, 21 days after the first or earliest date on which a bid could be closed, assuming it had not become unconditional as to acceptances by that date).

Competing Offers

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

A potential competing bidder's put up or shut up deadline will cease to apply if another bidder announces a firm intention to make an offer, in which case the potential competing bidder is 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), Code*).

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 1 to Rule 31.3, Code*). 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 32.5, Code*).

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 target company's board).

Since scheme offers must in practice be consensual, the Code allows much greater flexibility for the parties to agree their own timetable subject to certain minimum constraints. Therefore, the parties can agree certain key dates (for example, a Long Stop Date by which the scheme must have become effective or deadlines for the shareholder meetings or for the court sanction required to enable the scheme to become effective) as conditions to the bid which can be invoked without the need for Takeover Panel consent (see *Offer Conditions*). In addition, the Code requires certain of the key dates in relation to a scheme offer to be set out in the scheme circular.

Under the new Code, the bidder must now confirm prior to the court sanction hearing that all the conditions to the scheme offer have been satisfied or waived or seek the Takeover Panel's consent to invoking an outstanding condition. The bidder must also undertake at the sanction hearing to be bound by the scheme (see *Appendix 7, 3(g), Code*).

Offer Conditions

15. 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, Code*). 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, Code*). For voluntary contractual 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 22*) and is often waived down to the minimum acceptance condition to avoid the offer failing through non-satisfaction of the acceptance condition by the Unconditional Date.

If the bidder has served an Acceptance Condition Invocation Notice to bring forward the date by which its acceptance condition must be satisfied, it cannot change the acceptance level that it specifies in that Notice *(Rule 31.6(b)(iii), Code)* (see *Question 14, Acceptance Condition Invocation Notice*).

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, with the consent of the Takeover Panel, to change from a scheme of arrangement to a contractual offer to take advantage of the minimum acceptance condition if a competing offer arises.

Under the previous edition of the Code all bids had to contain a mandatory condition that they would automatically lapse if there was 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 EUMR) or the European Commission for a Phase 2 investigation under the EUMR. Under the new Code this special treatment of CMA and European Commission regulatory clearances has been removed so that Phase 2 clearances are now treated in the same way as any other regulatory clearances.

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, Code*).

Common conditions include:

- Any approval of shareholders that is 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 does not permit a bidder to invoke any condition or pre-condition 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, Code*). In practice, this is an extremely high hurdle, analogous to something that would justify frustration of a legal contract. Practice Statement No. 5 (which the Takeover Panel has revised following the changes made by the new Code) provides important guidance about how the Takeover Panel will approach requests for a bidder to be allowed to invoke a condition (other than the acceptance condition and certain other conditions, for example a listing condition in the case of a securities offer which do not require the consent of the Takeover Panel before they can be invoked) (see *Rule 13.5(b), Code*).

Bidders commonly reserve the right to waive certain of the conditions so that all conditions to a bid can be satisfied by the Unconditional Date.

Bid Documents

16. 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 target company's future business (including with respect to the target's research and development functions) and its strategic plans (including their likely impact on the employment in and location of the target company's business and its headquarters and headquarters' functions).
- The bidder's intentions regarding the continued employment of the employees, any material change proposed to their employment conditions, or to the balance of their skills and functions and any redeployment of fixed assets.
- If the bidder has no intention of making any changes in relation to these matters or its plans have repercussions for 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, Code*).

The Code effectively requires statements about a bidder's intentions on these matters to remain true for at least 12 months or any other period of time that the bidder specifies (*Rule 19.6(b)1, Code*) and requires the Takeover Panel to be consulted if this is not to be the case. Where a bidder decides to depart from its intention statement, unless the Takeover Panel agrees otherwise, an announcement must be made promptly giving details of and an explanation of its reasons for the departure.

At the end of the period of 12 months after the end of the offer period (or other period as was specified in the bidder's statement), the bidder must confirm in writing to the Takeover Panel whether or not it has taken the relevant action referred to in its intention statement and publish its confirmation to the market.

A bidder may decide, following prior discussions with the Takeover Panel, to include in the offer document a post-offer undertaking with respect to action that it commits to take after the end of the offer period. Except where the undertaking is addressed to and enforceable by a named party (for example, a government agency), the Code imposes strict requirements on the bidder to comply with its undertaking. These include:

- The publication of reports on the discharge of the undertaking, at least annually (depending on the life of the undertaking).
- The right of the Takeover Panel to require the appointment of an independent supervisor to monitor the bidder's compliance with the undertaking and submit reports to the Takeover Panel on its compliance.

In addition, a bidder prepares a form of acceptance to be used to accept the offer (and/or instructions on how the offer can 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.
- A form of proxy for use at that 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 14*) 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.
- 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

17. 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 can 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 towards the six parties that can 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 the opinion is obtained in sufficient time) (*Rule 2.11(d), Code*). If 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*).

The target's pension scheme trustees have similar information rights under the Code as those in relation to the target's employee representatives. Specifically, among other things, these 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

18. 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:

- 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.

(*Rule 9, Code*.)

In addition, the application of the "chain principle" under the Code can result in a person being required to make a mandatory bid as a result of an indirect acquisition of an interest in the target (that is, an acquisition of a 50% plus interest in a shareholder in the target, which itself need not be a company subject to the Code (for example, a non-UK company), where that shareholder's interest in the target is significant in relation to the shareholder. Significant for these purposes being taken to be 30% or more (by reference to relevant relative values), since Code changes effective from 13 June 2022. (*Rule 9, Code*.)

The Takeover Panel has discretion to waive this requirement in the circumstances set out in the Code. For example:

- When independent shareholders vote to waive the requirement in the context of an issue of new securities by the target.
- Where existing shareholders in the target holding 50% or more of the target's voting rights state in writing that they would not accept the mandatory offer.

(*Notes on Dispensations, Rule 9, Code*.)

CONSIDERATION

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

The Code does not generally impose restrictions on the type of consideration that can 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 both:

- Offer cash or a cash alternative (*Rule 9.5, Code*).
- Comply with the requirements to provide for a minimum level of consideration (see*Question 20*).

However, where a bidder (or its concert parties) acquires for cash any interests in a target company during the offer period and in the preceding 12 months, 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 11.1, 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 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 can 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. 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.

20. 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*). It 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 19*) 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*).

21. 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 are subject to restrictions regarding the types of shares they can hold. Therefore, if the shares are not listed in the UK, these 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

22. 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% in value of the shares to which 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 2006*).

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 2006*).
- 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 2006*).

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 2006*). Shares purchased by a bidder or its associates once the offer can be accepted at a price equal to, or below, the offer price, are counted toward the 90% calculation (*section 979(8) to (10), Companies Act 2006*). 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 can 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 2006*).

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 (for example, the Main Market of the London Stock Exchange) (*section 980(2), Companies Act 2006*).

The compulsory acquisition regime is not relevant in a scheme offer since if it is sanctioned by the court it will bind all target shareholders who are party to the scheme and so there will not be any remaining minority shareholders.

Restrictions on New Offers

23. 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 these actions where:

- More than three months have passed since the original offer lapsed or was withdrawn and a new offer is recommended by the target company board.
- A third party has made an offer.
- The Takeover Panel determines that there has been a material change of circumstances (*Rule 35 and Notes to Rules 35.1 and 35.2, Code*).

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, Code*).

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 these 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, Code*).

The Takeover Panel's Practice Statement No 28 set outs 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 they propose another bid for the target, 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 these 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 up or shut up deadline (see *Question 14, Offer Timetable*).

De-Listing

24. 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 this 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 votes cast by the AIM company's shareholders in a general meeting.

TARGET'S RESPONSE

25. 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, Code*). 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 (proposed) action:

- Could be prohibited by the Code.
- Is pursuant to a pre-existing obligation.
- Has already commenced.
- 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.

Even with 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 2006.
- 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 can be prepared and reported on within the timeframes permitted by the Code;
  - comparable valuations and relative performance of competitors; and
  - valuations of the target company's divisions in case proposals are made to break up the company.

TAX

26. 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 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 4*). Stamp duty and stamp duty reserve tax do not apply to shares quoted on certain growth markets recognised as such by HMRC, such as:

- The London Stock Exchange's AIM.

* Euronext Growth Dublin.

The 0.5% stamp duty reserve tax charge has not generally applied when interests in shares are transferred in the form of depositary receipts (for example, 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, had been held prior to Brexit to be incompatible with directly effective EU law in many circumstances. Although it remains on the UK statute books, HMRC have confirmed that the 1.5% charge is not payable on new issues of UK company shares into such a system or service (while still generally applying to transfers of existing shares into such a system or service). This is on the basis that, as a matter of UK domestic law under the terms of the European Union (Withdrawal) Act 2018, directly effective EU rules continue to apply following Brexit in accordance with prior case law, unless the relevant UK laws are amended in future.

A targeted market value rule charges stamp duty and SDRT on transfers of listed securities to connected companies by reference to deemed consideration equal to the higher of the market value of the listed securities transferred and consideration paid (if any). The government has published draft legislation, to be effective from a date on which the Finance Act 2020 is passed into law, which would apply a similar deemed consideration rule on the transfer of unlisted securities to a connected company, if some or all of the consideration for the transfer of the unlisted securities consists of the issue of shares.

OTHER REGULATORY RESTRICTIONS

27. Are any other regulatory approvals required, such as in relation to merger control, foreign ownership or specific industries? If so, what is the effect of obtaining these approvals on the public offer timetable?

Foreign Ownership

Other than in connection with certain regulated industries (see*Question 27*), 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.

National Security Review

Under the new NSIA the government has been given very significant powers to review a wide range of transactions that may trigger national security concerns for the UK. These powers, which are relevant to acquirors whether they are foreign entities or UK entities, are exercised by a new unit within the Department of Business, Energy, and Industrial Strategy (BEIS) that is dedicated to carrying out national security reviews, called the Investment Security Unit. The NSIA came into full force and effect on 4 January 2022 but the government has the power to call in for review transactions that closed after 11 November 2020 (when the Bill was first introduced to Parliament). NSIA is an important consideration for UK public M&A transactions and a number of public bids now include in their terms NSIA regulatory clearance conditions.

Transactions can be called in for review on national security grounds up to the earlier of five years after closing and six months of the government becoming aware of the transaction. The NSIA does not define what national security encompasses but requires the Secretary of State to publish a statement of policy (a draft of which has been published) explaining how this call-in power is expected to be used.

Transactions that can be called in for review in the context of a UK takeover can include acquiring control through an increase in ownership or voting rights beyond 25%. They can also include the acquisition of material influence (even with a smaller ownership interest than 25%) of a relevant entity or asset. Unlike review of transactions under the Enterprise Act 2002 by the CMA, there are no other materiality thresholds applicable to review under the NSIA.

Mandatory notification is required for transactions in 17 prescribed sensitive sectors (including AI, communications, data infrastructure, defence, energy, and transport). If the transaction closes without receiving government approval, it will be void. Voluntary notification will also be possible for transactions that may raise a national security concern.

The NSIA imposes strict time limits on the government for carrying out its national security reviews. It will have 30 days to decide whether to call in a transaction for review following notification and a further 30 days (extendable at the government's option by a further 45 days and thereafter by agreement with the relevant party) to carry out its review. This will likely run in tandem with any CMA review (see *UK Competition Law*).

The government can issue interim orders during the review and, following the review, either final orders imposing restrictions on (or, as a last resort, prohibiting) the transaction or granting clearance to the transaction.

The government also has a power (which it has never used) under the Industry Act 1975 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.

Foreign Investment Review

The Enterprise Act 2002 governs the UK's foreign investment review regime. Grounds for intervention include:

* Public interest cases (*section 42*).
* Special public interest cases (*section 59*).
* Protection of legitimate interests (*section 67, Enterprise Act 2002 and Article 21(4), EUMR*).

For a merger that raises public interest concerns (on financial stability, public health emergency, or media plurality grounds) the Secretary of State can issue a public interest intervention notice, requesting the CMA to prepare a Phase 1 report in relation to the public interest issue. The CMA's report will provide a recommendation as to whether the CMA has jurisdiction and public interest concerns are raised. This can either lead to the merger proceeding, to the agreement of undertakings offered by the parties, or, if appropriate, the Secretary of State may refer it to the CMA for a Phase 2 investigation.

Regulated Industries

Since the end of the UK's Brexit implementation period, mergers may be subject to review by both the European Commission and the CMA where the relevant jurisdictional thresholds are met. This review of the competition aspects of a transaction applies to all industries.

In addition, the UK can intervene to take appropriate measures to protect legitimate interests (for example, public security, media plurality, and prudential supervision of financial institutions). There are specific statutory regimes in place and further regulatory consents may be required for certain industries, for example, 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
  - EU-wide turnover of at least two of the parties exceeds EUR250 million.
- Or all of the following conditions apply:
  - combined worldwide turnover of the parties 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.

Since the end of the UK's Brexit implementation period (that is, 31 December 2020), mergers are no longer subject to the EU's "one-stop shop" jurisdictional principle in relation to the UK. This means that the CMA may investigate mergers that satisfy the EU thresholds set out above in parallel with the European Commission where the UK jurisdictional thresholds are also met (see *UK Competition Law*). The European Commission also no longer has jurisdiction to investigate the substantive effects in the UK of any mergers, with the CMA instead having jurisdiction (to the extent the thresholds under the Enterprise Act 2002 are met).

UK Competition Law

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

- The UK turnover of the target exceeds GBP70 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).

The UK government is consulting on proposals to update the jurisdictional tests (see*Question 31*).

Following amendments to the Enterprise Act 2002 in June 2018, for mergers in which the target business (or part of it) is active in certain sectors considered relevant to national security (in particular, the military, dual-use, computing hardware, and quantum technology sectors), the turnover and share of supply tests can be met in either of the following additional ways to those set out above:

- The UK turnover of the target exceeds GBP1 million.
- Before the merger, the target has a share of supply or purchase of at least 25% in a substantial part of UK. This test is met even if the share of supply does not increase as a result of the merger.

Notification is currently voluntary and non-suspensory. A merger can be completed without making any notification to, or obtaining clearance from, the CMA.

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 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 6, 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 this 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 can be completed while it is being considered by the CMA. The new Code now treats all regulatory clearance conditions (including CMA and European Commission Phase 2 references) in the same way as regards suspension of the Code timetable while certain clearances are being sought and the Takeover Panel's approach to consenting (or not) to the invocation of any condition where the relevant regulatory clearance cannot be obtained by the Long Stop Date for a contractual offer (see *Question 14, Suspension of the Offer Timetable and Long Stop Date*).

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 these processes and of any associated timing constraints. The CMA considers these constraints when conducting its review.

28. 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.

29. 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 3.30 pm 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 10*).

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.

Future Developments

30. What do you think will be the main factors affecting the public M&A market over the next 12 months, and how do you expect the market to develop?

Looking ahead over the next 12 months and leaving aside geopolitical and macroeconomic factors, for example, the re-emergence of economies from the COVID-19 pandemic, current inflationary pressures and the economic impacts of the war in Ukraine, the main factors likely to affect the public M&A market in the UK may be the impact that national security reviews of bids will face under the NSIA and the extent of the new powers that the Pensions Regulator will have in relation to defined benefit schemes under the Pensions Schemes Act 2021.

So far as NSIA is concerned, early indications from the first statutory annual report published by the government on its operation covering the three month period ending 31 March 2022 are, however, encouraging. Over that period 222 notifications were received of which 17 were called in for review. None were subject to a final order restricting or prohibiting the acquisition, three were cleared, and the remainder were still under review at the end of that period. Extrapolating those figures over a 12 month period would indicate that there are fewer transactions being affected by NSIA notification and review procedures than initial government estimates suggested might be the case. However, the decline in M&A activity over Q1 2022 may also explain why these extrapolated figures appear to fall below the government's earlier estimates.

It is still less clear what impact (if any) the new Code is having on the conduct of public M&A although the ending of the automatic lapsing of bids which encounter a Phase 2 investigation (whether by the CMA or the European Commission) could, of course, be significant for some bids.

REFORM

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

Revised Jurisdictional Thresholds for UK Merger Control

The UK government has announced proposals to revise thresholds relating to the CMA's jurisdiction to review mergers (see *Question 27*) to review mergers including:

- Increasing the current turnover threshold from GBP70 million to GBP100 million.
- Creating a safe harbour for mergers between small businesses by excluding transactions from review where the worldwide turnover of each of the merging parties is less than GBP10 million.
- Creating a new jurisdictional threshold which would give the CMA jurisdiction if at least one of the merging parties has an existing 33% share of supply of any goods or services in the UK (or in a substantial part of it) and a UK turnover of more than GBP350 million. This threshold would also include a UK nexus criterion and is intended to enable review of "killer acquisitions" and other mergers which do not involve direct competitors.

The Code

As outlined in this Q&A, a number of miscellaneous changes were made to the Code on 13 June 2022, none of them being as significant as the Code's new contractual offer timetable changes that were made in July 2021 and most simply clarifying or revising the Code to reflect existing Takeover Panel practice.

The Takeover Panel also confirmed in late July 2021 that it was not proposing making any changes to the Code's rules relating to the mandatory disclosure of takeover approaches. There has been some concern expressed about the possibility of companies being engaged in shadow bids for a protracted period of time as possible takeover transactions are discussed, unknown to the market. The Takeover Panel consulted informally on this issue and reported back that the overwhelming view of both investors and companies was that the current strict announcement rules are sufficient to deal with any of these private discussions between possible bid parties and that those rules strike an appropriate balance between allowing possible transactions to be explored and discussed (but in strict secrecy before any announcement as Rule 2 requires) and the interests of investors in knowing about the possibilities of those bids.

On 26 May 2022, the Takeover Panel launched a new consultation on proposed changes to the Code's long standing concert party presumptions (that is, situations or relationships which the Code treats as creating concert party arrangements unless the Takeover Panel can be persuaded otherwise with, for example, the consequent aggregation of interests in a target held by members of the concert party group). The consultation is scheduled to end on 23 September 2022 with changes expected to come into force two months after publication of the finalised changes in late 2022. The changes proposed are largely intended to update the Code's concert party definition so that it reflects the current practice and understanding of the Takeover Panel. The most significant proposed change would replace the existing concert party presumption (which concerns corporate groups and associated companies) by two new presumptions. The changes would make it clear that this key concert party presumption is focused on control, either of voting rights (whatever type of shares they are attached to) or majority ownership of equity shares, rather than on a parent company-subsidiary and 20% associated company relationship. The current ownership of a 20% (or more) interest in the equity share capital of a company which is sufficient to designate that company as an associated company would be increased to a 30% threshold (aligning the new threshold with the voting rights threshold that can trigger a mandatory bid under Rule 9 of the Code (see *Question 18*).

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- Conforama Investissement on its £673m cash offer for Darty
- Canaccord Financial Inc. on its £235m takeover of Collins Stewart Hawkpoint
- Steinhoff International Holdings on its £1.4bn takeover approach to Home Retail Group
- Close Brothers Group on its recommended cash offer for Cavanagh Group
- Reform Acquisitions on its recommended offer for Aston Villa
- WH Holding on its recommended cash offer for West Ham United
- Peel Group on its recommended cash offer for Mersey Docks and Harbour Company

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Recent transactions

- DBAY on its public takeover of Telit Communications plc.*
- SABMiller plc on its £79bn takeover by AB InBev.*
- Ingredion on its public takeover of PureCircle, a London premium-listed producer of stevia sweeteners.*
- Paysafe on its £3bn takeover by CVC and Blackstone.*
- Merrill Lynch International and BNP Paribas on the cash confirmation relating to EDF's £12.4bn acquisition of British Energy plc.*

* Denotes prior firm experience

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Recent transactions

- Acacia Mining plc on the GBP1.2 billion recommended offer from Barrick Gold Corporation.
- Boston Scientific Corporation on its USD4.2 billion recommended offer to acquire BTG plc.
- Fairfax Financial Holdings Limited on their joint bid for APR Energy plc along with Albright Capital Management LLC and ACON Equity Management LLC.
- DBAY Advisors Limited on its public-to–private takeover of Creston plc.
- Qatar Investment Authority on its GBP2.6 billion offer for Songbird Estates plc and the follow-on GBP4.1 billion offer for Canary Wharf Group plc.
- The lead arrangers in connection with the acquisition financings related to Comcast's GBP30 billion public-to-private acquisition of Sky plc and TDR Capital's acquisitions of Aggreko PLC and Arrow Global PLC.
- AlbaCore Capital on its arrangements with TDR Capital for the GBP1.9 billion takeover of BCA Marketplace plc.

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Recent transactions

- AlbaCore Capital on its arrangements with TDR Capital for the GBP1.3 billion takeover of Ei Group plc.
- Liberty Global plc on its USD2.5 billion Dutch auction tender offer and share buy-back.
- AlbaCore Capital on its arrangements with TDR Capital for the GBP1.9 billion takeover of BCA Marketplace plc.

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Recent transactions

- Gulf Marine Services PLC in connection with its premium listed placing and open offer capital raise on the LSE Main Market
- Ardagh Group SA on the business combination of its metal packaging business with an affiliate of the Gores Group
- 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 CAD1.95 per share, or about CAD681 million.
- Liberty Global on its acquisition of Cable & Wireless Communications at an enterprise value of USD8.2 billion.

Advising Singapore Airlines on the sale of its 49% stake in Virgin Atlantic to Delta Airlines.