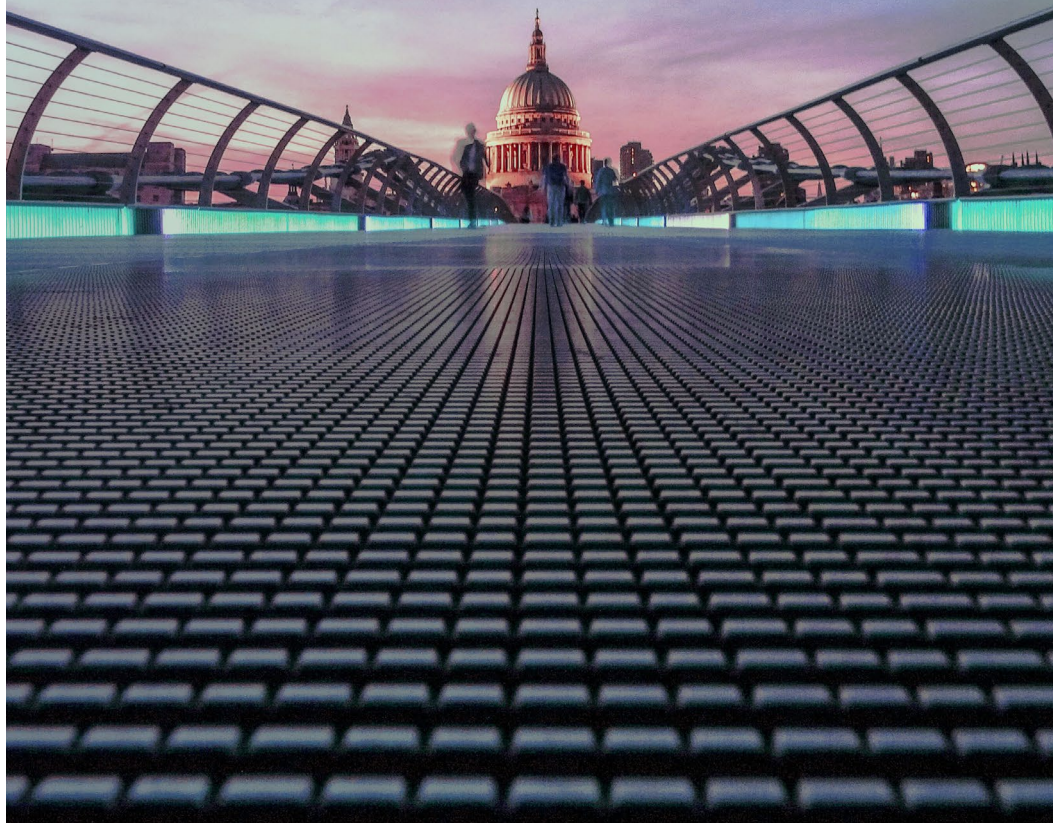


Public takeover offers

An introductory guide to public
company takeovers in the UK





Contents

- 05 Our Corporate Finance group
- 06 Introduction
- 06 The City Code On Takeovers And Mergers
- 08 Legislation
- 10 Structuring the bid – contractual offer or scheme of arrangement?
- 12 Rules relating to stake building
- 17 Key percentages
- 18 Preliminary issues
- 20 Pre-offer stage
- 26 Offer conditions
- 28 Bid offer timetable
- 30 Offer document information
- 36 Minority shareholder ‘squeeze out’
- 37 Schemes of arrangement
- 40 Financing the offer
- 43 Leveraged/management buy outs (‘MBOs’)
- 48 UK and EU merger regulations
- 55 Finally
- 57 Appendix
- 58 About us



Our Corporate Finance group

Taylor Wessing has one of the largest dedicated corporate finance practices in Europe, with genuine cross-border capability and a strong presence in Asia and the Middle East.

Our international capital market experts work as one integrated team on a range of international security transactions and offerings including: IPOs, secondary issues, public M&A, tender offers, bond offerings, securitisations, and restructurings.

In addition to being market leaders in advising clients from the technology field, we advise across many other sectors. We work with leading investment banks, brokers, financial advisers and sponsors, and financial services institutions.

Your contacts



William Belcher
Partner

+44 20 7300 4221
w.belcher@
taylorwessing.com



Robert Fenner
Partner

+44 20 7300 4986
r.fenner@
taylorwessing.com



Russell Holden
Partner

+44 20 7300 4678
r.holden@
taylorwessing.com



Tandeep Minhas
Partner

+44 20 7300 4244
t.minhas@
taylorwessing.com

Introduction

This publication summarises some of the key commercial and legal aspects relating to the acquisition in the United Kingdom of a company which is publicly listed or quoted in London.

This publication deals only with UK legislation and rules.

This publication should not be relied upon in place of detailed advice about any specific transaction.

The City Code on Takeovers and Mergers

The Panel on Takeovers and Mergers (the 'Panel') makes and polices the City Code on Takeovers and Mergers (the 'Code'), which sets out the main rules relating to offers for public companies.

The Code is a statutory set of rules for the purposes of all takeover offers and other merger transactions which it regulates and the Panel has statutory powers to seek enforcement of the Code and its rulings by the UK courts. The Panel also has authority to request that the Financial Conduct Authority ('FCA') takes enforcement action if a company's behaviour amounts to market abuse for the purposes of the Market Abuse Regulation (EU) 596/2014, as it applies in England and Wales from time to time after 31 December 2020 ('MAR').

The Code has six general principles and a number of rules, which can be summarised into three key principles:

- All target company shareholders are to be treated equally and must be given adequate information so that they can reach a properly informed decision.
- A false market must be avoided in the shares of the target company and bidder company.
- The target company must not take any steps which would prevent or hinder an offer being made to its shareholders without shareholder consent.
- The six general principles of the Code are set out in the appendix to this guide.

The Code applies, broadly speaking, to all takeovers (including offers for part or all of the share capital of a company) of companies with registered offices in the UK, Channel Islands or Isle of Man if their shares are admitted to trading on a regulated market or multilateral trading facility in the UK (such as the Main Market of the London Stock Exchange and AIM) or on a stock exchange in the Channel Islands or Isle of Man.

The Code also applies to offers for public companies which do not have their shares traded, but which are considered by the Panel to be resident in the UK, Channel Islands or Isle of Man. The Code can apply to certain types of private companies, principally where the share capital has, at any time during the previous ten years, been publicly traded. The residence of the bidder is immaterial.

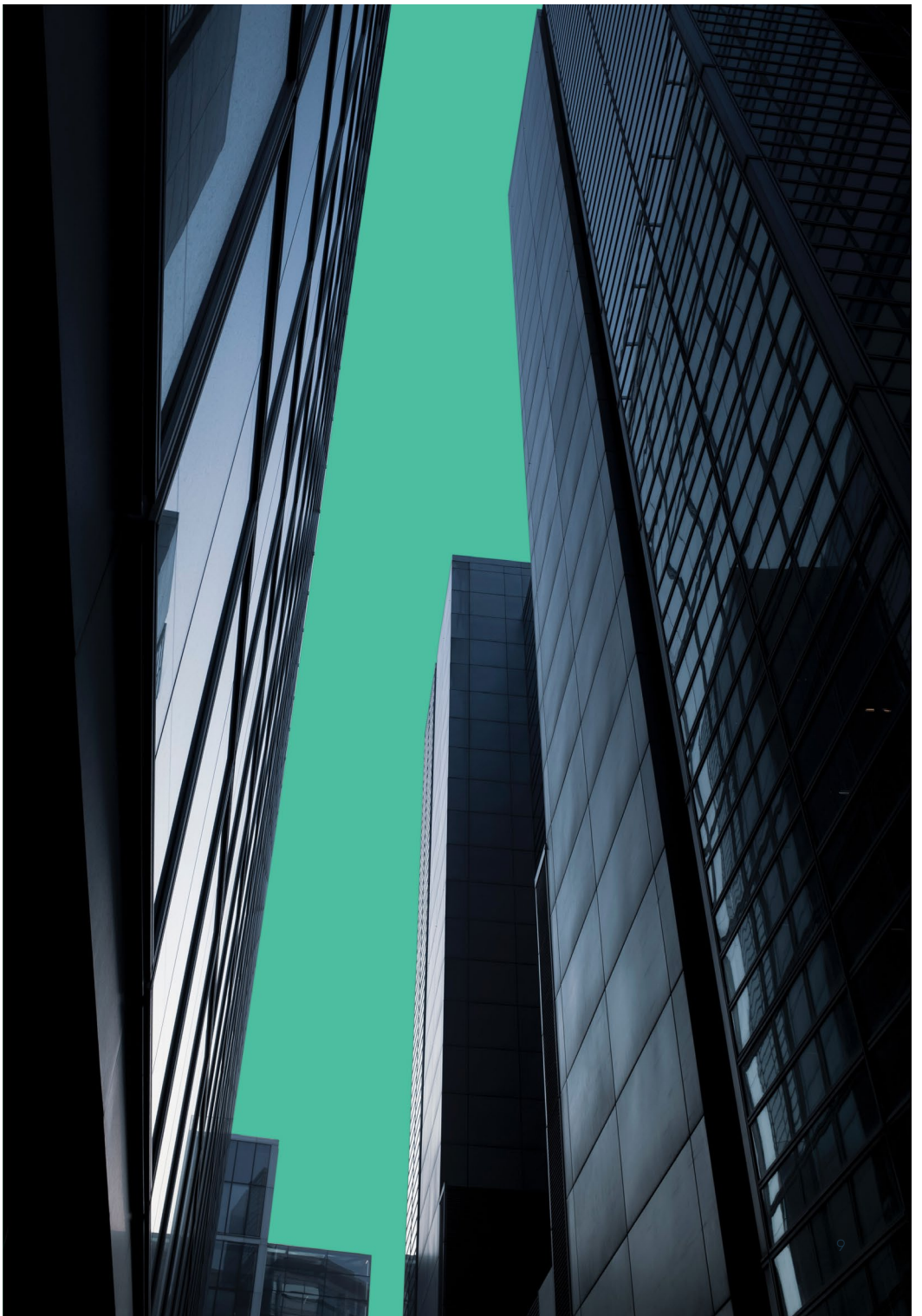
Legislation

Certain UK and EU legislative provisions are also particularly relevant to public company takeovers. The key ones are:

- the Companies Act 2006 ('Companies Act'), for example by providing a statutory mechanism for designation of the Panel as the supervisory authority to regulate takeovers, providing for court-sanctioned schemes of arrangement and providing for the compulsory acquisition of minority shareholdings in takeovers
- MAR which contains prohibitions on market abuse and market manipulation
- the Criminal Justice Act 1993 ('CJA 1993') relating to insider dealing
- the Financial Services Act 2012 which contains offences in relation to misleading statements
- the Financial Services and Markets Act 2000 ('FSMA') which, among other things, regulates the conduct of investment business and empowers the FCA to impose fines pursuant to MAR
- the Competition Act 1998, the Enterprise Act 2002 and the EU Merger Regulation (139/2004/EC) ('EUMR'), the relevant provisions of which are designed, broadly, to restrict anticompetitive conduct or agreements and to regulate certain types of merger, and
- the Prospectus Regulation (EU) 2017/1129 as it applies in England and Wales from time to time after 31 December 2020 (and supporting delegated legislation) which will be relevant where shares or other transferable securities are offered as all or part of the consideration.

In addition, parts of the FCA sourcebook need to be considered, including:

- the Disclosure Guidance and Transparency Rules ('DTRs'), which require, among other things, disclosure of interests in the target company's shares (if admitted to certain markets), and
- the Prospectus Regulation Rules, which will be relevant if shares or other transferable securities are being offered as consideration.



Structuring the bid

Contractual offer or scheme of arrangement?

Control of a target company can be achieved by structuring the bid using a takeover offer, being the traditional method of structuring the bid, or using a statutory scheme of arrangement (a 'Scheme').

In recent years, there has been a significant increase in the use of Schemes to implement transactions which are regulated by the Code, with Schemes now being the more commonly used of the two options.

It can be easier to understand the takeover regulatory regime in the context of a contractual offer (and bidders using a Scheme will often want the flexibility to revert to a contractual offer, for example, if there are competing bidders), so this guide explains the takeover process primarily in the context of a contractual offer.

Where reference in this guide is made to an 'offer' it should be taken to include an acquisition by way of a Scheme unless the context requires otherwise.

What is a scheme of arrangement?

A Scheme is a formal arrangement between a company and its shareholders, which is governed by sections 895 to 899 of the Companies Act and which must be sanctioned by the High Court.

The provisions of the Code apply to an offer effected by means of a Scheme on a modified basis.

In addition to the sanction of the High Court, a Scheme must also be approved by a majority in number of each class of shareholders whose shares are the subject of a proposed Scheme and who are voting at the meeting. That majority must also represent 75% or more of those shares.

Once approved by shareholders and the High Court, the Scheme will be binding on the company and all shareholders, regardless of whether or not they voted in favour, once a copy of the court order is filed at Companies House.

The principal advantages and disadvantages of a Scheme, compared with a traditional takeover offer using a contractual offer, are set out below.

	Scheme	Contractual offer
Certainty of acquiring 100% control	Once the High Court sanctions the Scheme, all members of the class concerned are bound. Therefore, the bidder needs to obtain agreement of 75% of shares voted to be able to secure 100% control.	The bidder must obtain acceptances from 90% of shares to which the offer relates to effect the statutory compulsory acquisition procedure under the Companies Act.
Timing	Generally quicker to acquire 100% control than if the 'squeeze out' procedure is used (see later).	Usually takes longer than a Scheme to acquire 100%.
Flexibility	Generally less flexible than a contractual offer, due to the High Court restraints on timing and requirement for cooperation of the target.	Usually more flexible than a Scheme.
Control of the offer process	The target and its directors control the Scheme's timing and implementation.	Bidder in control as making the contractual offer to shareholders.
Hostile takeovers	Not typically used (and no hostile Scheme has yet been successfully implemented), but there is a mechanism for hostile Schemes.	Can be used in a hostile takeover situation.

Rules relating to stake building

The Code, the DTRs, MAR and the CJA 1993 all contain restrictions on stake building exercises, ie, how many shares (or interests in shares) in a target company can be acquired and over what periods and requirements on disclosure of the resulting shareholdings.

The Code

A party (or parties acting in concert) which acquires interests in 30% of the shares of a company is required to make a mandatory offer for that company. A party owning less than 30% may not acquire interests in shares so as to control more than 30% except in specific circumstances. A party already owning between 30% and 50% may not increase its shareholding, again except in specific circumstances.

Dealings in interests in target company shares by parties and those acting in concert with them must be disclosed by 12 noon on the following business day during an offer period. Anyone who is interested in more than 1% of such shares must announce details of their interests in those shares (known as an 'opening

position disclosure') following the start of an offer period, and must also disclose any dealings during an offer period. An offer period begins when the first announcement is made of an offer or possible offer or when certain other announcements are made (such as that a company is seeking potential bidders or that a purchaser is being sought for an interest in shares carrying 30% or more of the voting rights in a company). Similar disclosure requirements apply to shares in the bidder (once the bidder is identified) if any of the consideration will be or is likely to be other than cash. For these purposes, an interest in shares includes:

- owning shares
- having the right to exercise voting rights attaching to shares
- options or derivatives with a right to call for delivery of shares, and
- long-position contracts for difference.

A bidder is obliged in any bid to offer all target shareholders the highest price at which it purchased target

shares at any time during the period of three months prior to the making of the bid. A bidder which subsequently acquires further target shares during the offer period at a higher price, must increase its bid price to that higher price.

A cash offer must be made to target company shareholders if a bidder has bought more than 10% of the target's shares before or during the bid.

Directors and financial advisers are not permitted to deal in target company shares during an offer period without prior notice.

The Disclosure Guidance and Transparency Rules

Under the DTRs (which apply for these purposes to AIM-quoted as well as Official List companies), any person having an interest in shares, or deemed to have an interest in shares through his or her indirect or direct holding of certain financial instruments must notify the company of this interest if the percentage of voting rights attached to it reaches, exceeds or falls below 3% and each 1% threshold thereafter up to 100% as

a result of an acquisition or disposal. This applies only to movements of whole percentage points. Certain concert party interests are included in the total. However, voting rights attached to certain shares are disregarded for the purposes of determining whether a person has a notification obligation in accordance with the thresholds above.

Concert parties

Parties who decide to act together in connection with a proposed bid, whether by the acquisition of shares in a target company or otherwise, will be regarded as concert parties and therefore as one party for the purposes of applying the share acquisition limits and mandatory bid provisions of the Code. The Code defines 'acting in concert' extremely widely – as persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate 'control' of a company or to frustrate the successful outcome of an offer for a company.

It is not necessary for a legally binding agreement between parties to have been entered into before a concert party could be regarded as existing, in other words, informal arrangements or agreements will suffice.

Certain categories of person are presumed to be acting in concert, unless the contrary can be established, for example:

- a company with its parent, subsidiaries and fellow subsidiaries
- a company with its directors (and their close relatives and family trusts)
- directors of a company which is the subject of an offer or where the directors have reason to believe that a bona fide offer may be imminent
- a company with its pension funds (and the pension funds of other group companies), and
- a connected adviser (such as an adviser to the bidder or target) with its client.

Insider dealing

Insider dealing legislation and the Code make it unlawful for any person, other than the bidder itself, who is aware of a proposed bid to buy shares in the target company until there has been an announcement either that the bid is to be made or that bid negotiations have been terminated. In addition, that person aware of the proposed bid must not recommend another person to deal in the target company shares until the proposed offer is no longer price-sensitive in relation to the target company shares.

Market abuse

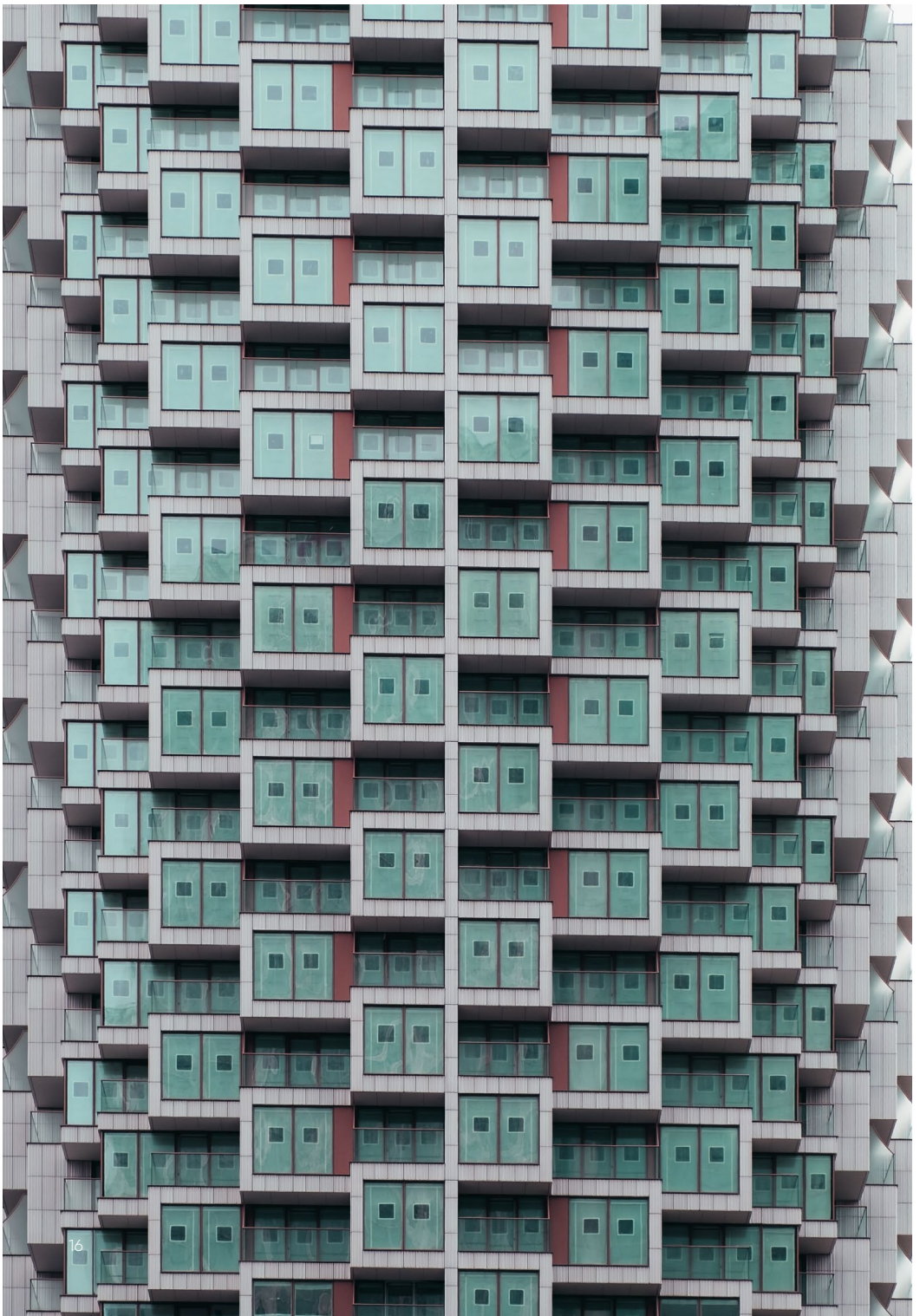
MAR establishes a regulatory framework on market abuse, which contains offences relating to insider dealing, unlawful disclosure of inside information and market manipulation.

The bidder and target company must ensure that they do not enter into transactions that give a false or misleading impression as to the price of securities or result in those securities trading at an abnormal or artificial level.

MAR permits the use of a bidder's own knowledge of its potential bid, and its own knowledge that it intends to acquire shares in the target, in the context of stakebuilding. However, this does not extend to the use of information that a bidder may obtain through due diligence on the target in the context of stakebuilding, so in that case a bidder that obtains due diligence information on the target would need to ensure that such information does not constitute inside information under MAR. Significant care needs to be taken, with specific advice, to ensure that the market abuse offences are not breached.

Other restrictions

Stakebuilding may also be restricted by other factors, such as the provisions in confidentiality undertakings or a standstill agreement, or the need for shareholder approval for an acquisition which passes a Class 1 threshold (if the bidder has a premium listing on the Main Market of the London Stock Exchange). Likewise, there may be sector-specific regulatory restrictions which may apply.



Key percentages

The following table highlights the main impact of acquiring certain

key percentages of a target's share capital.

Percentage of shares or voting rights in target	Impact
1%	<ul style="list-style-type: none">'opening position disclosure' required by noon ten business days after start of offer period or by bidder on day announces firm intention to bid, if earlier, dealings during an offer period to be disclosed by noon on the following day.
3%	<ul style="list-style-type: none">notify target company within two business days.
10%	<ul style="list-style-type: none">can block a 'squeeze out' (see page 36) – but the bidder may use a Scheme instead.
10% in a year	<ul style="list-style-type: none">if purchased for cash, any subsequent offer must be in cash or accompanied by a cash alternative at the highest price paid.
30%	<ul style="list-style-type: none">acquisition of 30% or more will give rise to a mandatory bid requirement.
More than 50%	<ul style="list-style-type: none">power to appoint/remove directorsoffer can be declared unconditional as to acceptances (if so wished).
75%+	<ul style="list-style-type: none">required majority of voted shares to approve a special resolution/approve a Scheme.
90% (of shares to which offer relates)	<ul style="list-style-type: none">power to compulsorily acquire or 'squeeze out' shares held by non-assenting minority shareholders (not relevant if Scheme used).

Preliminary issues

Due diligence

A bidder will want to investigate the business and affairs of a target in as much depth as possible, particularly so when it is raising finance to support its bid.

Two issues commonly result in any due diligence exercise being much more limited - although the precise scope will be a question of negotiation - than would be the case with the acquisition of a private company.

First, the Code imposes an obligation on a target company, its directors and their advisers to keep the prospect of a potential bid absolutely confidential. This, of necessity, will mean keeping the number of target personnel involved to the absolute minimum and will thus reduce the extent of the information which can be supplied.

Secondly, whilst a target company may be happy to disclose information in confidence to a 'friendly' bidder, the Code will require it to disclose the same information to any other bona fide potential bidder - including a potential competitor - who comes along subsequently.

Target board recommendation

An offer which is recommended by a target board will, price considerations aside, generally be more likely to succeed than a bid which is not so recommended. It is also likely to be a cheaper and less risky exercise; cheaper in that the costs of mounting a hostile bid, in terms of success fees to advisers and bank financing arrangements, are generally greater, and less risky in that greater due diligence should be possible in the case of a recommended bid.

The decision as to whether or not a bidder is prepared to 'go hostile' is something which needs very careful consideration at an early stage.

It is often assumed that if the target board does not co-operate with the bidder it is not usually possible to propose a Scheme and that, therefore, a Scheme cannot generally be used in a hostile situation. However, in some situations it may be possible to launch a hostile bid to be effected by way of a Scheme - the bidder will need to apply to the High Court for an order permitting it to circulate the scheme document and would need to satisfy the statutory requirements as to shareholding to enable it to requisition the necessary general meeting under the Companies Act. The Code requires a bidder to consult the Panel in this situation.

Pre-offer stage

Communicating and implementing the offer

Other than some limited exceptions, the announcement of an offer signals the formal start of the offer process. It is therefore hugely significant in the process. The Code requires that a firm intention to make an offer be notified, in the first instance, to the target board or its advisers, before the public announcement is made. If the offer (or an approach with regard to a possible offer) is not made by the bidder or potential bidder, the identity of that person must be disclosed to the target board at the outset.

Pre-bid announcements

The Code requires an announcement to be made when:

- following an approach by or on behalf of a potential bidder to the target board, the target is the subject of rumour and speculation, or there is untoward movement in its share price (based on the facts, but usually approximately 10% or 5% in a single day)
- after a potential bidder first actively considers an offer but before an approach has been made to the target board, the target is the subject of rumour and speculation, or there is untoward movement in its share price and there are reasonable grounds for concluding that it is the potential bidder's actions (whether through inadequate security or otherwise) which have led to the situation
- negotiations or discussions relating to a possible offer are about to be extended to include more than a very restricted number of people (outside those who need to know and their immediate advisers), or
- during an offer period, rumour or speculation specifically identifies a potential bidder who has not been previously identified in any announcement (in which event the Panel will normally require an announcement identifying that potential bidder).

Before the approach is made to the target company board, the obligation to make an announcement rests with the potential bidder. Once the approach has been made, the obligation to make an announcement rests with the target.

A denial of an intention to bid is treated with great importance and announcements expressing such an intention not to make an offer must be as clear and unambiguous as possible. A person will normally be bound by such a statement, and will be subject to restrictions, including a restriction for a six month period on announcing an offer and restrictions for a three month period on steps such as actively considering an offer or acquiring shares in the target. A change of intention after such a statement would only be permissible within six months of such statement in very limited circumstances, including where:

- the target board agrees (but if the statement was made after a competing offer was announced, then only if that offer has lapsed or been withdrawn and the person

and their concert parties have not acquired interests in target shares after the statement was made but before the competing offer lapsed or was withdrawn)

- a third party announces a firm intention to make an offer
- the Panel is satisfied that a material change of circumstances has occurred sufficient to justify the change of intention, or
- the statement was made outside an offer period and an event specified in the announcement as an event which would enable it to be set aside has in fact occurred (the Panel must be consulted before including any such event in the statement).

In considering the application of this rule, the Panel will take into account not only the statement itself but also the manner of any public reporting of it.

Naming of potential bidders and 'put up or shut up' (PUSU)

When making an announcement which starts an offer period (for example, when announcing a possible offer), target companies are required to identify all potential bidders with which the target is in talks or from whom an approach has been received (unless unequivocally rejected). Likewise, if the target makes an announcement which refers to the existence of a new potential bidder during the offer period, it must identify that bidder (unless a firm intention to make an offer has already been announced).

The Panel may grant a dispensation from the requirement for the target to announce an approach and name the potential bidder where it is satisfied that the potential bidder has ceased actively considering making an offer, in which case the potential bidder (and its concert parties) may not take certain actions (such as announce an offer or possible offer or make any statement suggesting that an offer may be made) for a period of six months, nor actively consider making an

offer, approach the target board or acquire any interests in target shares for a period of three months (save in certain limited circumstances).

In addition, once a potential bidder is identified, it will be subject to a 28 day PUSU deadline, so that it must be within 28 days from the date of the announcement in which it is first identified either 'put up' (announce a firm intention to make an offer) or 'shut up' (announce that it does not intend to make an offer).

This deadline can be extended by the Panel, but only at the request of the target. The Panel will take into account factors such as the status of negotiations between the bidder and target and the anticipated timetable for completion in consenting to an extension. The target may request different deadline extensions for different potential bidders or request an extension for one potential bidder and not another. The ability for a target to withhold its consent to an extension gives that target a degree of tactical power to influence the course of a bid, but it will be tempered by the possible pressure from shareholders regarding its response.

The requirement to name potential bidders and the PUSU deadline are significant factors in bidder and target strategy and bid planning.

They add more pressure to the necessity for pre-bid secrecy and will tend to require a bidder's preparations to be reasonably well advanced by the time that an initial approach is made. A bidder will often need to have progressed its financing arrangements before making an approach to the target or be confident of its ability to secure funding within the constrained timetable and by the time of announcing a firm intention to make an offer.

The requirement to name potential bidders and the PUSU deadline do not apply if the target has put itself up for sale by a public auction process (although potential bidders involved in an auction that is publicly announced may have to make disclosures about their and their concert parties' interests in the target).

Announcing a firm intention to make an offer

A firm intention to make an offer should only be announced when the bidder has every reason to believe that it can and will continue to be able to implement the offer. Responsibility in this regard also rests on the bidder's financial adviser.

The Code sets out information which must be included in the announcement of a firm intention to make an offer and prescribes standards of presentation. As well as confirming the fact and terms of the offer, the announcement must contain detailed specified information, including:

- the terms of the offer
- information about the bidder
- the intentions of the bidder with regard to the business, employees and pension scheme(s) of the target
- the bidder's holdings in the target
- the conditions or pre-conditions to which the offer or the making of an offer is subject

- details of irrevocable undertakings to accept the offer or vote in favour of the Scheme, and
- details of any 'offer related arrangements' (see below).

The announcement must also include a confirmation from the bidder's financial adviser, where the offer is for cash or contains an element of cash, that resources are available to the bidder sufficient to satisfy full acceptance of the offer (known as the 'cash confirmation').

The Panel's firm offer announcement checklist must be completed and accompany the final form of the firm offer announcement to be sent to the Panel.

Once a bidder has announced a firm intention to bid it must go through with its offer and a change in general economic, political or industrial circumstances, for example, will not justify a failure to proceed.

Break fees and other deal protection measures

Break fees (or inducement fees) and other offer-related arrangements are not permitted under the Code except

in the event of a hostile bid where the target board wishes to incentivise a third party 'white knight' or where the company has initiated a public auction.

Offer-related arrangements cover a wide range of measures, including:

- inducement fees and arrangements that have a similar financial or economic effect to inducement fees
- an implementation agreement between a bidder and the target (these were previously used in connection with Schemes as they enabled the bidder to gain a degree of control over the process), and
- any exclusivity agreements or restrictions on the target board changing its recommendation.

Rule 21.2 of the Code confirms that this prohibition does not apply to confidentiality agreements (provided they do not seek to prevent the target board from making an announcement of a possible offer or from publicly identifying the potential bidder), commitments not

to solicit employees, customers or suppliers, irrevocable undertakings, commitments to provide information for regulatory clearance, agreements imposing obligations only on the bidder (except in reverse takeovers), agreements relating to existing employee incentive arrangements or agreements between the bidder and the trustees of the target's pension schemes in relation to future funding.

In the limited circumstances where inducement fees are permitted (to incentivise a 'white knight'), there are restrictions on the amount of the inducement fee that can be paid:

- the fee must be no more than 1% of the value of the target, calculated by reference to the first competing offer, and
- the fee must only be payable if another offer becomes wholly unconditional.

Agreeing to pay such a break fee or inducement fee could also constitute an unlawful indemnity for the purposes of the Companies Act prohibition on financial assistance by public companies. To ensure that this is not the case, the fee should be

a fixed amount and not one which is precisely calculated according to the bidder's actual ultimate costs.

There is also an argument that, if the payment of a break fee would result in a 'material' reduction of the market value of the target's assets (or if the target does not actually have any net assets), this would by itself constitute unlawful financial assistance, even though it were not an unlawful indemnity. It is thought (although there is no statutory guidance) that a 1% reduction in the target's net assets represents the upper limit of the range as to what is material.

Any offer-related arrangement and any agreement, arrangement or commitment permitted or excluded under Rule 21.2 of the Code must be summarised in the announcement of a firm intention to make an offer and the offer document and a copy will need to be published on a website (usually of the relevant party).

Offer conditions

The acceptance condition

For any offer that could result in the bidder holding more than 50% of the voting rights of the target, it must be a condition that the offer will not become or be declared unconditional as to acceptances unless the bidder has acquired or agreed to acquire (by virtue of the offer or otherwise) shares carrying more than 50% of the voting rights. If the target company has more than one class of equity, then the Code provides that the bidder must make a comparable (and separate) offer for each class whether such class carries voting rights or not.

In practice, the acceptance condition is usually set by the bidder at 90% of the shares to which the offer relates, as this enables the bidder to exercise the squeeze out mechanism under the Companies Act (see [page 36](#)).

An acceptance condition is not required for a Scheme, as it will either succeed or fail based on whether it is approved by the requisite majority (a majority in number representing 75% in value of the shares held by those present and voting at the shareholder or class meeting) and approved by the court.

When a cash offer is required

If shares carrying 10% or more of the voting rights of any class included in an offer have been purchased for cash by a bidder or any person acting in concert with it during the offer period or within the previous 12 months, the bidder must offer cash for that class or a full cash alternative at not less than the highest price paid in that 12 month period.

When a securities offer is required

If shares carrying 10% or more of the voting rights of any class included in an offer have been purchased by a bidder or any person acting in concert with it in exchange for securities in the three months prior to the start of the offer period or during it, then the bidder will normally be required to offer securities to other holders of that class.

Other conditions

A voluntary offer may be subject to any condition which the bidder sees fit to include, except for conditions which depend solely on subjective judgements by the bidder, or the fulfilment of which is in its hands.

The conditions in a voluntary offer generally relate to certain actions or events which must have occurred or taken place prior to the offer becoming unconditional (for example, bidder shareholder approval) and/or provide safeguards against a wide range of specific adverse events occurring during the offer period. Conditions may be waived by the bidder rather than specifically fulfilled, but the Panel will only allow a bidder to invoke a condition to lapse an offer if it is material and significant in the context of the offer. This is a notoriously difficult hurdle to overcome.

Where a reference to the Competition and Markets Authority ('CMA') or by the European Commission ('EC') is possible, it must be a term of the offer that the offer will lapse if there is such a reference or if proceedings are initiated before the first closing date or the date on which the offer becomes or is declared unconditional as to acceptances, whichever is later (see further [page 52](#) onwards).

Mandatory offers

When a person (or persons acting in concert) acquires an interest which

carries 30% or more of the voting rights of a company or when a person already holding between 30% and 50% of the voting rights acquires additional interests which increases its percentage of the voting rights, that person must make a 'mandatory offer' to all shareholders.

Exceptions to this obligation are possible only in very limited circumstances. In addition, the conditions to which a mandatory offer may be subject are limited to:

- acceptances being received in respect of shares which, together with shares already acquired or agreed to be acquired, will result in the bidder and those acting in concert with it holding shares carrying more than 50% of the voting rights, and
- the possibility of reference to the CMA or the initiation of proceedings by the EC.

Mandatory offers must be in cash (or with a full cash alternative), normally at not less than the highest price paid by the bidder for shares of that class during the offer period or within the previous 12 months.

Bid offer timetable

A bid, whether welcome or not, distracts the target company from its day-to-day business. In order to minimise this disruption while allowing the shareholders sufficient time to decide on the merits of an offer, the bid timetable sets out rules as to when certain events have to have happened and time periods before which certain events cannot occur.

Between DAY -28 and DAY 0	Announce a firm intention to make an offer.
DAY 0	Making the offer, by sending the offer document to the target's shareholders or publishing it on a website. This must be done within 28 days of the announcement of a firm intention to make an offer, but is usually done sooner.
DAY 0 to 14	Sending the defence document. The target's board should circulate its defence document as soon as possible after the offer document is sent or published, and in any event within two weeks.
DAY 21	First closing date. The offer must be open for a sufficient time to allow the target to circulate its views on the offer, although this does not prevent an offer being declared unconditional by an earlier date.
DAY 22	The bidder may not, with certain exceptions, acquire interests in shares before this date which would bring its holding to 30% or more of the voting rights of the target company (except if acquired from a single shareholder).
DAY 21 to 46	Period during which a revised offer may be made.
DAY 35	First possible day for an offer to close after DAY 21 - if an offer has been declared or becomes unconditional as to acceptances, it must remain open for acceptance for at least 14 days after it would otherwise have expired.
DAY 39	No material information may be announced after DAY 39. This allows the bidder one week in which to consider any new information before DAY 46.

The timetable for a contractual takeover offer is summarised below (days include all days and do not refer to business days). Most of the provisions relating to the timing of takeover offers do not apply to a Scheme, as this will be largely subject to the court process. Nonetheless, the Code does impose some timing requirements on the timetable for a Scheme. A typical Scheme timetable can be found on [page 38](#).

DAY 42	Once an offer has been declared unconditional as to acceptances, a bidder has 21 days in which to satisfy or waive any offer conditions which remain outstanding. An offer that is declared unconditional as to acceptances on DAY 21 must therefore be declared wholly unconditional by DAY 42. Shareholders who have accepted, may withdraw their acceptances after 21 days from the first closing date of the initial offer (ie, usually after DAY 42) if the offer has not been declared unconditional as to acceptances.
DAY 46	An offer must be kept open for at least 14 days from the date that the offer or revised offer is made. Since DAY 60 is the last day on which an offer or its revision can be declared unconditional as to acceptances, DAY 46 is the last opportunity for making a revised offer.
DAY 60	If the offer has not achieved the minimum number of acceptances stipulated in its terms (at least 50%), by DAY 60 (subject to limited exceptions with Panel consent) it will lapse. The bidder (except in certain specific circumstances) may not make a further offer for a period of 12 months from that date nor may the bidder, if it is already interested (or would become interested as a result of such acquisition) in shares carrying 30% or more of the voting rights in the target, acquire any further interests in shares in the target company carrying voting rights in the 12 months from that date.
DAY 81	Last day by which any other conditions must be satisfied, on an offer declared unconditional as to acceptances.
14 days after offer wholly unconditional	Last day for settlement of the consideration.

Offer document information

In order to enable shareholders to evaluate fairly the proposals and arguments in the documents produced in a takeover, the Code provides that:

- shareholders must be given sufficient information and advice to enable them to reach a properly informed decision and must have sufficient time to do so and no relevant information should be withheld from them, and
- any document or advertisement addressed to shareholders containing information or advice from a bidder or the board of the target company or their respective advisers must, as is the case with a prospectus, be prepared with the highest standards of care and accuracy.

The offer document is the document by which the bidder makes the formal legal offer to target shareholders. It will contain the detailed terms and conditions of the offer (although the offer conditions will also have been included in the Rule 2.7 announcement). In the case of a Scheme, references in this guide

to the offer document are taken to mean the Scheme circular (or Scheme document).

Responsibility

The directors of the bidder must accept responsibility for the information in all documents sent to shareholders (save for the information relating to the target and its directors, for which the target directors will take responsibility) and to state that, to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case), the information contained in the document is in accordance with the facts and does not omit anything likely to affect the import of such information.

In order to assist the directors, a formal verification process (which consists of checking the facts and the bases and assumptions for statements of opinion or belief contained in the documentation) is undertaken prior to the public release of the document. Sometimes, the bidder board may appoint a committee to which to delegate the detailed consideration of this matter. All the directors, however, must believe

that the committee is competent to do the task before it and must make the personal disclosures required of them by the Code. The delegation to a committee does not affect a director's responsibility.

The standards of care and responsibility placed by the Code on parties connected with such documents are strengthened by the provisions of the Financial Services Act 2012 which makes it an offence to make a misleading or false statement, or to conceal material facts, for the purpose of inducing another person to enter into, or to refrain from entering into, an 'investment agreement'. This is defined so as to include acceptance of an offer. Such behaviour would also constitute market abuse under MAR.

Post-offer statements of intention and post-offer undertakings

There are important Code rules governing statements of intention regarding the business after completion of the takeover and commitments by a party to a specified course of action. The Code distinguishes between,

on the one hand, statements of intent made by a party ('post-offer statements of intent'), and on the other, commitments by a party to a certain course of action relating to the business after a successful completion of the takeover ('post-offer undertakings').

A post-offer statement of intention must be made on reasonable grounds, be an accurate statement of intention when made and the Panel must be consulted if the party later wishes to pursue a different course and, if a different course is actually taken, an immediate announcement will usually be required.

A post-offer undertaking (and any conditions to which it is subject) must be specific and precise, be readily understandable and be capable of objective assessment. The Panel must be consulted before it is given and it must specify the time period for which the undertaking is given or by when the action will be completed. A post-offer undertaking must be complied with (the party will only be excused compliance if the qualification or condition stated in the undertaking applies).

These statements and undertakings are monitored by the Panel.

A party who has made a post-offer statement of intention must confirm in writing to the Panel (usually 12 months after the offer period ended) on whether or not it took the action in question, and announce this also. Post-offer undertakings require written reports to the Panel, on a frequency determined by the Panel and with supporting documents if required by the Panel, covering progress towards compliance. The reports must also be announced.

The offer document

The offer document will ordinarily contain a letter from the bidder setting out the offer and, where the offer is recommended, a letter from the chairman of the target company. The offer document contains, among other things, the commercial arguments for the offer - the price, the commercial logic and the merits of the bidder's management. The offer document also contains the terms of the offer, information regarding the consideration,

the procedure and timetable for acceptance, the circumstances in which the offer can be revised, the timetable and the rights of withdrawal.

The bidder must set out in the offer document its intentions regarding the future business of the target (which fall within the rules for 'post-offer statements of intention') and the long-term commercial justification for the offer. In particular, the document must state:

- the bidder's intentions regarding the future business of the target, including research and development functions
- the bidder's intentions regarding the target's employees and management, including any material changes to conditions of employment or in the balance of their skills and functions
- the bidder's strategic plans for the target and their likely repercussions on employment and locations of the target's place of business, including the location and functions of the headquarters

- the bidder's intentions with regard to employer contributions into the target's pension schemes (including arrangements for funding any scheme deficit), the accrual of benefits for existing members and the admission of new members
- the bidder's intentions regarding any redeployment of the target's fixed assets, and
- the bidder's intentions regarding the maintenance of existing trading facilities for the target shares.

Statements of intention with regard to the target's business, employees and pension schemes must also be made in the Rule 2.7 announcement of a firm intention to make an offer.

Even if the bidder has no intention to make any changes in relation to any of these matters or considers that its strategic plans will have no repercussions on employment or the location of the target's place of business, it must make a statement to that effect.

Insofar as the offer affects the bidder (if a company), the bidder must also state its intentions regarding its own business.

The Code also requires other information to be included in the offer document regarding, among other things:

- financial and other information on the bidder and the target (by providing details of the websites where such information may be found)
- a summary of any current ratings and outlooks publicly accorded to the bidder and target
- a description of how the offer is to be financed and details of the facilities entered into both to finance the offer and to refinance the debt or working capital facilities of the target
- an estimate of the fees and expenses expected to be incurred in connection with the offer, both in aggregate and broken down by category (financing costs, financial advisory fees, legal fees etc.), and

- the bidder's and the bidder directors' (and their connected persons') interests in, rights to subscribe for and short positions in the target shares and their dealings in the last 12 months in the target shares and, in the case of a securities exchange offer, the bidder's shares also.

In the case of a securities exchange offer, the offer of securities to the shareholders of the target is likely to constitute an offer of transferable securities to the public. There is an exemption for takeovers from the requirement to publish an approved prospectus for an offer of transferable securities. This exemption will require an 'exemption document' to be published, containing information describing the transaction and its impact on the bidder. The exemption document will, however, need to be approved by the FCA unless the securities being offered are fungible with those already admitted to trading on a regulated market (provided that it does not constitute a reverse takeover). This has timing and costs implications for bidders.

Some bidders choose to issue a prospectus in any event for greater flexibility and certainty.

The defence document

The Code requires the board of the target company to circulate to its shareholders its views on an offer and to make known the advice of its independent advisers. The target directors must also provide information on interests and dealings by directors and connected parties. In the case of a recommended offer, this information will be included in the offer document. In a hostile bid, this information will form a part of a separate defence document (which must be sent or published within 14 days of the offer document).

The target's employee representatives (which will include both independent trade union representatives and/or any other representatives elected by employees) and the trustees of its pension schemes each have the right to append to the target board's circular a separate opinion on the effects of the offer on employment and the pension schemes respectively.

The target is obliged to inform its employee representatives and the pension scheme trustees of this right at the start of the offer period and to pay for both the circulation of their opinions and the cost of verifying their contents. The board is not, however, required to take responsibility for the contents of the opinions.

Further documents

If the bidder has a premium listing on the Official List and its shares are traded on the Main Market, the requirements of the Listing Rules may in certain circumstances necessitate the sending of a circular to its shareholders about the proposed acquisition seeking their approval.

Where shares are being offered as consideration and the exemption from the need to publish a prospectus is being relied upon, the issue of an exempted document will usually be required, containing information describing the transaction and its impact on the issuer of the shares.



Minority shareholder 'squeeze out'

The Companies Act contains provisions which enable a bidder to acquire compulsorily the shares held by shareholders of the target who do not accept the offer. These provisions are essential on a contractual offer (but will not be relevant on a Scheme). Where the bidder has received acceptances in respect of 90% or more of the shares to which the offer relates, it may, subject to any court order to the contrary, acquire the outstanding shares on the same terms set out in the offer. It can also, in these circumstances, be forced by the minority shareholders themselves to acquire their outstanding shares.

A minority shareholder is entitled to apply to the court to resist being 'squeezed out'. The court may order either that the compulsory acquisition may not be effected

or that the shares are acquired on different terms from those available under the offer. The non-assenting minority shareholder must show 'special circumstances' which would make the acquisition of these shares unfair. This is not easy, as the court will be greatly influenced by the fact that holders of 90% of the shares have accepted the offer.

Companies admitted to the Main Market or AIM are able, when buying back their own shares, to hold these 'on treasury' for re-sale at some future date rather than cancelling them. Such shares, known as treasury shares, remain 'issued' and can be transferred, for example, to an employee share scheme. For the purposes of calculating whether the requisite 90% threshold has been reached, treasury shares are ignored.

Schemes of arrangement

As previously mentioned, a Scheme is a specific procedure permitted under company law in the UK. It is a formal arrangement between a company and its shareholders which requires approval by both the shareholders of the target company and by the High Court. The Code applies to Schemes as it is treated as an 'offer', but on a modified basis.

Scheme of arrangement timetable

Schemes are generally less flexible than a contractual offer because the High Court process will put restraints on timing. As such, most of the provisions relating to the timetable for contractual offers will not apply to a Scheme. Schemes can no longer involve a reduction of capital (and the stamp duty saving this offered), but transfer Schemes are still available. Under transfer Schemes, target shares not already owned by the bidder are transferred to it and consideration is paid to target shareholders. The transfer attracts

stamp duty where target shares are listed on the Official List (no stamp duty is payable on the transfer of shares in companies traded on AIM, provided they are not also listed on a Recognised Stock Exchange).

A model outline timetable for a transfer Scheme is summarised on the next page. This timetable may be extended if the bidder needs to convene a meeting of its own shareholders to approve the Scheme. For instance, on a securities exchange offer if the bidder requires authority to allot its own securities or where the transaction is of a size requiring shareholders' approval under the Listing Rules.

In the past, implementation agreements were typically entered into between the bidder and target in relation to the conduct of a Scheme in order to allow the bidder a degree of control over the process. These agreements are no longer permitted due to the general prohibition on offer-related arrangements.

The Code instead requires the target company to set out the expected timetable for the Scheme in the Scheme circular and to implement the Scheme in accordance with this timetable (unless it withdraws its recommendation, the shareholder or court meeting is adjourned or the bidder invokes a condition to its offer).

Prior to D-DAY	<ul style="list-style-type: none"> Agree with the Panel those rules applicable to the Scheme and provisionally book hearing dates with High Court.
D-DAY -28	<ul style="list-style-type: none"> Announce the transaction, including the information required under Rule 2.7 and section 3(c)(i) of Appendix 7 to the Code. As soon as practicable after the announcement, finalise and submit merger control clearances (if necessary).
D-DAY -16	<ul style="list-style-type: none"> Last day for material alterations to the Scheme document ('Scheme Circular').
D-DAY -17	<ul style="list-style-type: none"> Finalise the Scheme Circular. The final form witness statement in support of the Part 8 claim form for leave to convene court meeting must be sworn and lodged, along with the Part 8 claim form and exhibits (including a copy of the Scheme Circular), at the High Court no less than seven days prior to hearing.
D-DAY -10	<ul style="list-style-type: none"> High Court hearing for leave to convene court meeting.
D-DAY	<ul style="list-style-type: none"> Post Scheme Circular and forms of proxy to shareholders. These should be sent within 28 days of the scheme announcement unless the Panel agrees otherwise.
D-DAY +7	<ul style="list-style-type: none"> Latest time for revisions to the Scheme. This assumes the court and shareholder meetings are to be held on the earliest date following the posting of the Scheme Circular and proxy forms to shareholders (see below D-DAY +21). Any revision to a Scheme should normally be made no later than 14 days before the date of the shareholder meeting.

A limited form of co-operation agreement or bid conduct agreement will be permitted, provided it complies with the provisions for offer-related arrangements.

D-DAY +19	<ul style="list-style-type: none"> ■ Latest date for submission of proxies.
D-DAY +21	<ul style="list-style-type: none"> ■ First date that court meeting and general meeting to approve the Scheme can be held and resolutions passed. The Panel requires shareholders to have a minimum of 21 days' notice so the meetings cannot take place before D-DAY +21. ■ Announce results (as soon as practicable or by 8.00am on the next business day).
D-DAY +22	<ol style="list-style-type: none"> 1. Complete report of chairman of meeting to court. 2. Swear and file witness statement as to service of notices and meeting results.
D-DAY +38	<ul style="list-style-type: none"> ■ Court hearing to obtain court order sanctioning the Scheme ('Scheme Court Order'). ■ Announce result (as soon as practicable).
D-DAY +39	<ul style="list-style-type: none"> ■ Last day of dealings in, and to register transfers of, Target shares (and disablement in CREST).
D-DAY +40	<ul style="list-style-type: none"> ■ The Scheme Court Order is filed at Companies House (if so D-DAY +40 will be the effective date of the Scheme). ■ Announcement about Scheme becoming effective (as soon as practicable).
D-DAY +54	<ul style="list-style-type: none"> ■ Last date for consideration to be posted to Scheme shareholders assuming D-DAY +40 was the effective date of the Scheme (Code requirement is to send consideration to shareholders within 14 days, at the latest, of the Scheme effective date).

Financing the offer

Certainty of funds

In all public offers, a bidder must have sufficient resources to satisfy full acceptance of the offer. Accordingly, the terms of all financing of any offer must ensure that the funds are certain and available at the appropriate times – in other words, to satisfy payment of the offer consideration when it becomes due under the offer, including (if applicable) the sums which will become due to minority shareholders under the squeeze out procedure.

In practice, this means that any loan agreement must have no unsatisfied conditions precedent to draw down in the period following the announcement of the offer, save that the only events which will entitle the debt provider to withdraw its finance (during the 'certain funds' period) will relate to the solvency of the bidder and the failure to satisfy the conditions on which the bid is made.

Debt providers will invariably want to regulate the conduct of an offer and to restrict a bidder's ability to declare its offer unconditional unless and until the requisite 90% acceptance level has been reached.

If a debt provider proposes to syndicate its loan to the bidder to persons who are also shareholders in the target company, the Panel must be consulted to ensure that there is no breach of the rules concerning favourable conditions being offered to some but not all shareholders.

Re-registration as a private company and financial assistance

A debt provider will commonly want its loan to the bidder to be guaranteed by, and secured on the assets of, the target and its subsidiaries. This will amount to the giving of financial assistance by the target group and as such will be unlawful whilst the target and any of its subsidiaries are public companies.

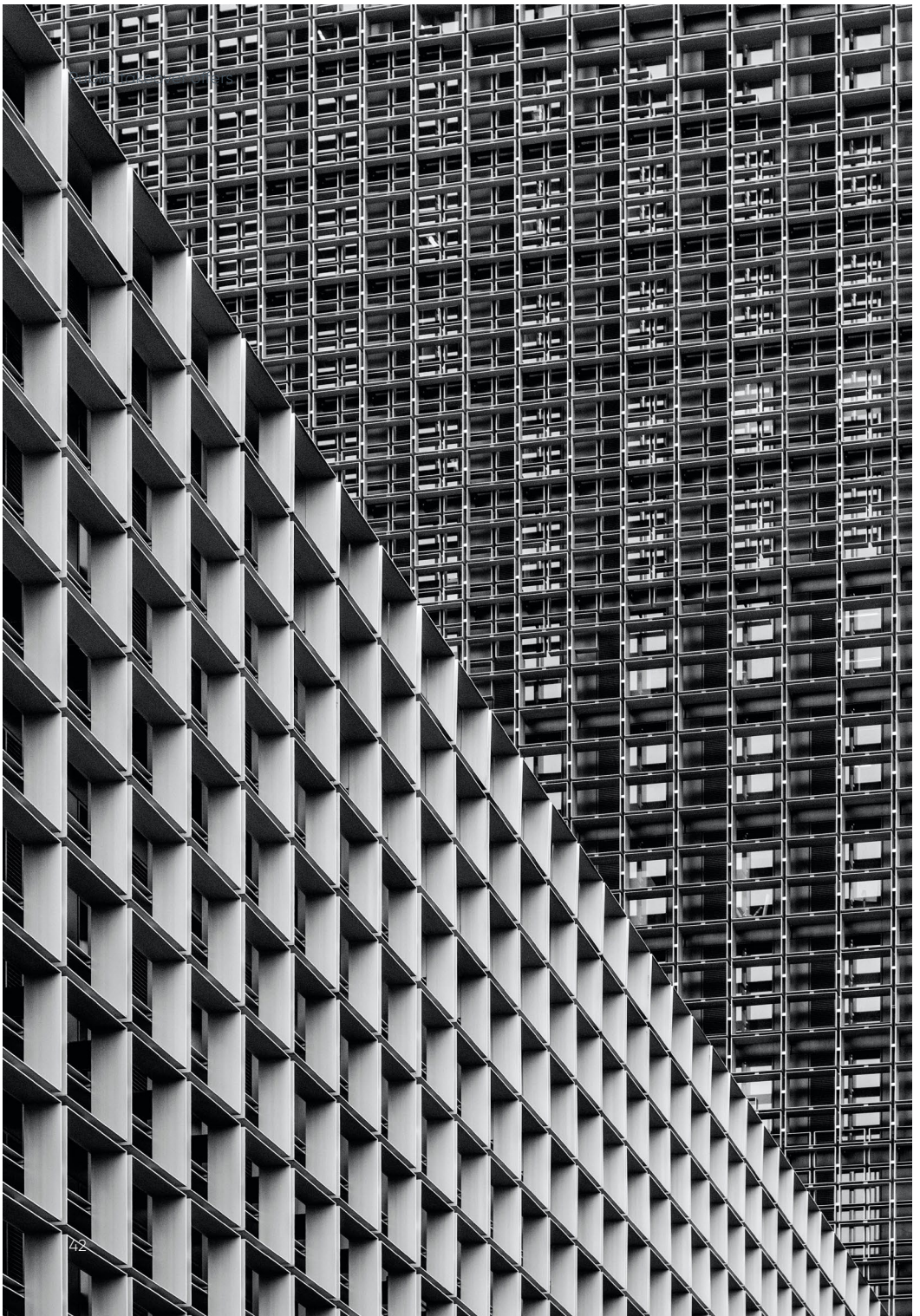
Therefore, the grant of those guarantees, security and any indemnities in favour of the debt provider cannot take place until after an offer has been declared wholly unconditional and the target and those of its subsidiaries which are public companies have first been re-registered as private limited companies.

Accordingly, in contrast to a private company acquisition, where the lender will take security over all the assets at completion, the provision of debt financing in a public company takeover will often take on a three stage approach:

1. When the bidder's press announcement is released, announcing a firm intention to make the offer under rule 2.7 of the Code, the lending bank will take a charge over the undertaking and assets of the bidder, including any shares acquired in the target company as a result of acceptances of the offer.
2. When the offer is declared or becomes unconditional in all respects, the target and its subsidiaries can grant charges to a lending bank to secure any new working capital advances made by the lending bank to the target and its subsidiaries.
3. Once the target and any of its public company subsidiaries have been re-registered as private limited companies,

further charges/cross guarantees can be granted by the target and its subsidiaries to secure the acquisition loan facilities which were provided to the bidder to finance the bid.

Re-registration as a private company requires the passing of a special resolution of a company's shareholders. Shareholders numbering 50 or more or holding 5% or more of the issued share capital or of any class of shares, who do not consent to or vote in favour of the resolution – for example, target shareholders who have not yet accepted the offer (even though it has become unconditional) – can apply to the court to have any re-registration resolution cancelled. Shareholders who do not object within a 28 day period become barred from objecting thereafter. The re-registration process is generally postponed until after this 28 day period unless acceptances of the offer have exceeded 95% and there are fewer than 50 non-assenting shareholders.



Leveraged/management buyouts ('MBO')

The management of public companies is sometimes asked to participate financially in bids for their companies – usually in bids financed by private equity houses, which are keen to ensure continuity of management going forward. In these transactions, the bidding vehicle is usually a newly-incorporated company in which management and the private equity house have shares. Loans provided by third party lenders usually form the majority of the acquisition finance required.

Conflict of interest – independent committee

There is an obvious inherent conflict of interest in any proposed takeover where some or all of the directors of the bidding vehicle are also directors of the target company.

As a result, where a public to private transaction involving an MBO is contemplated, it is important that the target board creates an independent committee as soon as possible, whose role will be to consider the proposals made by the management team, to decide whether, in principle, it is in the company's interests for the

MBO team to formulate an offer to be put to shareholders and to advise shareholders on whether or not to accept the offer.

The independent committee should comprise only those directors of the target company who are unconnected with, and independent of, the MBO team (or any competing bidder) – in other words, no member of the independent committee should have any continuing role (whether executive or non-executive) in either the bidder or the target company, in the event of the offer being successful.

Where all of the directors of the target have an ongoing connection with the bidder and/or target after completion, the target company's financial advisers are usually permitted to take on the role of the independent committee and advise the shareholders on the merits of the particular offer.

The Code

The Code contains special rules to protect shareholders where the target's management is associated with the bidder.

The target board must obtain competent independent advice as to whether the financial terms of any offer (including any alternative offers) are fair and reasonable and the substance of such advice must be made known to its shareholders.

In an MBO, it is particularly important that the independence of the adviser is beyond question. If the existing financial adviser of the target company has had an especially close relationship with any member of the MBO team, the target should consider the appointment of a new financial adviser to advise the independent committee on the merits of the offer and the Panel should be consulted in such cases. The Code makes it clear that the responsibility borne by the adviser is considerable and, therefore, the target board should appoint an independent adviser as soon as possible after it becomes aware of the possibility that an offer may be made.

As a general rule, no bidder, or any persons acting in concert with it, may make (except with the consent of the Panel) any arrangement with shareholders to deal in shares

of a target company or enter into arrangements which involve acceptance of an offer, if there are favourable conditions attached which are not being extended to all shareholders.

Under specific requirements on management incentivisation, where members of management hold shares in the target company and, as a result of the incentivisation arrangements, they will become shareholders in the bidder (on a basis that is not being made available to all other target company shareholders) those arrangements must be approved at a general meeting of the target company's shareholders. This approval must be by a separate vote of independent shareholders, taken on a poll.

Even where management are not to get shares in the bidder, if they are interested in target shares the Panel must be consulted and its consent obtained to incentivisation arrangements of a significant value and/or unusual nature, and this may sometimes lead to a requirement for a separate vote of independent shareholders.

Incentivisation arrangements with management who are interested in target shares must be disclosed publicly if they have been entered into or reached an advanced stage of discussions and the independent financial adviser to the target company must also state publicly that in its opinion the arrangements are fair and reasonable (unless the Panel otherwise consents).

If incentivisation arrangements are intended but no (or only limited) discussions have taken place, this must be stated publicly and relevant details disclosed. If no incentivisation arrangements are proposed, this must be stated publicly.

If the incentivisation arrangements change or progress to an advanced or agreed stage after the offer document is published, the Panel must be consulted and any required steps must be taken.

If any special deals are to be extended beyond the members of the MBO team to their immediate family, the Panel should be consulted at an early stage. The Panel will not usually consent to such an extension

unless it can be justified in some way, such as part of a tax planning exercise.

No member of an MBO team would ordinarily be able to deal in shares of the target when there is reason to suppose that an approach or an offer may be made by a company connected with them up to the time of the announcement of the approach or offer (or termination of discussions).

The MBO team may commonly be deemed to be acting in concert with the bidder and its other shareholders and should, therefore, be careful that their aggregate shareholdings in the target do not exceed 30%, thereby triggering a mandatory offer for the target.

Consideration should be given to the entering into of 'standstill agreements' (whereby the parties agree not to purchase shares, save in certain circumstances) between parties acting in concert. 'Standstill' provisions may also be included in the investment agreement between the private equity investor and management team.

Due diligence

Disclosure of information on the target in an MBO gives rise to some specific issues under the Code.

Management will be in possession of confidential price-sensitive information about the business affairs of the target. Non-public information concerning the target company should only be made available to the equity or debt provider (or other external parties) with the prior consent of the independent directors. Failure to obtain such authorisation could result in a breach of confidentiality and potential civil liability for the misuse of the information.

As any information which is given to potential providers of finance (whether equity or debt) to the bidder must also be given to any other competing bidder or bona fide potential bidder under the Code, the independent directors will want to keep a tight control on the information which the management team can provide to its debt and equity providers. This is normally achieved by way of an undertaking

from the relevant parties, preventing access to and disclosure of confidential information without the consent of the independent directors.

General issues

An MBO will obviously involve a considerable amount of management's time and will most likely cause them to be in breach of certain of the contractual provisions in their employment contracts, such as an obligation to devote their 'full time and attention' to their employer's business; any restrictions on being involved in another business or company; and confidentiality provisions. Each member of the management team should obtain the appropriate releases from any relevant restrictions.

Private equity houses are likely to require warranties from an MBO management team in relation to the target's business and affairs. This raises difficult issues and is a subject that needs to be addressed early. The principal reason for seeking such warranties in a public to private transaction is to ensure proper disclosure of information, rather

than providing a means of economic redress for the private equity house. Obviously, no warranties will be given by the selling shareholders.

Difficulty can sometimes arise with leveraged MBOs in convincing target shareholders to accept an offer, as they may feel that if the management sees value in the business, it should deliver this value to existing shareholders.

An MBO proposal is unlikely to be favourably received unless it is made by the executives of a target company on the board of which there is, and has been for some time, a strong independent non-executive presence.

In the event of an MBO proposal, it would not be appropriate for the bidder to employ as advisers those who have previously been employed as such by the target company unless independent non-executive directors advise that the interests of shareholders would not be adversely affected by such an arrangement between the bidder and those advisers.

It is most unlikely that MBO proposals would receive a sympathetic response unless they were supported and recommended by the independent non-executive directors of the target company.

UK and EU merger control

This briefing provides an introduction to the UK and EU merger control regimes. It should be noted that a number of other local national merger control regimes may apply to a transaction, depending on where the parties to the transaction carry out business.

United Kingdom

The UK merger regime involves a preliminary Phase 1 investigation by the CMA. If the CMA determines that there is the possibility of competition concerns, it will open a more in-depth Phase 2 investigation.

Jurisdiction

Transactions can be investigated where:

- two or more enterprises cease to be distinct, and
- either the turnover or the share of supply test (set out below) is satisfied.

Two enterprises cease to be distinct where they are brought under common control or ownership. Control is not limited to voting

control, but extends to material influence, which may be acquired with a stake of as little as 10%. An increase in the level of control may also be caught.

Share of supply test

This test will be met where the enterprises participating in the transaction are engaged in supplying or acquiring goods or services of the same description and between them supply or acquire at least 25% of those goods or services in the UK or a substantial part of it.

The merger must therefore create or enhance a share of 25% or more of the goods or services in which the parties' activities overlap.

Turnover test

This test is met where the UK turnover of the enterprise being acquired exceeds £70m.

Unless there have been significant changes since the accounts were prepared, the CMA will generally accept the turnover shown in the accounts of the last business year. Where only part of a business is

acquired, it will be necessary to provide evidence of its turnover to the CMA.

Merger clearance

The UK merger regime is voluntary in the sense that there is no legal obligation to notify a transaction even where the thresholds are met. However, it is not safe to assume that the CMA will not find out about a merger which satisfies the share of supply or turnover tests. The CMA has the power to prevent parties from implementing a completed merger or completing an anticipated merger pending clearance from the CMA. There is also the power to order divestment of a completed merger.

The CMA must (subject to certain limited exceptions) open a Phase 2 investigation if it believes that it is or may be the case that a relevant merger situation (ie. satisfying the share of supply or turnover tests) will result, and that it may be expected to result in a substantial lessening of competition ('SLC') within a UK market.

It is not obligatory to seek clearance, but it is usual to do so, particularly

where the share of supply test is satisfied and competition issues exist. Where clearance has not been sought, a Phase 2 investigation may be commenced up to four months after the transaction has been made public.

It is no longer possible to 'informally' notify a merger and instead the parties must use the prescribed Merger Notice. However, the CMA strongly encourages the parties to enter pre-notification discussions at least two weeks before the intended date for notification. The CMA will endeavour to renew documentation submitted at this stage within five to ten days of receipt.

The CMA will expect to see information memoranda, business plans, board papers and reports prepared for the purposes of assessing the deal. Great care should therefore be taken, even at an early stage, to avoid making claims or predictions about the parties' combined market position, for example, that will be hard to defend before the regulator. The same principle applies in EU filings, discussed below.

The periods for considering a merger start when the CMA is satisfied that it has received a fully completed submission and any additional required information.

In appropriate cases the CMA may accept undertakings in lieu of a reference ('UILs'). Time limits are suspended while such UILs are negotiated. The CMA may also 'stop the clock' once the statutory timetable has begun in order to consider complex concerns, so it is often advisable to address any foreseeable issues prior to formal submission and pre-empt any concerns the CMA may have. This may, however, result in pre-notification discussions extending up to six weeks and beyond.

Phase 1

Once the merger has been made public, the parties may submit the notification. The statutory timetable starts on the first day after the CMA has confirmed to the parties that in the case of notified mergers, the parties have submitted a satisfactory Merger Notice, or in the case of an 'own initiative' investigation, the CMA

has sufficient information to enable it to begin its investigation.

The CMA has a statutory obligation to reach a decision as to whether to refer to a Phase 2 investigation within 40 working days. The amount of evidence requested by the CMA in order to reach this decision should not be underestimated.

The CMA will also ask third parties for comments by placing a notice on its website. The CMA will also directly contact the parties' customers and competitors, to ask questions relating to market definition and any possible concerns relating to the merger.

After considering all the evidence, the CMA will determine whether there is a risk of an SLC. If there are no competition concerns, the CMA will proceed to clearance and issue a decision which will be publically announced.

Remedies

If the CMA decides to refer the merger to a Phase 2 investigation, the parties may offer remedies in the form of binding UILs. The CMA will only accept UILs where they

resolve the SLC that has been identified and are capable of ready implementation. Generally, the CMA is more likely to accept structural remedies (ie. divestment of all or part of the business) than behavioural remedies.

If, however, the UILs are deemed not to be suitable, the CMA will proceed to a referral decision and a Phase 2 investigation will begin.

Fees

A fee, varying according to the UK turnover of the enterprise acquired, is payable on clearance or reference. The maximum fee is currently £160,000.

Phase 2

If a merger is referred to Phase 2, the CMA must decide whether the merger can in fact be expected to result in an SLC. This is a more in-depth and detailed examination of the possible SLC identified in Phase 1. The entire process is complex and time consuming. The CMA must usually report within 24 weeks, with a possible extension by a further eight weeks.

In reaching its decision on whether there is an SLC the CMA must decide whether an SLC is more likely than not to occur. A mere possibility that there may be an SLC will not be enough for the CMA to rule against the transaction.

If the CMA recommends against a merger, it may make an appropriate order, including a divestment order, and can also accept undertakings in lieu of an order. It may also prohibit the merger entirely, which means that, if the merger has already completed, the parties must unwind the transaction.

Public interest regime

Where a notified merger raises 'public interest' concerns in relation to national defence, plurality of the media, stability of the financial system and the need to maintain in the UK the capability to combat and to mitigate the effects of public health emergencies, the Secretary of State can issue an intervention notice and examine if the transaction raises concerns.

If the enterprise being acquired develops or produces items for military or military and civilian use, quantum technology or computing hardware as well as Artificial Intelligence, cryptographic authentication and advanced material, there is a voluntary system which is triggered when the turnover of the target is over £1m or the target has a share of supply of 25% or more.

There is currently a bill making its way through Parliament that, when it becomes law, will introduce a retroactive call-in power by the Secretary of State for transactions which raise national security issues and which have been completed from 12 November 2020.

EU

The EUMR provides for the mandatory pre-notification to the EC of all mergers with a Community dimension, with very limited exceptions. The EC will assess the compatibility of such mergers with the common market and, depending on that assessment, will either approve them (with or without conditions) or prohibit them.

Turnover thresholds

A merger will have a Community dimension and will, therefore, be subject to notification and examination by the EC in accordance with the EUMR if:

- the combined aggregate world-wide group turnover of all the parties is more than €5bn
- the aggregate Community-wide turnover of each of at least two of the parties is more than €250m, and

- each party obtains no more than two-thirds of its aggregate Community-wide turnover within the same one Member State (ie. mergers which primarily concern a single Member State fall outside the Regulation).

The EUMR also applies where:

- the combined aggregate world-wide group turnover of all the parties is more than €2.5bn, and
- in each of at least three Member States the combined aggregate group turnover of all the parties is more than €100m, and
- in each of at least three Member States included for the purposes of (b), the aggregate turnover of each of at least two of the parties is more than €25m, and
- the aggregate Community-wide turnover of each of at least two of the parties is more than €100m, and
- each party obtains no more than two-thirds of its aggregate Community-wide turnover within the same one Member State.

- In cases falling below these thresholds, where it would otherwise be necessary to notify in three or more national jurisdictions, the parties may request the EC to take over the case from the national authorities.

If no Member State concerned opposes the application, the EC will have exclusive jurisdiction throughout the EEA. If any Member State objects, the case will not be referred. The opposite scenario is also possible.

In the case of sales of part of a business (for example, a division or subsidiary), the vendor's turnover to be taken into account is only the turnover of the part of the business sold. There are special rules for calculating turnover for the purposes of the EUMR.

Timing and procedure

Notification may be made on the basis of a 'good faith intention' to enter into an agreement. The key timing requirement is not to implement the transaction before receiving clearance. The filing itself requires the compilation and

detailed analysis of large volumes of information, and several weeks should therefore usually be allowed for preparation of the filing.

The EC must examine every merger notified to it within strict time limits:

Phase 1 lasts for 25 working days, but is extended to 35 working days where the parties offer remedies in lieu of Phase 2, and

Phase 2 normally lasts for 90 working days, but is automatically extended to 105 working days if the parties offer remedies on or after working day 55 following the start of Phase 2.

Phase 2 may be further extended by up to 20 working days if either the parties make a request to that effect within 15 working days of the start of Phase 2, or the EC proposes an extension and the parties consent.

Phase 1 will start once the EC deems the notification to be sufficient to allow it to assess the issues. This may be several weeks after the draft notification has been submitted for review.

Substantive test

The EC is required to determine whether or not a merger falls within the scope of the EUMR and, if so, whether or not it raises serious doubts as to its compatibility with the common market. If the EC finds that a notified merger does raise such doubts, it must take the step of opening proceedings, starting Phase 2.

The EC will prohibit a merger if it will 'significantly impede effective competition, in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.' This may be the case either where the merger creates or strengthens a leading player in the market, or where it otherwise reduces the level of competition in the market. The EC may be prepared to accept undertakings, for example to divest part of the acquired business, in lieu of the start of Phase 2 proceedings or a prohibition decision.

Finally

The EC may impose fines for failure to notify a notifiable merger in due time, supplying incorrect or misleading information in a notification or failure to comply with undertakings given to the EC.

A merger that meets the EUMR jurisdictional thresholds must be notified to the EC to the exclusion of any EU member state merger control rules that might otherwise apply (so called 'one stop shop'). A merger, once approved by the EC under the EUMR, may not generally be prohibited or subjected to conditions by the merger control authorities of member states (subject to exceptions).

The one stop shop no longer applies to the UK from 31 December 2020, when the Brexit transition period ended. That means that mergers which have a Community dimension but also meet the UK threshold could be examined by both competition authorities and two separate filings will be required.

This briefing reviews in general terms the issues arising in connection with a takeover of a UK public company which is subject to the City Code on Takeovers and Mergers. The three key points to bear in mind regarding any such transaction are:

1. Identifying issues early in the process so that appropriate resources can be brought to bear on problem solving.
2. Procedures need to be followed to ensure that all relevant documents are prepared to the highest standards of care and accuracy. Be patient, let your experienced adviser guide you through the process.
3. Organisation of the process assists a successful outcome. For the target (and often the bidder), this means dividing resources between managing the transaction and ensuring that the existing ongoing business is not adversely affected by the process.



Appendix

General principles of the Code

The general principles under the Code are as follows:

1. All holders of the securities of a target company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.
2. The holders of the securities of a target company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the target company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.
3. The board of a target company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.
4. False markets must not be created in the securities of the target company, of the bidder company or of any company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.
5. A bidder must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.
6. A target company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

About us

Taylor Wessing is a global law firm that serves the world's most innovative people and businesses. Deeply embedded within our sectors, we work closely together with our clients to crack complex problems, enabling ideas and aspirations to thrive. Together we challenge expectation and create extraordinary results.

By shaping the conversation in our sectors, we enable our clients to unlock growth, protect innovation and accelerate ambition.



Technology, Media & Communications



Private Wealth



Energy & Infrastructure



Life Sciences & Healthcare

- Aerospace & Defence
- Business & Professional Services
- Consumer & Retail
- Hotels & Leisure
- Manufacturing & Industrials
- Real Estate
- Automotive & Mobility
- Chemicals
- Financial Institutions
- Logistics & Transport
- Public Services & Education




1000+ lawyers
300+ partners
28 offices
16 jurisdictions

Challenge expectation, together

With our team based across Europe, the Middle East, US and Asia, we work with clients wherever they want to do business. We blend the best of local commercial, industry and cultural knowledge with international experience to provide proactive, integrated solutions across the full range of service areas.

1000+ lawyers 300+ partners 28 offices 16 jurisdictions



Austria	Klagenfurt Vienna
Belgium	Brussels
China	Beijing Hong Kong Shanghai
Czech Republic	Brno Prague
France	Paris
Germany	Berlin Düsseldorf Frankfurt Hamburg Munich
Hungary	Budapest
Netherlands	Amsterdam Eindhoven
Poland	Warsaw
Slovakia	Bratislava
South Korea	Seoul*
UAE	Dubai
Ukraine	Kyiv
United Kingdom	Cambridge Liverpool London London TechFocus
USA	New York Silicon Valley

* In association with DR & AJU LLC

© Taylor Wessing LLP 2021 | 2009-000283-8

This publication is not intended to constitute legal advice. Taylor Wessing entities operate under one brand but are legally distinct, either being or affiliated to a member of Taylor Wessing Verein. Taylor Wessing Verein does not itself provide legal or other services. Further information can be found on our regulatory page at:

taylorwessing.com

TaylorWessing