

REGULATION OF TAKEOVERS IN THE UK

CORPORATE AND M&A

Takeovers of public companies in the UK are subject to regulation under the City Code on Takeovers and Mergers (the "Code").

THE PANEL

The Code is issued and administered by the Panel on Takeovers and Mergers (the "Panel"). The Panel is an independent body which draws its members from major financial and business institutions. The Panel works on a day-to-day basis through its "Executive" (professional staff).

The Panel has been designated as the supervisory authority to carry out certain regulatory functions in the UK in relation to takeovers pursuant to the EU Directive on Takeover Bids (2004/25/EC). Its EU Directive functions are set out in the Companies Act 2006 Part 28. The Panel also has statutory powers in relation to takeover transactions for a range of UK, Channel Islands and Isle of Man companies which are outside the scope of the Directive. (See "*Companies and transactions to which the Code applies*" below.)

THE CODE

The Code consists of 6 General Principles and 38 specific Rules, accompanied by definitions, explanatory notes and Appendices.

The principal purposes of the Code are to ensure fair and equal treatment of all equity shareholders in a target company (referred to in the Code as an "offeree"), to provide an orderly framework for the conduct of takeovers and to ensure that shareholders are not denied an opportunity to make an informed decision on the merits of an offer. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the UK financial markets. The Code affords the Panel considerable flexibility, for example to grant derogations from, or waivers of, certain Rules.

The General Principles and Rules of the Code are not framed in technical language and are to be interpreted so as to achieve their underlying purpose. Their spirit must be observed as well as their letter. Rather than adopting a technical, legalistic, approach to interpretation of the Code, if a party or any of its advisers is in any doubt as to whether a proposed course of conduct is in accordance with the Code, they must consult the Panel Executive in advance. The Executive may also be approached on a preliminary, "no names" basis for non-binding guidance.

ENFORCEMENT OF THE CODE

It is the practice of the Panel, in discharging its functions under the Code, to focus on the specific consequences of breaches of the Code, with the aim of providing appropriate remedial or compensatory action in a timely manner. The Panel may give any direction that appears to it to be necessary in order:

- ◆ to restrain a person from acting (or continuing to act) in breach of the Code; or
- ◆ to restrain a person from doing (or continuing to do) a particular thing, pending determination of whether that or any other conduct of his is or would be a breach of the Code; or
- ◆ otherwise to secure compliance with the Code.

The Panel also has power to require a person to pay compensation to the holders, or former holders, of securities of a target company for breach of certain Rules of the Code and to seek enforcement of the Code through the UK courts.

In addition, disciplinary action may be appropriate in respect of certain breaches of the Code. The Panel has power to:

- ◆ issue a private or public statement of censure; or
- ◆ suspend, withdraw or impose conditions on any exemption, approval or other special status which the Panel has granted to a person (for example, exempt market maker status); or
- ◆ report the offender's conduct to a UK or overseas regulatory authority or professional body so that it can consider whether to take disciplinary or enforcement action; or
- ◆ publish a Panel Statement indicating that the offender is someone who is not likely to comply with the Code - there are so-called "cold-shouldering" rules of the UK Financial Services Authority (FSA) and certain professional bodies which, in certain circumstances, oblige FSA-authorized persons (such as investment banks and brokers), and members of such bodies, not to act for the person in question in a transaction subject to the Code.

COMPANIES AND TRANSACTIONS TO WHICH THE CODE APPLIES

In determining whether or not the Code applies, it is the nature of the target, or potential target, which is relevant, not the nature of the offeror.

The Code applies to offers for:

- ◆ companies and Societas Europaea which have their registered offices in the UK, the Channel Islands or the Isle of Man, if any of their securities are admitted to trading on a regulated market in the UK (e.g. the main market of the London Stock Exchange - premium or standard listing - or the PLUS-listed market), or on any stock exchange in the Channel Islands or the Isle of Man; and
- ◆ public and certain private companies and Societas Europaea which have their registered offices in the UK, the Channel Islands or the Isle of Man and which are considered by the Panel to have their place of central management and control (residence) in the UK, the Channel Islands or the Isle of Man. This includes, for example, resident companies with equity securities admitted to trading on AIM or the PLUS-quoted market, but also unquoted companies which may be owned by only a few people but have elected to be registered as public companies because this is considered to carry greater prestige. (The Panel may be willing to waive compliance with the Code for closely-held "public" companies, where shareholders consent, but it is necessary to consult with the Panel at an early stage to clarify the position and procedural requirements.)

The resident private companies to which the Code applies includes those which have had their equity shares and/or voting securities admitted to the Official List at any time during the previous ten years, or if dealings and/or prices for their shares have been published regularly for at least six months during the previous ten years, whether via a newspaper, electronic price quotation system or otherwise, or if certain other conditions apply. Companies which have been traded during the requisite period on AIM or on PLUS are therefore subject to the Code.

Special rules apply, where the Panel may share jurisdiction with supervisory authorities in other member states of the European Economic Area ("EEA"), for public offers for companies which have their registered offices and securities admitted to trading in different member states of the EEA.

The Code is concerned with regulating takeover bids and merger transactions of the relevant companies, however structured. The Code is also concerned with regulating other transactions (including offers by a parent company for shares in its subsidiary, dual holding company transactions, new share issues/"reverse" takeovers, share capital reorganisations and offers to minority shareholders) which have as their objective or potential effect (directly or indirectly) obtaining or consolidating control of a company subject to the Code, as well as partial and tender offers to shareholders for securities in the relevant companies. (For the purposes of the Code, "control" means an interest in securities carrying 30% or more of the voting rights in a target company.) The Code applies to all the above transactions at whatever stage of their implementation, including possible transactions which have not yet been announced. (In this note, unless otherwise noted, or the context otherwise requires, references to an "offer" or "offeror" include a potential offer or offeror.)

OFFER STRUCTURES AND TIMING

A takeover transaction a company subject to the Code will typically be structured either as a "contractual offer" to purchase target shares, requiring individual acceptance by a specified majority of shareholders, or a "scheme of arrangement" – a statutory process requiring approval by the requisite majority vote of shareholders and sanction by court order, which then binds all target shareholders of the relevant class(es).

Contractual Offers and Statutory "Squeeze Out"

The Code provides that a contractual offer for voting shares cannot become unconditional unless the offeror has acquired and/or agreed to acquire (by acceptances of the offer or otherwise) shares carrying over 50% of the voting rights in the target.

The Companies Act 2006, Part 28, enables a person who has made a takeover offer for any class of shares and acquired not less than 90% of the shares to which that offer relates (and not less than 90% of the voting rights carried by those shares) to acquire the remaining shares of the same class on the terms of the offer. Various technical requirements must be satisfied in order to ensure that these compulsory acquisition rights will apply. Pre-existing shareholdings of the offeror and its associates do not count as "shares to which the offer relates", but (subject to certain conditions) shares acquired by them during, but outside, the offer may be counted towards the 90% threshold. Where the 90% level is reached, there is also a corresponding right for a minority shareholder to require the offeror to buy his shares on the terms of the offer.

Although a non-accepting shareholder may apply to court to resist compulsory acquisition, or for an order that his shares be acquired on different terms, such applications are rare in practice and even more rarely successful.

Most contractual offers specify a 90% acceptance condition at the outset, reflecting the threshold for statutory compulsory acquisition, on the basis that this condition may then be waived by the offeror at any level above the simple voting majority required the Code. Banks providing consideration loan facilities to an offeror, however, may seek to reserve a veto over its discretion to declare the offer unconditional as to acceptances at a lower level, particularly because inability to “squeeze out” residual minority shareholders would make it considerably more problematic to obtain, for example, guarantees and/or security from the target group for the acquisition loan facilities following completion of the offer.

Schemes of Arrangement

As an alternative to a contractual offer, it has become increasingly common for a recommended bid to proceed by way of a scheme of arrangement under the Companies Act 2006, Part 26. A substantial majority of the larger offers announced in the first half of 2011, for example, were structured as schemes of arrangement. Because a scheme must be proposed by the target company to its shareholders and the court, however, it is not practicable to implement a hostile takeover by means of a scheme.

The Code applies to a scheme, as well as a contractual offer, subject to certain modifications to reflect issues arising in practice with the way schemes operate, statutory requirements and the court timetable. Appendix 7 to the Code sets out the particular rules which apply to takeovers to be effected by way of a scheme.

The key steps involved in a scheme of arrangement are:

- ◆ A “scheme document” (also called a “scheme circular”), containing both the information required by the Code for an offer document and target response document, as well as information required by the Companies Act and notice of the target shareholder meeting(s) necessary to approve the scheme, is prepared by the parties jointly and, with the court’s permission, posted by the target to its shareholders.
- ◆ The scheme must then be approved at a meeting of target shareholders, or separate meetings of each affected class of shareholders. A scheme requires approval by a majority

in number of those target shareholders of each relevant class who vote, representing at least 75% in value of the shares of each class voted, at the shareholder meeting(s). This meeting is referred to as the “court meeting” because it is, technically, convened by order of the court. Shares owned or controlled by the offeror and/or its affiliates will not be able to vote. Usually there will also be a further general meeting of target shareholders held on the same day, to approve related matters (normally requiring at least 75% of the votes cast).

- ◆ Court sanction for the scheme is sought at a final hearing, which considers compliance with statutory requirements and fairness to affected shareholders (who have a right to attend and speak, but rarely do so). The court has discretion to approve the scheme or not, although the judge would normally be reluctant to disregard approval by the requisite majorities, absent compelling circumstances (such as material conflicts of interest, failures in disclosure or new developments). An uncontested hearing normally takes only about half an hour.
- ◆ Upon filing at the Registrar of Companies of the court order approving the scheme, it becomes effective and binds all shareholders of the relevant class(es), whether or not they voted in favour (or at all).

A scheme usually involves cancellation of the existing target shares, and re-issue of those shares to the offeror, in exchange for the offeror paying (or issuing) the agreed consideration to the former target shareholders, rather than a direct transfer of target shares to the offeror. This saves the stamp duty of approximately 0.5% of the consideration for a transfer of shares in a UK target that would apply in the case of a contractual offer.

Timing

The timetable dictated by the Code is of critical importance and reflects the Code’s General Principle 6 that a target company must not be hindered in the conduct of its affairs for longer than is reasonable. Once a firm offer is announced, the future of the target will normally be decided within a maximum period of about three months, unless the transaction is referred to the UK or European competition authorities (in which case the outcome may be in doubt for some time) or a competing bidder emerges. An agreed contractual offer, with no competing bidder, might be declared fully unconditional within as little 3 weeks after its announcement, although even in that case it would typically be somewhat longer. A hostile bid will rarely be concluded in less than two months and could take considerably longer.

Timing for a Contractual Offer

The key timing requirements for a contractual offer under the Code are:

- ◆ Following announcement of a firm offer, the formal offer document must normally be published within 28 days. Most are published sooner and in many cases nearly simultaneously with the announcement.
- ◆ The target board must advise its shareholders of its views on the offer within 14 days of publication of the offer document, but in the case of a recommended offer this requirement is satisfied by including a letter and information from the target board in the offer document itself.
- ◆ The offer must be open for at least 21 days after the date of publication of the offer document (but where the offer is extended to target shareholders in the US the initial period may need to be 20 business days instead). The end of the initial offer period is the “first closing date”. The offeror may (but is not obliged to) extend the offer to further closing dates, but must keep it open for at least 14 days after it becomes, or is declared to be, unconditional as to the level of acceptances.
- ◆ Except with the consent of the Panel, the offer may not become or be declared unconditional as to acceptances later than the 60th day after the initial offer document was published. The Panel would normally only give its consent where there is a competing bid or the target board consents to the extension.
- ◆ All other conditions must be satisfied within 21 days after the later of the first closing date, or the date on which the offer becomes or is declared unconditional as to acceptances. If not, the offer must lapse.
- ◆ If an offer has not become or been declared unconditional as to acceptances by 21 days after the first closing date (“day 42”), shareholders have a right to withdraw their acceptances.

Timing for a Scheme of Arrangement

The timetable for a scheme of arrangement varies, depending upon court schedules and other factors, but in an uncontested situation it would be reasonable to expect a scheme to take about 4 to 6 weeks longer, from the firm offer announcement to its effective date, than a recommended contractual offer would to the earliest date it could be declared wholly unconditional.

However, with a contractual offer it takes another six weeks from the time the 90% test is satisfied to complete the compulsory acquisition of non-accepting shares. Thus a scheme, once approved, is likely to get the bidder to 100% ownership more quickly than a contractual offer, but may take somewhat longer to achieve day-to-day control.

The timing for the key steps of a scheme would be as follows:

- ◆ Once a firm offer announcement is issued with the target board's recommendation, the target must send the formal scheme document to its shareholders within 28 days, unless the Panel agrees otherwise or the target board withdraws its recommendation (in which case the Panel would normally consent to the offeror switching to a contractual offer, if it so chooses). In practice the scheme document is usually published at least a week after the announcement.
- ◆ The legal minimum notice period for the target shareholder meetings will vary between about 16 and 24 days, depending on the target's constitution, but under the Code cannot be less than 21 days from the date the scheme document is sent to shareholders.
- ◆ The final court hearing to make the order(s) necessary for the scheme to become effective will normally be held about 3 weeks after the shareholder meetings, although this varies with court schedules. This hearing may, for technical reasons, be split into two hearings about one or two days apart.
- ◆ The effective date of the scheme (at which time the offeror acquires 100% of the target shares) will normally be the next business day after the final court hearing.

The Code allows the conditions to the scheme to include “long-stop” deadlines for certain steps to be accomplished – i.e. the holding of the shareholder meetings, the court's sanction for the scheme and the scheme becoming effective; however the offeror is obliged to allow the target some leeway as the deadlines for the shareholder meetings and court sanction must be more than 21 days after the expected dates for these events set out in the scheme document.

There are a number of other differences between a contractual offer and a scheme and we would be happy to provide separate advice as to their relative merits and the most appropriate course of action in any given situation.

Unless otherwise noted, references below to an “offer” mean a takeover proposal subject to the Code, however structured, and “offer document” includes a scheme document.

GENERAL PRINCIPLES OF THE CODE

The General Principles demonstrate the fundamental concerns addressed by the Code:

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 offeror company or of any other 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. An offeror must announce a bid only after ensuring that it can fulfil in full any cash consideration, if 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.

THE RULES OF THE CODE

The Rules are more detailed than the General Principles but, as mentioned above, are not intended to be the subject of technical legal interpretation. Provided the General Principles are respected, the Panel may modify or relax the application of a Rule if it considers that in the circumstances it would operate unduly harshly or in an otherwise inappropriate way.

The following is a summary of certain key provisions of the Rules, but it should not be regarded as comprehensive.

The Approach; Secrecy and Announcements

An offer must be put forward in the first instance to the target board or to its advisers. The identity of the ultimate offeror must be disclosed at the outset.

When a firm intention to make an offer is notified to the target board, it must make an *immediate* announcement. An obligation to make an immediate announcement (i.e. that an approach has been made or that discussions are taking place or an offer is being considered) can also arise at an earlier stage if, for example:

- ◆ the prospective target is the subject of rumour and speculation, or there is an “untoward” movement in its share price, before the offeror makes any approach to the target board and there are reasonable grounds for concluding that it is the offeror’s actions (whether through inadequate security, or otherwise) which have led to the situation; or
- ◆ following an approach to the target board, the target is the subject of rumour and speculation, or there is an untoward movement in its share price; or
- ◆ when negotiations are about to be extended to include more than a very restricted number of people (normally no more than six external parties), outside those who need to know in the companies concerned and their immediate advisers.

Whether a share price movement is “untoward” will depend on the circumstances, but the Panel should be consulted, at the latest, if there is movement of 10% or more over the relevant period or 5% or more in a single day.

Announcements under the Code must be made through one of the approved Regulatory Information Services (RIS).

Because of the risks of creating a false market and insider dealing in the event of information leaks, the Code emphasises the importance of maintaining secrecy before an announcement is made about an offer (including a possible offer). All persons privy to confidential information, particularly price-sensitive information, concerning the offer must treat it as secret and conduct themselves so as to minimise the risk of any leak. The Panel will not hesitate to intervene and force an announcement if speculation in the press or unusual market activity indicates

that word of a possible offer has leaked out, but primary responsibility for monitoring the market for indications of a leak, consulting with the Panel if in any doubt whether an announcement may be required, and promptly making announcements which are required, and promptly making announcements which are required, lies with the offeror (before it makes any approach to the target board), or the target (at any time after an approach has been received and not unequivocally rejected), and their respective advisers.

Secrecy is also vital to the companies involved because a premature announcement can have serious consequences for both sides: for the target de-stabilising its shareholder base and employee relations by putting it publicly “into play” and for the offeror making its identity and interest public and starting the clock running on a 28-day “put up or shut up” period (see the following section).

Consequences of “Possible Offer” Announcements; “Put up or Shut up” Deadline

An “offer period” commences for the target company when the first announcement is made of an offer (including a possible offer) for it. Certain other types of announcement can also trigger an offer period, such as an announcement by the company’s board that they are carrying out a “strategic review” that may lead to an offer or that they are actively seeking bidders for the company by means of a “formal sale process”. The offer period will continue until either a firm offer receives sufficient shareholder acceptances (or, in the case of a scheme of arrangement, becomes effective) or all announced offer proposals have lapsed or been withdrawn.

If the parties are able to maintain secrecy until a firm offer is announced, the offer period will only commence at that time; however if either party is obliged to make an announcement earlier (in particular due to a leak of information), or chooses to do so, then the offer period will start at a time when a firm offer may or may not ever emerge. An announcement by a potential offeror before its approach to the target board will obviously reveal its identity, but Rule 2.4 now requires that an announcement by a target company that commences an offer period (other than one announcing that the board is seeking bidders through a “formal sale process”), must identify each potential offeror with which the target is in talks, or from which an approach has been received and not unequivocally rejected.

The Code specifically forbids a potential offeror from attempting to prevent the target board from making an announcement, or publicly identifying the offeror, at any time the board thinks appropriate (i.e. whether or not the circumstances would in fact require an announcement under the Code). The Panel will consider it a breach of this rule if an offeror attempts to circumvent this restriction (for example by specifying that an offer approach will be withdrawn automatically if a Code requirement to make an announcement identifying the offeror is triggered or the target does not engage with the offeror within a certain time).

Once a potential offeror is publicly identified in an announcement under the Code, whether issued by the offeror or target, Rule 2.6 gives that offeror 28 days within which to “put up” (by announcing a firm offer) or “shut up” (by announcing that it does not intend to make an offer (which would have the consequences outlined below at the end of this section)). The Panel will normally consent to an extension of the 28-day deadline, but only at the request of the target board (not just the offeror) and after taking into account the status of discussions close to the original deadline. An offeror will therefore need the target’s cooperation to obtain an extension and cannot “reserve” one at the outset.

The Panel must be consulted in advance if, before the announcement of a firm intention to make an offer, any person proposes to make a statement in relation to the terms (in particular as to price, exchange ratio, valuation, and similar matters) on which an offer might be made. If any such statement is made by a potential offeror or person acting in concert with it, and not immediately corrected, the offeror will be bound by it if it later does make an offer (unless it specifically reserved the right not to be bound in the relevant circumstances).

A public statement of an intention *not* to make an offer is treated by the Panel as firm, so that the person making it and persons acting in concert with it would be prohibited from announcing an offer, acquiring shares in the target or taking certain other steps in connection with an offer, for a period of six months afterwards, unless the target board agrees, a third party subsequently announces a firm offer, the Panel accepts that there has been a material change of circumstances or another exception applies. Any person proposing to make such a statement should consult the Panel in advance.

Announcing a Firm Offer; Certainty and Disclosure of Financing Arrangements

The formal announcement of a firm intention to make an offer (often called a "Rule 2.7 announcement") is a key document, normally very detailed, both as to the terms and conditions of the offer and the commercial logic behind it. The Code specifies certain information which must be included in the announcement. In the case of a recommended offer, the wording of the announcement will be carefully worked out between the parties and their advisers.

The Code states that a firm offer should be announced only after the most careful and responsible consideration and when the offeror has "every reason" to believe that it can and will be able to implement the offer. Responsibility in this regard also rests on the offeror's financial adviser. Once a firm intention to make an offer has been announced, the offeror must proceed with the offer unless a specific pre-condition to making the offer, acceptable to the Panel, has been identified in the announcement and has not been satisfied. However, the Panel would normally consent to release an offeror from the obligation to proceed if a competing bidder announces a higher firm offer before the initial offeror publishes its offer document.

A firm offer will normally be made subject to satisfaction of a number of objective conditions, including, for example, specific conditions the satisfaction of which is readily ascertainable, such as target shareholder acceptance or approval levels, major regulatory approvals and offeror shareholder consents (if needed), as well as a number of general conditions such as absence of material undisclosed liabilities of the target, and similar matters. Conditions which depend solely on subjective judgments of the offeror are normally not permitted and the Panel will not permit an offeror to invoke any condition (other than target shareholder acceptance/approval levels) so as to cause the offer not to proceed, unless it is satisfied that the circumstances of the non-satisfaction of the condition are of material significance to the offeror in the context of the offer. The Panel sets a very high threshold in this regard so that, for example, even a very material deterioration in the target's business or the financial markets generally would not normally let an offeror "off the hook". A referral of the takeover to the UK Competition Commission, or the initiation of proceedings by the European Commission under the EU merger control regulations would, however, normally cause the offer to lapse.

An offer cannot normally be made subject to a financing condition (although there may be conditions relating to offeror shareholder approvals and/or admission of securities to listing

or trading, where cash consideration is to be raised by means of an equity issue). In "exceptional" cases, the Panel may be prepared to accept a financing pre-condition (to the making of the offer), but normally an offeror must have fully-documented and committed financing arrangements in place at the time a firm offer is announced.

Where the offer consideration is, or includes, cash, the offeror's financial adviser must confirm publicly that sufficient resources are available to the offeror to satisfy full acceptance of the offer. An adviser which fails to act responsibly and take all reasonable steps to assure itself that the cash is available runs a risk of being required by the Panel to produce the money itself. The offeror will thus have to satisfy its own advisers that it has sufficient cash resources available to pay all the consideration. This may involve a firm underwriting commitment (where the deal is to be financed by a share issue), the offeror's own cash resources, or committed loan facilities from a reputable bank, but the terms of any loan commitment have to be very carefully drawn, to ensure that the lender cannot refuse to advance the money once the offer has become unconditional.

Copies of agreements and documents relating to the financing of an offer must be put on public "display" (by publication on a website) immediately following the announcement of a firm offer. Details of the financing arrangements must be provided in the offer document when published. (The Panel has indicated that it would not require detailed disclosure to be made of the equity financing structures of private equity offeror vehicles and stated that debt facilities should be disclosed in detail but equity financing arrangements should be disclosed in broad terms.)

Once a firm offer is announced, the offer document must normally be sent to target shareholders no more than 28 days later.

The Concept of "Acting in Concert"

Many provisions of the Code, particularly those concerning dealings in and disclosure of interests in relevant securities (see below), apply not just to the parties to an offer, but to persons "acting in concert" with them ("concert parties"). Persons are "acting in concert" when, pursuant to an agreement or understanding (whether formal or informal), they co-operate to obtain or consolidate control of a company (i.e. interests in target securities carrying 30% or more of the voting rights) or to frustrate the successful outcome of an offer. However, certain categories of persons are automatically deemed to be concert parties, or will be presumed to be so unless the contrary is established to the Panel's satisfaction.

A party's subsidiaries and other "affiliated persons" will be deemed to be its concert parties. The test for "affiliated" status is, broadly, majority voting or board control, or the power to exercise dominant influence or control, so that persons controlled by another person are deemed to be concert parties of the controlling person and each other. Thus all majority-owned members of a corporate group, for example, will be deemed to be acting in concert with each other. In addition, the following persons (among others) will be presumed to be acting in concert, unless the Panel is satisfied that they are not:

- ◆ a company with its "associated" companies and those of its parent, subsidiaries, sister subsidiaries and their associated companies (the test for "associated" status being 20% ownership or control of equity share capital and by including "associates of associates" the net can be very wide);
- ◆ a company with its directors, together with their close relatives and related trusts;
- ◆ a company with its pension funds or those of any of its group companies or associated companies; and
- ◆ a fund manager with any investment company, unit trust or other person whose investments it manages on a discretionary basis.

An offeror's or target's financial advisers and corporate brokers and their affiliated entities will also normally be presumed to be acting in concert with it, although special rules apply in respect of certain types of affiliates.

Fairness in the Conduct of an Offer

Equivalent Treatment for Different Classes; Convertibles and Options

The Code requires that a "comparable" offer be made for each class of equity shares (whether voting or not) of a target and that, when an offer is made for securities with voting rights, an "appropriate" offer or proposal must be made for any outstanding convertible securities and options/warrants of the target.

Break Fees and Other "Offer-related Arrangements" Prohibited

In September 2011, Rule 21.2 of the Code was amended to introduce a general prohibition on "inducement fees", exclusivity and "no shop" agreements, transaction implementation agreements and other "deal-protection" arrangements by a target with an offeror. The ban extends to arrangements with concert parties of either party. There are some limited exceptions; in particular, the Panel would normally consent to an inducement

fee for a "white knight" who announces a firm offer after a hostile bidder has already done so, and for a person who makes a firm offer after participating in a formal sale process launched by the target board, in each case capped at an amount no more than 1% of the value of the target at the offer price.

Certain types of commitments are still permitted, such as agreements by a target to keep confidential information provided by an offeror or not to solicit its employees, normal irrevocable undertakings by target directors and other target concert parties to accept an offer or vote in favour of an offer structured as a scheme of arrangement and certain agreements relating to employee incentive arrangements.

"Special Deals with Favourable Conditions" Prohibited

Rule 16.1 prohibits favourable arrangements by an offeror with a target shareholder which are not extended to all shareholders of the same class, except with the consent of the Panel. This would include, for example, offering different forms of consideration to different shareholders. Special provisions apply where management shareholders are to remain financially involved in the business, as on a typical "public to private"/"management buyout" transaction (see below).

Restrictions on and Disclosure of Management Incentive Arrangements

Rule 16.2 requires that, except with the consent of the Panel, where an offeror has entered into, or reached an advanced stage of discussions on proposals for, any form of incentivisation arrangements with management shareholders of a target, details of the proposals must be disclosed when the offer is made and a public "fair and reasonable" opinion from the independent financial adviser to the target board is required. (Where only limited discussions on incentivisation have taken place, or no incentivisation arrangements are proposed, this must also be stated by the offeror.) If the value of proposed incentivisation arrangements is significant, or the nature of the arrangements is unusual (either in the context of the industry or good practice generally), the Panel must be consulted, and its consent obtained, in advance (even if the members of management concerned are not shareholders). As a condition of giving its consent, the Panel may require that the incentivisation arrangements be approved by a vote of the target's independent shareholders.

If the proposed management incentivisation arrangements would involve management shareholders becoming shareholders in the offeror on a basis that is not being made available to all other target company shareholders, such arrangements must be approved by a vote of the target's independent shareholders.

Restrictions on "Frustrating Action" by a target

During the course of an offer, or even earlier if the board of a company subject to the Code has reason to believe that a bona fide offer might be imminent, Rule 21.1 provides that the board must not, without the approval of a shareholder vote, take any action which may result in an offer (including a bona fide possible offer) being frustrated or target shareholders being denied the opportunity to decide on its merits. The Rule contains a non-exhaustive list of actions which fall within this restriction, including issues or grants of shares or options, material acquisitions and disposals of assets and entry into contracts other than in the ordinary course of business. Material amendments to directors' employment agreements and dividends outside the target's normal practice would also normally be subject to this restriction. The Panel will normally consent to waive the restriction for actions pursuant to pre-existing obligations or with the offeror's consent and may consent to a waiver in certain other circumstances.

Equality of Access to Information

Information about parties to an offer must be made available equally to all target shareholders as nearly as practicable at the same time and in the same manner (Rule 20.1). Thus meetings by an offeror, or target (or their advisers) with shareholders or analysts must be "policed" by appropriate advisers who will be responsible for confirming to the Panel that no new information or opinions were provided. If material new information does, nevertheless, "slip out", an immediate announcement to the market is required. Under Rule 20.2, any information which a target gives to one offeror must, on request, normally also be given to any other bona fide offeror, even if its approach is not welcomed by the target board.

Provision of Information During the Offer

In addition to expanding on the general principles of fair disclosure and avoiding creation of a false market, the Code imposes various restrictions on the publication of documents or other communications which might be considered "advertisements" in connection with an offer, and on telephone campaigns, media interviews, etc. Careless statements can have very serious consequences and therefore the activities of the offeror and target are usually carefully monitored by their professional advisers.

Directors' Responsibilities

In any documents or advertisements published by the offeror and/or target in connection with an offer, their respective directors must formally accept responsibility for the accuracy of the information they contain. In joint documents relating to a recommended offer, the directors of each will take responsibility for the information relating to themselves and their company.

Where the offeror is a controlled subsidiary, this responsibility will generally extend to directors of the parent company. In situations where the offeror is a consortium or private-equity vehicle, an entity other than a conventional corporation, a corporation which has a two-tiered management and supervisory board structure, or otherwise has special features, the Panel should be consulted as early as practicable to confirm which individuals will be required to take responsibility as offeror "directors".

Documents from the Offeror and the Target Boards

The Code contains detailed requirements as to the contents of offer documents (and target board reply documents, if separate; in a recommended offer the two are normally combined in one document). The offer document must include information about the target, but also (even on a purely cash offer) a substantial amount of information about the offeror, including, in particular:

- ◆ financial information for the past two years and subsequent interim statements (incorporated by reference to the website where they were published, in the case of UK companies with securities traded on a UK regulated market, AIM or PLUS);
- ◆ information about its business and prospects;
- ◆ details of the financing arrangements for the offer;
- ◆ the offeror's intentions with regard to the target group (see "Statement of Offeror's intentions" below);
- ◆ details of offer-related fees and expenses (see "Disclosure of Fees and Expenses" below);
- ◆ details of any current ratings and outlooks published on the offeror and offeree by ratings agencies and of any changes to the same during the offer period, including a summary of the reasons given for any changes;
- ◆ whether and how the remuneration of the offeror's directors will be affected by the acquisition of the target or any associated transaction; and
- ◆ details of all material contracts entered into by the offeror group outside the ordinary course of business during the past two years.

For offerors which are not UK companies the requirements may be varied or supplemented as the Panel considers appropriate and information must be provided concerning any person who controls the offeror, or who has invested in the offeror for the purposes of the offer, or whose pre-existing interest in the offeror

is sufficient to give him/it a potential indirect interest of 5% or more in the target on success of the offer. The precise nature of the further information required will depend on the circumstances, but the Panel would normally expect it to include a general description of the business interests of the offeror and such other persons and details of those assets which the Panel considers may be relevant to the business of the target company.

Thus the advisers to a foreign or unquoted offeror need to consider carefully, and at an early stage, the extent of information that will be required and to discuss the position with the Panel.

In the case of a contractual offer for a company whose securities are admitted to a regulated market, there are criminal sanctions if the offer document does not comply with the requisite contents requirements. Similar rules apply to the preparation of target response documents.

Prospectus Required for Consideration Securities?

Where securities are to be offered as considered under a contractual offer, this is likely to involve an “offer to the public”, requiring preparation and approval by the FSA of a prospectus, or equivalent document, to accompany the Offer Document. The generally-accepted view is that the requirement for a prospectus or equivalent document for an “offer to the public” does not apply to securities which are to be issued pursuant to a scheme of arrangement. However a prospectus would still be required in that case if the offeror is seeking admission to a regulated market in the UK of consideration securities of a class not already listed, or which will increase a listed class by more than 10%. An AIM Admission Document would be required for a new admission of consideration securities to AIM or “reverse takeover” of an AIM-traded company).

Statement of Offeror's Intentions

The offer document must include a statement by the offeror of its intentions with regard to the future business of the target and explain the long-term commercial justification for the offer. This statement must include, in particular:

- ◆ the offeror's intentions with regard to the continued employment of the management and employees of the target group, including any material change in the conditions of employment; and
- ◆ its strategic plans for the target and their likely repercussions on employment and the locations of the target's places of business.

If the offeror has no intention to make any changes in relation to such matters, or believes its strategic plans will have no repercussions on employment or the location of places of business, it must make a statement to that effect.

Where the offeror is a company and will be affected by the offer, it must make a similar statement concerning its intentions with regard to its own future business, employment and locations.

The Target board must state its views on the offeror's intentions for the Target and on the effects of the offer on the Target's interests, as well as the substance of the independent financial advice received by the Target board concerning the offer, in the offer document or any separate response document.

Where an offeror or target makes any statement of intention to take, or not take, any course of action after the offer in any document, announcement or other information published in relation to the offer, whether in response to these requirements or otherwise, that party will be regarded by the Panel as committed to such action (or non-action) for a period of 12 months following the end of the offer period, unless another period is stated or there is a material change of circumstances.

Disclosure of Offer-related Fees and Expenses

In the offer document (or, in the case of the target, any separate document published by it in response to a non-recommended offer) the offeror and target must each disclose an estimate of the total fees and expenses expected to be incurred by them in connection with the offer, together with a breakdown by category (e.g. financial and broking advice, legal, accounting, public relations, financing arrangements, etc.). Where a fee is variable or is not capped at a maximum amount, this must be stated and the nature of the arrangement indicated, and a figure or range given reflecting a reasonable estimate of the fees likely to be paid under it. If it later appears that the disclosed estimate within any category has been or is likely to be exceeded by 10% or more, the Panel must be consulted and may require an updated disclosure, if it considers it appropriate to do so.

Employee Representatives' Opinion(s)

The target group's employee representatives (if any) have the right to provide an opinion (or opinions where there are more than one set of representatives) on the effects of the offer on employment, which the target must publish either in any recommended offer document or separate response document, if received in good time, or on a website, if not.

Restrictions on and Consequences of Dealings in Shares

The Code contains various restrictions on dealings in shares and other relevant securities of a target (and in some circumstances also an offeror) including, in particular, the following:

- ◆ No dealings of any kind in target securities by any person (other than the offeror itself), who is privy to confidential price-sensitive information concerning a proposed offer, may take place between the time when there is reason to suppose that an approach or offer is contemplated and announcement of the approach or offer (or of termination of the discussions). No person privy to such information may make any recommendation to anyone else as to such dealings. No such dealings in securities of the offeror may take place unless the proposed offer is not price-sensitive in relation to such securities.
- ◆ During the offer period, an offeror and its concert parties may not sell any target securities without obtaining the Panel's consent and giving 24 hours' advance public notice.
- ◆ Before contacting a private individual or small corporate shareholder with a view to seeking an undertaking to accept an offer or vote in favour of a scheme, the Panel must be consulted.
- ◆ Acquisitions of interests in shares which take a person's (or concert party group's) aggregate interests to 30% or more of the voting rights in any company subject to the Code, or increase a pre-existing interest of between 30% and 50%, are prohibited, except in certain circumstances. Such acquisitions may also trigger a mandatory offer obligation under Rule 9 (see "*Mandatory Offers under Rule 9*" below).
- ◆ If acquisitions of interests in target shares have been made, either in the 3 months preceding the start of the offer period, or between the start of the offer period and an announcement of a firm intention to make an offer, in either case by the offeror or its concert parties, the offer may not be on less favourable terms than such acquisition(s). (The Panel may apply this Rule to acquisitions more than three months earlier if it thinks necessary.)
- ◆ After the commencement of the offer period, acquisitions of interests in target securities by the offeror or its concert parties above the offer price trigger a requirement to raise the offer price accordingly.
- ◆ Where interests in shares carrying 10% or more of the voting rights of any class under offer have been acquired for cash by an offeror and/or its concert parties during, or within twelve months before the start of, the offer period, or where *any* interests in shares under offer are acquired for cash by an offeror or its concert parties during the offer period, the offer must be in cash (or accompanied by a full cash alternative) at not less than the highest price paid by the offeror (or concert party) during the relevant period, unless the Panel permits otherwise. Certain share exchanges may be treated as cash purchases for this purpose; or, on the other hand, give rise to an obligation to offer securities to all other holders of target shares of the same class, depending on the circumstances.
- ◆ There are disclosure requirements in respect of holdings or dealings in relevant securities of a target (and/or an offeror, where its securities are or may be offered as consideration), as discussed in the following section.

There are also more general criminal and civil prohibitions on insider dealing and market abuse, which must be considered in the context of any proposed share purchases. (See "*Statutory and Regulatory Background*" below).

Disclosure of Interests and Dealings in Shares

Opening Position Disclosures by Offer Parties

Once an offeror is publicly identified by an announcement under the Code (whether made by the offeror itself or the target), it must make a public "opening position disclosure" (OPD) of its "interests" and those of its concert parties in "relevant securities" of the target (Rule 8.1). The target must, similarly, make an OPD with respect to its interests and those of its concert parties in relevant securities of the target (Rule 8.2). Under the same rules, OPDs must also be made by the target and offeror with respect to interests in relevant securities of the offeror and any other publicly-identified offeror for the same target, except that no disclosure is required in respect of securities of an offeror whose offer is, or is likely to be, solely in cash. (For this purpose a normal "loan note alternative" to allow UK shareholders to defer realisation of capital gains would count as cash.) OPDs are normally due within 10 business days after the announcement which commences an offer period, or in the case of disclosure by or about an offeror, within 10 business days of the announcement which first publicly identifies that offeror, if later. Announcement of a firm offer will accelerate the offeror's OPD obligation, *but a potential offeror which is publicly identified must make an OPD for itself and its concert parties even if it never makes a firm offer.*

The "Disclosure Table" published on the Panel's website - www.thetakeoverpanel.org.uk/disclosure/disclosure-table - gives the date(s) of the relevant announcement(s) commencing the offer period for each target and identifying any offeror(s). Where disclosure in respect of securities of a particular offeror is not required (because it is regarded as a cash offeror) this is stated in the table. The relevant disclosure forms are also available from the Panel's website.

For the purpose of Rule 8 disclosure, "relevant securities" include (i) any securities of the target which are being offered for or which carry voting rights; (ii) securities of an offeror which carry substantially the same rights as any securities to be issued as consideration for the offer; (iii) equity share capital of the target or any non-cash offeror; and (iv) securities which carry rights of conversion into, or to subscribe for, securities in any of the first three categories.

"Interests" in securities include physical holdings, long derivative positions, options, rights to acquire and other interests giving long economic exposure (absolute or conditional) to changes in the price of such securities, but conversion or subscription rights do not confer an "interest" in the new shares issuable under them until exercised. Short positions do not count as "interests" but must be included in an offer party's OPD.

Disclosure of Dealings by Offer Parties and Concert Parties

"Dealings" in relevant securities (including, without limitation, not only acquisitions and disposals of physical securities, but also grants and exercises of options, entering into, terminating or amending agreements to buy or sell, and transactions in derivatives referenced to, relevant securities) by offer parties or their concert parties must be publicly disclosed by the person dealing not later than noon on the next business day (Rules 8.1, 8.2 and 8.4).

Disclosure of Interests and Dealings by 1% Holders

In addition to the requirements which apply to publicly-identified offer parties, any person who is "interested" in securities representing 1% or more of any class of relevant securities of a target or non-cash offeror (a "1% holder") must make an OPD under Rule 8.3 by not later than 3.30 p.m. on the tenth business day after:

- (i) the date of the announcement that commences the offer period (in respect of interests in the target and any offeror(s) identified in that announcement; or
- (ii) the date of the announcement publicly identifying the relevant offeror (if later).

Dealings during an offer period in relevant securities by a 1% holder (including a dealing by which it becomes, or ceases to be a 1% holder) must, however, be disclosed by 3.30 p.m. on the next business day after dealing. Dealing by a 1% holder before the OPD deadline will also accelerate the obligation to provide the information that would have been included in the OPD. A person who is a 1% holder in respect of any offer party will have to disclose interests (whatever the percentage) and dealings in relevant securities of all parties to the offer. Although short positions do not count toward the 1% threshold (and normally cannot be netted against long positions in calculating it), where the long position in any offer party is sufficient to require disclosure the OPD must also include details of any relevant short positions.

Rule 8.3 does not apply to "recognised intermediaries" acting in a client-serving capacity.

Other Disclosure Requirements

There are also general requirements for disclosure of substantial shareholdings and director/senior management holdings and dealings, under the UK Disclosure and Transparency Rules (DTRs) and the Listing Rules or AIM Rules, which apply regardless of whether or not the relevant issuer is involved in a Code offer. See below under "Statutory and Regulatory Background" for further information.

Mandatory Offers Under Rule 9

Unless the Panel permits otherwise, a person who (alone or with concert parties) acquires an interest in shares carrying 30% or more of the voting rights in a company or, if already holding interests of 30% or more but less than 50%, acquires any interest in shares carrying additional voting rights, must make a general cash offer (or a securities offer with a full cash alternative) to all holders of equity share capital in the Company. (The offer must also extend to voting non-equity shares if the offeror or any concert party holds such shares.) The price offered may not be less than the highest price paid by the offeror (or its concert parties) for an interest in shares of the class during the offer period or the preceding twelve months and the only condition allowed is that sufficient acceptances are received to give the offeror (with concert parties) more than 50% of the voting rights.

Special provisions apply where a shareholder (or a concert party) holding more than 30% sells an interest in shares (or is diluted by a new issue of shares) but without reducing the shareholding to less than 30%. These allow, subject to certain conditions, the shareholder (or concert party) to recover his (or its) original percentage interest.

In certain circumstances, the Panel may waive the mandatory offer requirement, e.g., where shares are issued as consideration for an acquisition or on a refinancing. If the Panel does consent to a waiver, it will normally be subject to various conditions, including approval by a vote of the independent shareholders.

The Panel does not normally regard the mere action of shareholders voting together on a particular matter as indicative that they are acting in concert; however, the Panel *will* normally presume that shareholders who requisition or threaten to requisition the consideration of a “board control-seeking proposal” at a shareholders meeting, and their supporters, to be acting in concert, with the result that subsequent acquisitions of further interests in shares by any member of the group could trigger a mandatory offer obligation, if the aggregate holdings are sufficient to bring them within Rule 9.

Statutory and Regulatory Background

The Code operates against a general statutory background which includes the provisions mentioned briefly below.

Misleading Statements and Practices

Section 397 of the Financial Services and Markets Act 2000 (“FSMA”) makes it a criminal offence for any person to make a statement which he knows to be misleading, false or deceptive, or dishonestly conceal any material facts, or recklessly make a misleading, false or deceptive statement, for the purpose of inducing, or is reckless as to whether it may induce, any person to enter into or refrain from entering into a relevant agreement (which term would include an agreement for the sale of shares). This section also prohibits actions which create a false or misleading impression as to the market in or price or value of any investments for such a purpose.

Civil liabilities for misrepresentation can arise under the common law (such as for fraudulent or negligent misstatement, for deceit or even for defamation) and/or the Misrepresentation Act 1967.

Regulated Activities and Financial Promotions

No person may carry on a “regulated activity” (within the meaning of the FSMA) in the United Kingdom unless he is either authorised or exempt. Regulated activity includes dealing and arranging deals in investments, managing investments and advising on investments. Investment banks and brokers should generally be authorised for these activities. Certain exceptions may apply to persons dealing for their own account.

Under Section 21 of FSMA only authorised persons may communicate, in the course of business, or approve, invitations or inducements to engage in “investment activity” (“financial promotions”). Both communicating and causing communications to be made are caught. However, there are a number of exemptions, which need to be carefully considered in any given circumstances.

Many types of “communications” would be covered by the restriction on financial promotion, both oral and written. Examples include:

- ◆ written investment advertising;
- ◆ letters, e-mails and other written material, such as publications on the Internet;
- ◆ telephone conversations, personal visits, presentations and interactive dialogue, for example, at a meeting.

Breach of these restrictions is a criminal offence. In addition, agreements entered into in consequence of the breach are unenforceable (subject to relief being granted by the court) and third parties may be entitled to recover any money or property paid and also compensation for any loss sustained.

Insider Dealing

The Criminal Justice Act 1993 prohibits a person who has unpublished price sensitive information from an inside source about publicly-traded securities from dealing or encouraging others to deal in such securities or disclosing such information other than in the proper performance of his duties. There are detailed provisions defining the information and dealings to which the Act applies and a variety of possible exceptions and defences.

Particular care must be taken by all parties aware of a potential offer to ensure that their activities do not fall foul of the law against insider dealing or put them in a position where they are prohibited from dealing if they wish to remain free to do so. For example, a prospective offeror will become unable to purchase target shares in the market if it receives unpublished price sensitive information during preliminary discussions with the target.

Market Abuse

In the context of a takeover bid, the market abuse regime under FSMA is concerned with behaviour which occurs in relation to the shares of the target (or the offeror, if applicable), or related products, such as derivatives whose price or value is expressed by reference to the price of such shares, and which falls within

any of the types of market abuse defined by FSMA. These broadly fall under two heads, namely insider dealing and market manipulation. The regime would, for example, cover improper disclosure of inside information or dealing or attempting to deal in shares in the target or offeror on the basis of inside information.

The regime also catches a person (A) who requires or encourages another person or persons to engage in behaviour which, if carried out by A would amount to market abuse.

Subject to certain statutory defences, the Financial Services Authority may impose a (potentially unlimited) penalty on any person who is or has engaged in market abuse or is guilty of requiring or encouraging another to do so. In addition to financial penalties, the FSA may impose a public censure, apply to the court for an injunction or apply to the court for, or itself make, a restitution order for payment of an amount determined with regard to the profits accrued or loss or other adverse effect suffered as a result of market abuse.

There are a number of statutory exceptions, known as "safe harbours", to the market abuse regime which may be relevant in the context of a takeover offer, but there is no blanket safe harbour for takeovers in general. Consequently great care needs to be taken to ensure that conduct in relation to an offer proposal does not amount to market abuse.

Notification and Investigation of major shareholdings

Where a person acquires voting rights in a UK company whose shares are admitted to trading on a regulated market (e.g. premium or standard official listing) or a prescribed market (e.g. AIM), DTR 5 of the FSA's Disclosure and Transparency Rules require that person to notify the company within two trading days if the percentage of voting rights held by him, whether directly or indirectly and including voting rights attributable to shares to which certain derivatives and other financial instruments are referenced) reaches 3 per cent. A further disclosure is required whenever such interests cross the next whole percentage level up or down. The company is under an obligation to announce to the market information notified to it under DTR5.

Companies also have certain statutory powers to require information (by means of a notice under Companies Act 2006 section 793) for the purpose of determining the identity of persons who may be interested in their shares. Failure to respond to such a notice is a criminal offence and also enables the company to invoke sanctions under the Companies Act and/or its constitution, including the right to suspend voting rights and transfers of, and payment of dividends on, the shares in question. Investors who receive such a notice should inform their legal advisers immediately.

Dealings by Directors, Certain Employees and Connected Persons DTR3 and the Listing Rules, or the AIM Rules (as applicable) impose certain restrictions on and disclosure requirements in respect of "dealings" (broadly defined) by directors, other relevant employees and certain persons connected with them in their company's shares. There are also certain statutory and regulatory requirements to disclose the interests of directors in shares.

Competition Law and Other Regulatory Restraints

Proposed acquisitions which satisfy certain criteria may be subject to review under UK or European Union competition laws. Special regulatory requirements also apply to takeovers of companies in particular industries (e.g. banking, insurance, gaming, media).

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This note is intended to provide general information about some recent and anticipated developments which may be of interest. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

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