SLAUGHTER AND MAY/

# A Guide to Takeovers in the United Kingdom

January 2025

# Contents

# 1. Introduction

This memorandum is a general guide to takeovers of UK incorporated and listed companies subject to The City Code on Takeovers and Mergers (the "City Code"). It first describes the UK bodies which regulate takeovers of such companies and then summarises the more important legislation and rules under which they do so.

This memorandum deals primarily with UK legislation and rules. However, regulations in other jurisdictions may be relevant to a takeover of a UK incorporated and listed company; for example, when that company has overseas listings or assets.

This memorandum should not be relied on in place of detailed advice about any specific transaction.

# 2. The Regulatory Bodies

Takeovers in the UK are regulated by a number of different authorities deriving powers from several sources.

## 2.1 The Panel on Takeovers and Mergers

The Panel on Takeovers and Mergers (the "Panel") is the body which regulates takeovers of companies subject to the City Code.

## 2.2 Government Departments

Government departments and other regulatory bodies may become involved in a takeover. Examples are the UK's statutory financial regulators, the Prudential Regulation Authority (the "PRA") which is responsible for the prudential regulation of banks and insurers, and (more likely), the Financial Conduct Authority (the "FCA") which is responsible for the conduct regulation of financial services firms and administers financial services and parts of companies legislation; the Competition and Markets Authority (the "CMA"), which is responsible for, amongst other things, investigating mergers that could give rise to competition concerns.

## 2.3 Other Regulatory Consents

Other regulatory (including ministerial) consents may be required for particular takeovers: for example, takeovers involving companies in industries such as newspaper, television, radio and financial services.

Under the Enterprise Act, the UK Government also had powers to scrutinise and intervene in acquisitions to protect national security. These powers have, however, been replaced by a more stringent, standalone regime under the **National Security and Investment Act** (see section 3.5 below for details of the regime).

# 3. The Legislation and Rules

The following is a summary of the principal legislation and rules under which takeovers of UK incorporated and listed companies are regulated.

## 3.1 The City Code

The City Code is made and administered by the Panel. The Panel's statutory functions are set out in and under Chapter 1 of Part 28 of the Companies Act 2006. The rules of the City Code have statutory force in the UK and the Panel has statutory powers in respect of all offers and other transactions to which the City Code applies.

The City Code outlines the conduct to be observed in takeover and merger transactions (however effected) of certain companies which have their registered offices in the UK, the Channel Islands or the Isle of Man, i.e. companies that are "**UK registered**". The City Code does not apply to takeover bids and merger transactions of companies that are registered in any jurisdiction other than the UK, the Channel Islands or the Isle of Man.

It is the identity of the offeree company that determines whether the City Code applies; the status or residence of the offeror is irrelevant.

The City Code's provisions on the Panel's jurisdiction are being changed with effect from 3 February 2025 (the "**implementation date**") and there are also some transitional provisions that apply for a two-year period until 3 February 2027.

From the implementation date, the City Code will continue to apply to UK registered companies that are "**UK quoted**", i.e. if any of their securities are admitted to trading on a UK regulated market or a UK multilateral trading facility (such as AIM) or any stock exchange in the Channel Islands or the Isle of Man.

If the company ceases to be UK quoted (e.g. by delisting its securities) after the implementation date it will remain subject to the City Code for two years from the date on which it ceases to be UK quoted. So, if on the date on which an offer or possible offer for the company is announced (the "**relevant date**"), less than two years have passed since the company ceased to be UK quoted, the City Code will still apply to the transaction.

Before the implementation date, the City Code also applied to public companies (and certain private companies) that were not UK quoted, if they satisfied a UK residence test. As mentioned above, there are detailed transitional provisions to determine whether the City Code continues to apply to such companies after the implementation date but those provisions are outside the scope of this summary. The residence test is being abolished and will cease to have any relevance after the two-year transition period.

The City Code comprises six general principles and 38 rules (as well as numerous notes which aid the interpretation of the rules). Its underlying objective can be summed up in three underlying principles:

- all shareholders of the same class in a target company must be treated equally and must have adequate information so that they can reach a properly informed decision;
- a false market must not be created in the securities of the offeror or the target company; and
- the management of the target company must not take any action which would frustrate an offer without the consent of its shareholders.

The 38 rules, which form the bulk of the City Code, are effectively expansions of the general principles and contain provisions governing specific aspects of a takeover. Both the spirit as well as the precise wording of the City Code are required to be observed.

The Panel is not concerned with the financial or commercial advantages or disadvantages of a takeover, which the Panel regards as matters for the company and its shareholders. Neither is it the purpose of the City Code either to facilitate or to impede the making of takeover offers.

See Appendix 1 and Appendix 2 to this memorandum for further details of the General Principles and certain key rules of the City Code.

## 3.2 The Listing Rules and Prospectus Legislation

If the consideration being provided by the offeror is in the form of shares, or a combination of cash and shares, a prospectus is likely to be required. The prospectus regime is governed by the UK Prospectus Regulation (Regulation (EU) 2017/1129 (Retained EU Legislation)). The UK Prospectus Regulation is part of retained EU Law that was on-shored on 31 December 2020 at the end of the Brexit transition period.

An FCA approved prospectus must be made publicly available in relation to any offer of transferable securities to the public (broadly, 150 people or more (other than qualified investors)) in the UK and/or an admission to trading of such securities on a regulated market (which includes the Official List but not AIM).

There are a number of exemptions under the UK Prospectus Regulation from the general requirement to produce a prospectus. In relation to takeovers involving a securities exchange offer and mergers, there is an exemption (the takeover exemption) that provides that a prospectus is not required if a document is made available containing certain prescribed information describing the transaction and its impact on the offeror (an "exemption document"). A key potential advantage of an exemption document is that it does not require FCA approval if certain conditions are met.

Unfortunately, however, the UK government has not yet enacted regulation setting out the information that must be contained in an exemption document, which limits the usefulness of the exemption. It now seems unlikely that the UK government will enact an equivalent regulation, as it intends to overhaul the UK's prospectus legislation in ways that will lead to further divergence from the EU's regime.

Until it does so, we expect most bidders will still need to seek FCA approval of exemption documents or at least seek some degree of comfort from the FCA that falls short of official approval. The FCA has said in Primary Market Bulletin 34 (published in June 2021) that, until HM Treasury makes regulations under article 1(7) of the UK Prospectus Regulation specifying the minimum contents of a takeover exempt document, when approving an exempt document the FCA will have regard to Commission Delegated Regulation (EU) 2021/528. Therefore the contents will probably align with the EU rules on the required contents (which, depending on the circumstances, are somewhat less onerous than those for a prospectus).The position is complicated by the fact that the FCA has taken the view that it does not have jurisdiction to approve an exemption document where the shares are to be admitted to a regulated market; it may be that the FCA would be willing to give some non-binding comfort in these circumstances, but there has not yet been a test case. Where the shares are not going to be admitted to a regulated market, the FCA accepts that it is responsible for approving the document; the expectation is that the FCA will approve an exemption document that complies with the EU rules.

With the UK's effective exit from the EU, "passporting" a prospectus and associated processes have been deleted from UK legislation and are no longer relevant.

An additional point is that an offeror issuing a prospectus must publish a supplementary prospectus if there are significant new developments while the offer remains outstanding or, if the securities are admitted to trading, before admission. The UK Prospectus Regulation allows withdrawal rights to investors for two working days after a supplementary prospectus is published. This right is difficult to reconcile with the existing scheme of takeover regulation under the City Code and the Panel has indicated that withdrawal rights cannot arise once the securities offered have been unconditionally allotted. Under the City Code, shareholders who have accepted an offer can withdraw their acceptance at any time unless the offer is unconditional from the outset. The right to withdraw the acceptance must be exercisable until the earlier of the time that the acceptance condition is satisfied, or the cut-off time for receiving acceptances on the day specified by the offeror as being the latest date by which all of the conditions to the offer must be satisfied or waived.

In the case of a cash offer with a loan note alternative, consideration must be given as to whether the loan notes will be treated as transferable securities for the purposes of the UK Prospectus Regulation, requiring publication of a prospectus. It is common practice for there to be a restricted transfer loan note or a non-transferable loan note as a means of dealing with this issue.

Companies wanting to make a securities exchange offer in the UK will also consider whether to effect the takeover by scheme of arrangement (see section 4 below) which, amongst other advantages, is generally thought to avoid the need to produce a prospectus insofar as it does not constitute an offer to the public. However:

- a prospectus will still be required for the purposes of admission to trading unless the securities being issued do not amount to 20 per cent. or more of a class already admitted to trading (this was increased from 10 per cent. to 20 per cent. following the coming into force in July 2017 of the relevant provision of the Prospectus Regulation; and
- the FCA has indicated in draft Technical Guidance published in August 2020 that in its view if a securities exchange offer involves a choice between different forms of consideration, for example where a scheme includes a mix and match facility offering a choice between shares and cash, this will constitute an offer to the public, even if the takeover is implemented by way of a scheme, and so a prospectus will still be required absent another exemption applying. This view is considered to be incorrect as a matter of law by many City lawyers and the FCA has since announced in March 2023 (Primary Market Bulletin 44) that it will not publish a final form of the Technical Guidance, an indication that it recognises that its view is not shared by practitioners (although without technically ceding the issue).

In relation to the Listing Rules, where the offeror is a listed company, the offeror may, depending on the 'class' of transaction within which the takeover transaction falls, have to make an announcement or send an appropriate circular to shareholders and obtain their prior approval. The Listing Rules classify transactions (including certain types of indemnity) by assessing the size of the target relative to that of the offeror on the basis of a number of different tests and impose more onerous obligations the bigger the size of the transaction; for example where a test shows that the size of the target company is 25 per cent. or more of the offeror, the prior approval of the offeror's shareholders will be needed.

## 3.3 Companies Legislation

The four main statutes, for the purposes of this memorandum, are the Financial Services and Markets Act 2000, the Financial Services Act 2012, the Criminal Justice Act 1993 and the Companies Act 2006. Further details of the relevant sections of these statutes are set out in the Appendices to this memorandum.

## 3.4 UK Competition Legislation

The Enterprise Act 2002 (the "Enterprise Act") came into force on 20 June 2003 (replacing the merger provisions of the Fair Trading Act 1973). It was significantly amended by the Enterprise and Regulatory Reform Act 2013 (with the reforms to the mergers regime coming into force on 1 April 2014). The Enterprise Act 2002 (Share of Supply) (Amendment) Order 2020 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 amended the jurisdictional thresholds for transactions in which the target company is active in certain sensitive sectors.

The CMA (see section 2.2 above) may initiate an investigation of a takeover (a Phase 1 investigation) if there is a merger situation qualifying for investigation. The CMA will be under a duty to refer a takeover for a detailed Phase 2 investigation by one of its Inquiry Groups (under sections 22 or 33 of the Enterprise Act) if it believes that a relevant merger has been created and this has resulted or may be expected to result in a substantial lessening of competition.

In general terms, a merger qualifies for investigation if it produces the situation that two or more formerly distinct enterprises (at least one of which must be carried on in the UK or under the control of a company incorporated in the UK) cease to be distinct (meaning that they are brought under common ownership or common control) and:

- as a result of the merger a 25 per cent. share of the supply of goods or services of a particular description is created or enhanced in the UK as a whole or in a substantial part of it (the "share of supply" test); or
- the value of the UK turnover of the enterprise proposed to be taken over exceeds £70 million per annum (the "turnover test").

As regards coming under "common control", three degrees of control are recognised: a controlling interest; ability to control commercial policy; and ability to materially influence commercial policy. There are no precise criteria for assessing whether an enterprise can materially influence or control the policy of another; the CMA will form a view on a case by case basis (though taking account of its own guidance).

There is no statutory obligation to notify the CMA of a proposed takeover which qualifies for reference, but in practice, many qualifying takeovers are notified as the CMA has wide-ranging powers to call in a merger up to four months after completion.

Where merger parties do not wish to formally notify a merger to the CMA for investigation, they can submit a short (max. five page) briefing paper to the mergers intelligence unit explaining why, in their view, the merger does not give rise to a relevant merger situation and/or does not give rise to a substantial lessening of competition. This may result in a decision to investigate, or the CMA may indicate that it has no further questions about the merger at that stage. Parties should note that this does not preclude further questions at a later stage, and, if further information comes to light, the CMA can still open an investigation within four months of completion.

The only way to obtain a binding clearance decision from the CMA is to formally notify a takeover by means of a formal Merger Notice. Where the parties are able to satisfy the CMA that there is a good faith intention to proceed with the transaction, they are encouraged to enter into pre-notification discussions. This should help the parties to ensure that the Merger Notice is complete at the time of submission thus avoiding burdensome information requests post submission. The notification can only be made once the acquisition is a matter of public record.

Once the CMA has confirmed to the parties that the Merger Notice is complete, it has an "initial period" of 40 working days (extendable in certain circumstances) within which to decide whether to clear the merger or refer it for a detailed Phase 2 investigation.

If the parties do not submit a Merger Notice, there is a risk that the CMA may initiate an investigation any time within four months of completion of the takeover. This could involve the imposition of a (typically burdensome) initial enforcement order to hold the companies separate while the CMA is carrying out its investigation.

At the culmination of the Phase 1 investigation, the CMA is able to seek and enforce undertakings from the parties to a takeover in lieu of a reference for a Phase 2 investigation. In order to gain clearance from the CMA, parties can, for example, consider providing undertakings to divest. These may take the form of a share sale, a sale of a business (or part of it) or an asset disposal. Less frequently, behavioural undertakings might also be considered to secure CMA clearance.

The CMA may refer a takeover for a Phase 2 investigation either after consummation of a takeover or in anticipation of a takeover. Once a takeover has been referred, the CMA Inquiry Group assigned to the Phase 2 investigation will consider in more detail whether the takeover may be expected to result in a substantial lessening of competition.

Once the CMA has finished its Phase 2 investigation, its report is published. Except in a very limited number of cases where the Secretary of State retains decision-making powers, the CMA will make the final decision whether to clear the takeover, prohibit it or approve it subject to remedies (in the form of undertakings given by the parties or by adopting an order to similar effect). If the takeover has already taken place, the CMA has wide powers to require divestment as above or to prohibit the takeover completely and require the parties to unwind the transaction.

## 3.5 UK National Security and Investment Act

The National Security and Investment Act 2021 ("NSI Act") came into force on 4 January 2022 and applies to all transactions taking place since 12 November 2020. It establishes a mandatory notification and approval regime for transactions (including takeovers) in 17 sensitive sectors of the UK economy, such as civil nuclear, data infrastructure, artificial intelligence, quantum technologies, military or dual-use tech and satellite and space tech. It also gives the UK government powers to scrutinise other transactions (not limited to particular sectors) to protect national security.

The mandatory notification regime requires investors acquiring "control" over entities operating in the UK within one of the 17 specified sectors to receive Government approval before completing their deals. The requirement also applies where an existing investor increases their level of control by specified thresholds, with the threshold for "control" being set as low 25 per cent. of voting rights and shares in a qualifying entity. Failure to obtain clearance from the Secretary of State before the completion of a takeover that falls within the mandatory notification regime will render the transaction void, and civil and criminal penalties may be imposed.

It is worth noting that the regime is not limited to foreign acquirers: UK acquirers are also caught by the mandatory notification requirement.

Once a notification has been accepted, the Secretary of State must decide within an initial 30-working day period either to clear the notified acquisition or exercise its power to initiate a full national security assessment of the deal. Where an in-depth assessment of the deal is carried out, the Secretary of State has

a further 30 working days (which may be extended) to decide whether to block the transaction, to issue a final order imposing remedies or to confirm that no further action will be taken in respect of the deal.

Whether or not the Government has received a notification, the Secretary of State has the power to "call in" any transaction that it reasonably suspects may raise national security risks. This power is widely drafted: it is not limited to particular sectors, but turns on the existence of a "trigger event" (broadly, a change of control within the meaning of the NSI Act – this will include takeovers).

Parties can submit voluntary notifications if a takeover falls outside the scope of the mandatory regime but involves a risk of being "called in" by the Government, for example where the relevant target entity operates in sectors that are closely linked to the 17 mandatory notification sectors. Bidders whose deals may pose national security concerns should consider notifying the Government and/or including appropriate conditionality in any offer.

## 3.6 EU Competition Rules

The UK is no longer part of the EU competition regime and the CMA is the only authority with jurisdiction to review mergers for their effects in the UK. However, the European Commission will still investigate mergers within the EU single market, meaning that, in some cases, takeovers that meet the relevant EU thresholds as well as those in the UK will be reviewed by both the CMA and the Commission. Therefore, parties will need to consider both the UK and EU rules separately when considering whether a takeover might engage the merger regimes.

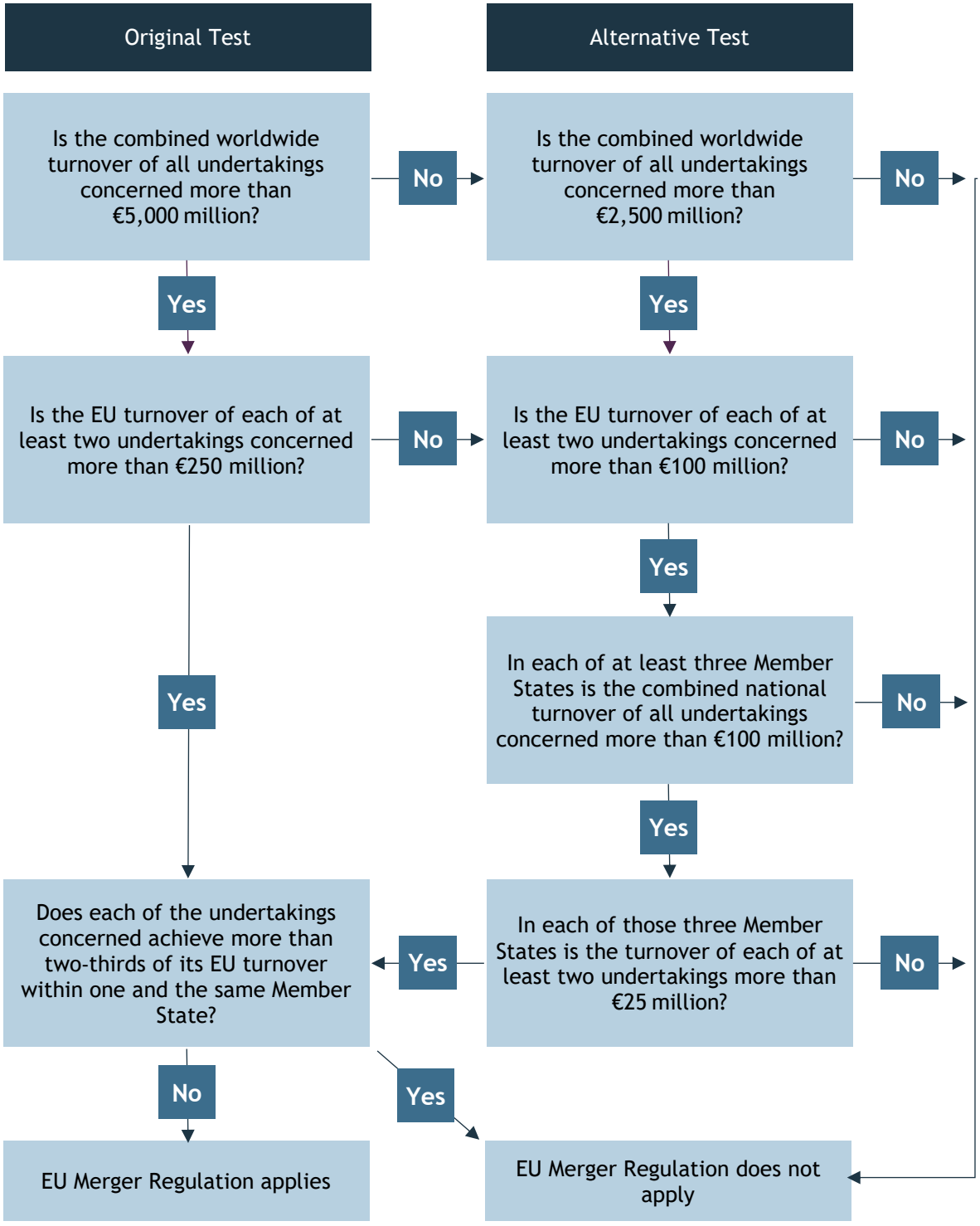
The European Commission has exclusive jurisdiction under the EU Merger Regulation ("EUMR"), which came into force on 1 May, 2004, to review competition issues arising out of takeovers which are "concentrations with an EU dimension". Such takeovers are not generally subject to review by the competition authorities of the EEA Member States. Whether a takeover (which is a concentration) will have an "EU dimension" depends on whether it satisfies a number of turnover thresholds, which are shown on the chart overleaf. It should be noted that the EUMR prohibits closing prior to clearance and can apply to transactions with little or no EU connection.

The European Commission has an initial 25 working day period from the date of notification in which to come to a decision. This period can be extended to 35 working days if the parties submit binding commitments to resolve identified competition issues. After the expiry of this period the Commission must decide whether to clear the takeover or to commence an in -depth investigation, for a further period of90 working days which may be extended). This is known as a 'Phase II' investigation.

Takeovers which do not satisfy the EUMR thresholds above will generally be for the exclusive competence of national competition authorities within the EEA. In some cases, national competition authorities are able to refer transactions that do not have an "EU dimension" to the Commission for review under the EUMR. Following a change in the Commission's referral policy in 2021, referrals to the Commission can occur even in circumstances where the relevant national competition authority does not have jurisdiction to review the takeover under its domestic merger control regime, provided that the deal (i) affects trade between Member States and (ii) threatens to significantly affect competition.

See section 3.4 above and Appendix 7 for a summary of the UK merger control regime, and Appendix 8 for a summary of the basic jurisdictional tests and notification requirements for the national merger control regimes in the EEA.

## EU Merger Regulation (EUMR Thresholds)



## 3.7 UK Competition Referral and EC Competition Proceedings

It used to be the case under the City Code that where the takeover was capable of being referred for a CMA Phase 2 or a European Phase II investigation, it had to be a term that the offer will lapse if such a reference or process was initiated. This is no longer the case. An offeror can now make it a condition of its offer that there is no Phase 2 reference or process. However, the City Code places some restrictions on an offeror's ability to rely such a condition in order to lapse its offer. It provides that the offer may only be lapsed if the offeror can satisfy the Panel that the Phase 2 reference or process would give rise to circumstances which are of "material significance" to it in the context of the offer.

Factors which the Panel will take into account in deciding whether the offeror can invoke the condition and lapse its offer are whether the reference or process would be likely to result in a serious risk of material damage to the business of the offeror and/or offeree company, and the whether it would be worthwhile to require the offeror to pursue the reference or process where the prospect of the clearance being obtained is low. An offeror that is clear that it would want to lapse in the event of a Phase 2 reference can to some extent mitigate the risk of being made to continue with its offer in those circumstances by:

- setting a shorter long-stop date that would not accommodate the Phase 2 process;
- making it clear in its announcement and offer document that the making of a Phase 2 reference would be material for it; and
- arguing that the advisory and/or financing costs involved would be constitute material damage to its business.

See paragraph 1.4 of Appendix 2 for more information about the offer conditions.

## 3.8 EU Foreign Subsidies Rules

The EU Foreign Subsidies Regulation ("EU FSR"), which entered into force on 12 January 2023, applies to all economic activity in the EU with the aim of preventing subsidies from outside the EU distorting competition within the EU to ensure a level playing field.

The EU FSR gives the EC three tools:

- M&A tool - Notification obligation for mergers, acquisitions and joint ventures that meet specified thresholds (see below).
- Procurement tool - Notification obligation for public procurement procedures that meet certain thresholds.
- Ex officio tool - Investigative powers where the EC suspects that there are distortive foreign subsidies. The EC can also request ad-hoc notification for smaller transactions and public procurement procedures.

*Jurisdiction M&A tool*

A takeover will fall within the scope of the EU FSR notification obligation if it meets the specified thresholds. In particular, under the EU FSR, concentrations (including takeovers) must be notified to the EC from 12 October 2023 if:

- One of the merging companies, acquired company or the joint venture is established in the EU and generates an aggregate turnover in the EU of at least EUR 500 million; and

- The companies involved in the transaction had received "financial contributions" of more than EUR 50m in the last three years from non-EU countries.

Article 3(2) EU FSR defines financial contributions widely to include, inter alia, (i) the transfer of funds or liabilities; (ii) the foregoing of revenue that is otherwise due (e.g. tax exemptions); and (iii) the provision of goods or services or the purchase of goods or services.

A notifiable takeover must be notified to the EC prior to implementation and following the announcement of the public bid.

*Procedure M&A tool*

The EC will conduct a preliminary review within 25 working days of receipt of a complete notification. Where the EC believes the subsidised concentration may distort competition in the internal market, it will initiate an in-depth review, for which it has an additional 90 working days. Where the parties offer commitments during the in-depth review, the EC will have 15 further working days.

*Outcome M&A tool*

If the EC concludes that a distortive foreign subsidy exists, it will balance the negative effects of the subsidy, in terms of the distortion, with positive effects of the subsidy to determine appropriate redressive measures or to accept commitments. With respect to these, the Regulation includes a range of structural or non-structural remedies, such as the divestment of certain assets or providing access to infrastructure. In case of notified transactions, the EC can also prohibit the subsidised concentration.

# 4. Schemes of Arrangement

Although this memorandum deals principally with acquiring control of the target company by means of a takeover offer, it should be emphasised that it is common for control to be acquired instead by way of a scheme of arrangement (a "Scheme"). A Scheme is a formal arrangement between a company and its shareholders, governed by Sections 895 to 899 of the Companies Act 2006 and sanctioned by the High Court. A Scheme is an "offer" for the purposes of the City Code which applies to Schemes on a modified basis (see Appendix 7 of the City Code).

A Scheme must be approved both by the shareholders of the target company and by the High Court. Shareholder approval must constitute a majority in number of each class of shareholders whose shares are the subject of a Scheme and who are voting at the meeting. This majority must represent at least 75 per cent. in value of those shares which are voted (if the offeror or its associates hold any target shares they will not be able to vote them). The arrangement is binding on the target company and on all the shareholders involved.

The fact that a Scheme is binding on all the relevant shareholders provides certainty and can offer particular attractions when an offeror is confident of gaining the support of target company shareholders holding 75 per cent. of the shares but believes that the 90 per cent. level needed for the compulsory acquisition procedures (see paragraph 1.8 below of Appendix 3) to apply may be difficult to attain.

It was previously possible to implement a Scheme by cancelling shares in the target company and utilising the resulting reserve in issuing new shares to the offeror (a "cancellation scheme") instead of by transferring shares in the target company, with a resulting advantage in the fact that no stamp duty (currently payable at the rate of 0.5 per cent.) is payable (there being no transfer of shares). However, the use of cancellation schemes to acquire control of a target company has been prohibited with effect from March 2015.

In general, a Scheme is a less flexible procedure, particularly because of the High Court constraints on timetable. Also, it requires the co-operation of the target company and so cannot be used where an offer is hostile.

# 5. Overseas Shareholders

The laws of other jurisdictions may be relevant to a takeover if the target has shareholders which are resident or incorporated outside the UK. As a general guideline, specific advice should usually be obtained in relation to any jurisdiction if any of the following apply:

- target securities are listed or dealt in on a securities exchange in that jurisdiction or are dealt in on an over-the-counter market in that jurisdiction;
- more than 1 per cent. of target securities are owned by overseas shareholders in that jurisdiction;
- there are more than 50 overseas holders of target securities in that jurisdiction;
- target securities have been marketed in that jurisdiction; or
- target complies with any filing or reporting requirements relating to its securities in the jurisdiction concerned.

# 6. Specific Tax Considerations for Overseas Offerors

An overseas offeror with no existing subsidiary in the UK could carry out an acquisition of a UK target company itself or through the medium of a new UK offeror company. In making that decision the following points should be considered.

Historically, a new UK offeror company was often established to obtain debt financing and effect the acquisition so as to allow interest expenses to be set off against the target's future UK taxable profits by way of group relief. Whilst this still remains a good starting point, certain limits on the tax deductability of interest expenses should be noted. For instance:

- interest may not be deductible by the UK offeror to the extent that the UK offeror is thinly capitalised or the debt has an unallowable purpose or hybrid features which give rise to tax mismatches, for example, by allowing interest payments to be treated as tax-exempt income in the payee jurisdiction, or if the debt is equity-linked or has equity-like features;
- in the case of intra-group debt, interest deductions may be limited under the UK's transfer pricing rules to the extent that the debt is not on arm's length terms; and
- there is an EBITDA-based cap on interest deductions which applies where a group has over £2 million in UK net interest expenses.

Any gain realised by the UK offeror on a future sale of shares in the target will theoretically be within the UK corporation tax net. But, if the target is a trading company or the holding company of a trading group or trading sub-group and the UK offeror has held not less than 10% of the shares in the target for more than a year, any gain should generally be exempt under the substantial shareholding exemption. A sale of the UK offeror by its non-UK shareholder would generally remain outside the UK tax net. Dividends paid by the target company to the UK offeror and by the UK offeror should also normally be exempt from UK tax.

There is, however, no need to use a UK offeror, particularly if there is no desire to take an interest deduction for acquisition debt in the UK, perhaps because any interest expense is instead taken as a deduction in another jurisdiction.

All or part of the consideration offered to the UK target company's shareholders may take the form of shares or loan notes. This may be attractive from a UK tax perspective, in particular for UK retail shareholders who should then be able to defer an appropriate proportion of any capital gains tax liability in respect of their target shares. Consideration would, however, need to be given to the tax treatment of interest and dividend payments in the hands of such shareholders, particularly in respect of any non-UK withholding tax imposed on such payments.

# 7. Further Information

Further information on certain aspects of takeovers in the United Kingdom is given in the Appendices to this memorandum as follows:

Appendix 1 – The City Code: General Principles

Appendix 2– Key Provisions of the City Code

Appendix 3 – Dealing and Disclosure Requirements Prior to an Offer Announcement and During an Offer Period

Appendix 4 – Important Thresholds of Shareholdings in Takeovers

Appendix 5 – Definition of "Persons Acting in Concert"

Appendix 6 – Summary Offer Timetables

Appendix 7 – UK Merger Control Regime

Appendix 8 – Outline of national merger control regimes in the EEA

*This Memorandum is intended to give general information only. It does not seek to give advice or to be an exhaustive statement of the law or practice and readers should take specific advice on any particular matter which concerns them. If you require any advice or information, please contact your usual adviser at Slaughter and May.*

# APPENDIX 1: THE CITY CODE: GENERAL PRINCIPLES

## Text of General Principles

The following are the General Principles of the City Code (references to "offeree company" mean the target company):

1. (1) All holders of the securities of an offeree company of the same class must be afforded equivalent treatment.

   (2) If a person acquires control of a company, the other holders of securities must be protected.

2. (1) The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the takeover bid.

   (2) Where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the takeover bid on:

   (a) employment;

   (b) conditions of employment; and

   (c) the locations of the company's places of business.

3. The board of an offeree 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 takeover bid.

4. False markets must not be created in the securities of:

   (a) the offeree company;

   (b) if the offeror is a company, that company; or

   (c) any other company concerned by the takeover 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 takeover bid only after:

   (a) ensuring that he/she can fulfil in full any cash consideration, if such is offered; and

   (b) taking all reasonable measures to secure the implementation of any other type of consideration.

6. An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a takeover bid for its securities.

# APPENDIX 2: KEY PROVISIONS OF THE CITY CODE

The following is a summary of certain key Rules of the City Code (other than those relating to dealings (and disclosure of dealings) and mandatory offers, which are dealt with in Appendix 3).

## 1. Preparation of an Offer

Subject to certain limited exceptions, the announcement of an offer signals the formal commencement of the offer process. Rule 1(a) of the City Code provides an offeror (or its advisers) must notify a firm intention to make an offer in the first instance to the board of the target company or to its advisers (before a public announcement of the offer is made). In the case of a hostile offer the relevant communication would ordinarily take place only a few minutes before public announcement. Conversely in the case of a recommended offer, the period would clearly be significantly longer.

Except with the consent of the Panel, the offeror has to send its offer document to shareholders of the target company and persons with information rights within 28 days of the announcement (Rule 24.1(a) of the City Code). However, the offeror may only publish an offer document within the 14 days following the announcement if the board of the target company consents. This means that in a hostile offer, the offeror will have to wait 14 days after making its announcement before it can send out the offer document.

To avoid there being offers which cannot be implemented and so as to avoid the creation of a false market in the shares of the target company and, where relevant, the offeror, General Principle 5 of the City Code provides that an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration that is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.

In a number of instances, the City Code requires the making of an announcement and the public identification of particular offerors before the parties would otherwise wish. An announcement is required by Rule 2.2 of the City Code when, inter alia:

- following an approach to the board of the target company, the target company is the subject of rumour and speculation or there is an untoward movement in its share price. This will be considered in light of all the relevant facts, for example the percentage movements of the target company's share price. A movement of approximately 10 per cent. or a rise of five per cent. in the course of a single day may be regarded as untoward for the purposes of Rule 2.2;
- after a potential offeror first actively considers an offer but before an approach has been made to the board of the target company, the target company is the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the potential offeror'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 within the parties concerned and their immediate advisers). An offeror wishing to approach a wider group, for example, in order to arrange financing for the offer (whether equity or debt), where a consortium to make an offer is being organised or where irrevocable commitments are being sought, should consult the Panel; or
- during an offer period, rumour or speculation specifically identifies a potential offeror which has not previously been identified in any announcement. In those circumstances, the Panel will normally require an announcement to be made by the target company or the potential offeror (as appropriate) identifying that potential offeror.

The Panel may grant a dispensation from the requirement for an announcement to be made where it is satisfied the potential offeror has ceased actively to consider making an offer. However, following such a dispensation, the potential offeror will be subject to a number of restrictions for a period of six months. For example, it may not announce a firm intention to make an offer, or a possible offer, for the target company during this period. Further, it may not actively consider making an offer for the target company, or approach the board of the target company, or acquire interests in shares of the target company within the first three months of this restricted period. In addition, it may not purchase, agree to purchase, or make any statement which raises or confirms the possibility that it is interested in purchasing assets which are "significant" in relation to the target company. (In determining whether the assets are "significant" in relation to the target company the Panel will have regard to the consideration for the assets compared to the market value of the target company's equity shares, the value of the assets to be purchased compared to the total assets of the target company, and the operating profit attributable to the assets to be purchased compared with the operating profit of the target company. Relative values of more than 75% are regarded as being significant.)

The Panel may, in certain limited circumstances (set out in Note 2 to Rule 2.8), set aside these restrictions (most notably, where a third party has announced a firm intention to make an offer for the target company or where the target company's board has agreed to the restrictions being set aside). It should however be noted that, during the first three months of the dispensation having been granted, the Panel will not normally give its consent if the only circumstance that applies is that the target company's board has agreed to the restrictions being set aside (Note 4 to Rule 2.2 and Note 2 to Rule 2.8).

Before the board of the target company is approached, the potential offeror is responsible for making any announcement required under Rule 2.2. The offeror should, therefore, keep a close watch on the target company's share price for any sign of untoward movement. Following an approach to the board of the target company, the target company normally has responsibility for making an announcement and it, must, therefore, keep a close watch on its share price (Rule 2.3 of the City Code).

Any announcement made by the target company which commences an offer period must identify any potential offeror with whom the target company is in talks or from whom an approach has been received. Further, any subsequent announcement by the target company which refers to a new potential offeror must identify that potential offeror unless such an announcement is made after an offeror has announced a firm intention to make an offer for the target company (Rule 2.4 of the City Code).

After the date of the announcement in which it is first identified, a potential offeror is subject to a 28 day deadline by which it must either announce a firm intention to make an offer or announce it does not intend to make an offer; the imposition of this deadline is sometimes called the "put up or shut up" regime (Rule 2.6(a) of the City Code). The Panel may consent to an extension of the deadline if this is requested by both the offeror and the target company, and indeed the Panel has indicated that it will normally consent to an extension in such circumstances. However, extensions will only be granted when the 28 day period is close to expiry. The "put up or shut up" deadline will not apply, or will cease to apply, to a potential offeror if another offeror has already announced, or subsequently announces, a firm intention to make an offer for the target company. In that situation, the potential offeror must, by 5.00pm on the "Day 53", announce a firm intention to make an offer or announce that it does not intend to make an offer (Rule 2.6(d) of the City Code). (Day 53 is usually the 53rd day following the publication of the first offeror's initial offer document but if the "Day 60" date is extended under the City Code, then Day 53 is also extended so that it remains 7 days prior to Day 60.) The Panel will normally grant a dispensation from the requirement for potential offerors to be publicly identified and from the 28 day "put up or shut up" deadline where an offer period commences with an announcement by the target company that it is seeking one or more potential offerors by means of a formal sale process (Note 2 on Rule 2.6 of the City Code).

Where there has been an announcement of a firm intention to make an offer, the offeror must make an offer unless either the making of the offer is subject to the prior fulfilment of a specific pre-condition and that pre-condition has not been met or the offeror would be permitted to invoke a condition to the offer if the offer were made (Rule 2.7(b) of the City Code).

A change in general economic, industrial or political circumstances will not justify failure to proceed with an announced offer. However, with the consent of the Panel, an offeror need not make the offer if a competing offeror subsequently announces a firm intention to make a higher offer (Rule 2.7(b) of the City Code). An offeror must, therefore, ensure that he has all the funding in place to satisfy the offer in full before announcing the offer.

Further, a potential offeror should take care in making any statement as to its future intention or otherwise to make an offer. A person making a statement that he does not intend to make an offer for a company will normally be bound by that statement for a period of six months, unless circumstances occur that the person has specified in its statement were circumstances in which the statement might be set aside. The range of circumstances that a person may specify in such a statement is strictly limited under the Code.

### 1.1 Secrecy

It is vitally important before an announcement of an offer or possible offer that absolute secrecy is maintained. The City Code requires that all persons privy to confidential information, and particularly price sensitive information, concerning an offer or possible offer must treat that information as secret and may only pass it to another person if it is necessary to do so and if that person is made aware of the need for secrecy (Rule 2.1(a) of the City Code).

### 1.2 Contents of an Announcement

The announcement of the offer is required by Rule 2.7 of the City Code to contain a number of matters, including the terms of the offer, the identity of the offeror and details of any existing holding of shares, or options over shares or outstanding derivatives, in the target company owned or controlled by the offeror or persons acting in concert with it, as well as details of any short positions.

The press announcement will also invariably set out the offeror's rationale for making the offer. The announcement must also include the intentions of the offeror with regard to the business, employees and any pension scheme(s) of the target company. Until January 2018, the offeror was only required to include this information when it published the offer document. It was decided to move the stage at which these disclosures are made forward, in order to give the target company's employee representatives and pension scheme trustees more time to give a meaningful opinion on the effects of the offer. If received in time, these opinions are then included in the offer document (on a recommended takeover) or the target company's defence document (on a hostile takeover).

For these purposes, the offeror must explain the long-term commercial justification for the offer, and state:

- its intentions regarding the future business of the target company including its intentions for any research and development functions;
- its intentions with regard to the continued employment of the employees and management of the target company and of its subsidiaries, including any material change in the conditions of employment or in the balance of the skills and functions of the employees and management;
- its strategic plans for the target company and their likely effect on employment and business locations, including on the locations of the target company's headquarters;

- its intentions with regard to employer contributions into the target company's pension scheme(s) including with regard to current arrangements for the funding of any scheme deficit, the accrual of benefits for existing members, and the admission of new members;
- its intentions with regard to any redeployment of fixed assets; and
- its intentions with regard to maintaining any existing trading facilities in securities of the target company.

If the offeror has no intention to make changes in relation to these matters or if it considers that its strategic plans will have no repercussions on employment or on the location of the places of business, it must make a statement to that effect (Note 1 on Rule 2.7). Insofar as the offeror itself is affected by the offer, it must also state its intentions with regard to its future business and its intentions regarding employees and management, and its strategic plans and their likely effect on employment and the offeror's own business locations.

The announcement must also set out all the conditions to which the offer or the making of it is subject, and a long-stop date. **The offeror must ensure that all the conditions of the offer are correct in the announcement as there will be no opportunity to change such conditions at a later date. Conditions and pre-conditions and the long-stop date are discussed further below.**

### 1.3 Irrevocable Undertakings

Before a bid is announced an offeror will often seek irrevocable undertakings from certain key shareholders in the target, and target directors who are also target shareholders, that they will accept the offeror's offer (or, in the case of a Scheme, vote in favour of the Scheme at the shareholder meetings).

An offeror proposing to contact a private individual or small corporate shareholder with a view to seeking an irrevocable commitment must consult the Panel in advance (Rule 4.3 of the City Code). Irrevocable undertakings may be legally binding in all circumstances (unless and until the offer lapses) or may cease to apply in the event of a higher offer.

### 1.4 Conditions and Pre-Conditions

The City Code permits an offeror to include conditions or pre-conditions to the offer which need to be satisfied in order for the offer to proceed. A pre-condition is a condition which must be satisfied or waived before the offer is formally made by the sending of the offer document, whereas a condition to the offer itself applies when the offer has been formally made by the sending of the offer document.

An offer must not normally be subject to conditions or pre-conditions which depend solely on subjective judgements by the directors of the offeror or of the target company, or the fulfilment of which is in their control. An element of subjectivity may be acceptable to the Panel where it is not practicable to specify all the factors on which satisfaction of a particular condition or pre-condition may depend (Rule 13.1 of the City Code).

*Pre-Conditions*

The Panel must be consulted in advance if any person proposes to include in an announcement any pre-conditions to which making of the offer will be subject. Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition involves an official authorisation or regulatory clearance relating to the offer (Rule 13.3 of the City Code) and either:

(A) the offeree company agrees to the pre-condition; or

(B) the Panel is satisfied that the failure to obtain the authorisation or clearance in question could give rise to circumstances which are of material significance to the offeror in the context of the offer. This test of "material significance" is discussed further below, but it is worth noting here that the fact that the Panel consents to a pre-condition being included does not mean necessarily that the Panel will permit the offeror to lapse its offer later on if the authorisation or clearance is not obtained.

*Conditions*

The offer will typically be subject to a number of conditions which can be divided into a number of broad categories as follows:

(A) In the case of a takeover offer, it must normally be a condition that the offer will not be declared unconditional unless the offeror has acquired or agreed to acquire shares carrying over 50 per cent. of the voting rights attributable to each of the equity share capital in the target company alone and the equity share capital and the non-equity share capital combined (Rule 10 of the City Code). This condition (the "acceptance condition") is, except in the case of a mandatory offer under Rule 9 (see Appendix 3 below), usually drafted so as to be conditional on 90 per cent. acceptances (which would then generally allow compulsory purchase of the balance) but with the offeror having power to reduce this to shares carrying over 50 per cent. of the voting rights. In the case of an offer implemented by way of a Scheme, the offer will usually be conditional upon the Scheme becoming effective, which is in turn conditional upon the passing of the resolutions at the shareholder meetings, the sanction of the Scheme by the Court and the delivery of the Court order to the Registrar of Companies.

(B) There will be conditions relating to formal matters designed to give effect to legal and regulatory requirements or requirements in the offeror's constitution. Depending on the circumstances, these may include matters such as the consent of shareholders to the implementation of the takeover or the issuance of consideration securities, and the consents of the FCA and the London Stock Exchange in relation to the listing and/or admission to trading of any consideration securities.

(C) There will be terms and conditions in relation to long-stop dates and so-called "mini-long-stop dates" – in a takeover offer, a term relating to the long-stop date and in a scheme of arrangement, a condition relating to the long-stop date of the scheme or a specific date by which the shareholder meetings or the court sanction hearing must be held.

(D) There will be specific and general regulatory conditions relating to the obtaining of relevant official authorisations and regulatory clearances and bespoke conditions relating to the (non)-occurrence of a specific event or circumstances in relation to the offeree company.

(E) There will be other conditions relating to the continuing nature and condition of the target company and its business, principally general protective conditions (include a "material adverse change" condition). A "no material adverse change" condition is often included (to the effect that there has been no material adverse change in the financial or trading position or profits or prospects in the target group since that disclosed in the most recent accounts). The Panel has ruled that for an offeror to invoke a material adverse change condition, and so withdraw its offer, the offeror is required to demonstrate to the Panel that circumstances have arisen affecting the target which could not have reasonably been foreseen at the time

of the announcement of the offer and which are of an entirely exceptional nature. Failure to identify a specific liability of the target group in the course of due diligence before the offer is made would not normally provide grounds on which subsequently to withdraw an offer.

The conditions of an offer must not depend solely on subjective judgements by the directors of the offeror or of the target company or on conditions the fulfilment of which are in their hands (Rule 13 of the City Code).

It should be noted that the terms of any arrangement or agreement, whether or not in writing, entered into by the offeror which relates to the circumstances in which it may or may not invoke or seek to invoke a pre-condition or condition to its offer and the consequence of it doing so, will be disclosable unless dispensation is obtained from the Panel.

**Following the announcement of a firm intention to make an offer, an offeror should use all reasonable efforts to ensure satisfaction of any conditions or pre-conditions to which the offer is subject (Rule 13.2 of the City Code).**

While the acceptance condition in (A) and the conditions in categories (B) and (C) above can be invoked without the Panel's consent (although in relation to (C), there are separate requirements – see paragraph 1.5 below), the City Code contains constraints on the ability of the offeror to invoke conditions and pre-conditions that are in categories (D) and (E) above (i.e. regulatory conditions or general protective conditions) and invoking these conditions requires the Panel's consent. The offeror may only do so if the circumstances which give rise to the right to invoke the condition or pre-condition are of "material significance to the offeror in the context of the offer" (Rule 13.5(a) of the City Code). In applying this provision, the Panel will consider the extent to which the condition or pre-condition was negotiated with the target, whether the condition or pre-condition was drawn to the attention of the target's shareholders along with a clear explanation of when it could be invoked and whether the condition was adapted to fit the circumstances of the target.

A "no material adverse change" condition is often included in announcements and offer documents (to the effect that there has been no material adverse change in the financial or trading position or profits or prospects in the target group since that disclosed in the most recent accounts). The Panel has ruled that for an offeror to invoke a material adverse change condition, and so withdraw its offer, the offeror is required to demonstrate to the Panel that circumstances have arisen affecting the target which could not have reasonably been foreseen at the time of the announcement of the offer and which are of an entirely exceptional nature. Failure to identify a specific liability of the target group in the course of due diligence before the offer is made would not normally provide grounds on which subsequently to withdraw an offer.

### 1.5 Long-stop date

The offeror must include a long-stop date in its announcement and in the offer document. The offer must lapse or be withdrawn if by the long-stop date:

- sufficient acceptances have not been received to satisfy the acceptance condition, or
- there remains a condition relating to an official authorisation or regulatory clearance that has not been satisfied, and the Panel consents to the offeror lapsing its offer on the basis that the matter is of "material significance".

If the offer is recommended by the board of the offeree company, the offeror and offeree can agree the long-stop date. If the offer is not recommended, the Panel must be consulted about the date proposed by

the offeror before the announcement is made. In that situation, the Panel will normally require the long-stop date to be no earlier than the date by which the last condition or pre-condition relating to an official authorisation or regulatory clearance is reasonably expected to be satisfied.

Where on the long-stop date the Panel still needs time to determine whether to consent to the offeror lapsing its offer based on an unsatisfied regulatory condition, the offeror will generally not be permitted to lapse or withdraw its offer pending the Panel's final determination. This has consequences for the length of period for which any financing may be required to be available. This is discussed below in paragraph 1.8 ("Financing Arrangements") below.

### 1.6 Convertible Securities and Option Holders

When a takeover offer subject to the City Code is made, and the target has convertible securities outstanding (which in this context includes share options and subscription rights, such as warrants), the offeror is required to make an appropriate offer or proposal to these convertible security holders to ensure that their interests are safeguarded. Equality of treatment is required (Rule 15(a) of the City Code).

The target board is required to obtain competent independent advice as to the merits of the offer or proposal to convertible security holders and this advice, together with the target board's opinion on the offer or proposal and the board's recommendation as to the action that they should take, should be made known to the security holders (Rule 15(b) of the City Code).

As with Rule 14 of the City Code (see below), these offers should not normally be made conditional on any particular level of acceptances.

Whenever practicable, the offer to convertible security holders should be sent at the same time as the offer document. However, if this is not practicable, the Panel should be consulted and the document sent out as soon as possible with a copy being lodged at the Panel at the same time (Rule 15(c) of the City Code). In practice, the offer to option holders in the target is generally not sent at the same time as the offer document. A statement indicating that the bidder will make appropriate proposals to the holders of share options in the target is conventionally included both in the initial press announcement and in the offer document and the proposals are usually only sent to option holders once the offer has become wholly unconditional.

In addition, where practicable, relevant documents, announcements and other information sent to target shareholders must also be sent simultaneously to holders of convertible securities. If those holders are able to exercise their rights during the course of the offer, and to accept the offer in respect of the resulting shares, their attention should, where appropriate, be drawn to this fact in the documents (see note on Rule 15 of the City Code).

### 1.7 Offers for other Classes of Shares and Rights in Respect of Shares

Where a company has more than one class of equity share capital, a "comparable" offer must be made for each class of equity shares (Rule 14.1 of the City Code), whether such capital carries voting rights or not.

A comparable offer does not have to be identical but any differences must be capable of being justified to the Panel; the Panel must be consulted in advance. An acceptance condition may not be attached to an offer for non-voting equity share capital unless the offer for the voting equity share capital is itself conditional on the success of the offer for the non-voting equity share capital.

The offeror must make a separate offer for each class of shares that it wishes to acquire (Rule 14.2 of the City Code).

## 1.8 Financing Arrangements

Although the entire offer consideration sometimes takes the form of securities in the offeror, it is usual for some or all of the consideration to be in the form of cash. This cash could derive from the company's own resources but it could also be raised, in whole or in part, by means of an underwriting of shares in the offeror. A common method of underwriting in such circumstances is a so-called "cash underpinning" where the offeror arranges for its financial adviser to make a separate offer to the shareholders in the target company to acquire the shares in the offeror to which they are entitled as consideration under the offer, such offer being at a fixed price. Target shareholders who wish to receive cash would accept such offer. It would also be possible, although it is less common, for the underwriting to take the form of a rights issue.

Where the offeror funds some or all of the consideration from new bank facilities, it is necessary, in light of the requirement of the City Code that the offeror be able to implement the offer, that the offeror should have available to it an unconditional loan agreement at the time of announcement of the offer. The offeror's financial adviser will also be concerned in light of its obligations in relation to cash confirmation (see paragraph 2.3 below), that the cash under the facility be available for the purposes of the implementation of the offer. Accordingly, the financial adviser has an interest in ensuring that the facility be provided on terms that it will continue to be available until the entire cash consideration under the offer has been paid notwithstanding that an event of default may have occurred or some other right to withdraw the funding may have arisen.

As mentioned above, an offeror must specify a long-stop date and this will usually be no earlier than the date by which the last condition or pre-condition relating to an official authorisation or regulatory clearance is reasonably expected to be satisfied. However, for the reasons described above, it is possible that where a condition has not been fulfilled at the long-stop date, the Panel will need more time to determine whether or not the offeror can lapse its offer or must waive the condition (on the basis it is not of "material significance") and complete its offer. This possibility needs to be taken into account by the offeror at the outset when arranging any cash financing needed to fund the consideration. As a rule of thumb, when arranging the availability period of its financing, an offeror should add four weeks to the long-stop date to take account of the time the Panel may need to make a determination, plus:

(A) up to 28 days in the case of a contractual offer (reflecting the fact that once an offer has become unconditional it must remain open for not less than 14 days and the bidder must give at least 14 days' notice before it is closed and a further period of up to 14 days to allow for the consideration to be provided to accepting offeree shareholders); and

(B) up to 14 days in the case of a scheme of arrangement reflecting the fact that once a scheme has become effective consideration must be sent to target shareholders within 14 days.

It is not uncommon for at least part of the consideration being provided to take the form of securities, even if only a debt instrument, so as to give those UK tax resident target company shareholders who are liable to taxation on capital gains the opportunity of "rolling over" their capital gain into the consideration securities, thus deferring a charge to taxation.

## 1.9 Due Diligence

The offeror will invariably conduct a due diligence exercise in relation to the target company before announcing an offer. The extent of the due diligence exercise in the case of a hostile offer will be limited to reviewing publicly available information, such as the results of searches of public registers and financial analysts' reports. In the case of a recommended offer, the due diligence exercise may be much more extensive, but the target company will often seek to limit its extent, either because it does not wish the offeror, who may be a competitor, to obtain confidential information from it, or because it would not wish

the information to be made available to an alternative offeror (see paragraph 3.1 below in relation to Rule 21.3 of the City Code) or because the target company wants to ensure that details of a potential bid are not leaked to the public. For all these reasons, as a matter of practice, due diligence in public offers is often limited in comparison with private sales. The target company will, prior to handing over any information, ordinarily insist upon the potential offeror entering into a confidentiality agreement and it would also often seek to include in the confidentiality agreement "standstill" provisions, that is to say provisions restricting for a specified period the ability of the offeror to acquire target company shares without the consent of the board of the target company. There are difficult questions of law as to the enforceability of standstill arrangements.

## 2. Documents from the Offeror and Target Board

### 2.1 Standards of Care and Directors' Responsibility for Documents

Rule 19.1 of the City Code requires documents, announcements or other information published, or statements made, in the course of takeovers to be prepared with the highest standards of care and accuracy. The directors of the parties to the takeover must take responsibility for documents published by their respective companies and the documents must contain a responsibility statement to that effect (Rule of the City Code). This will also apply to any offer-related information published on electronic media or a website. The inclusion of such a responsibility statement may expose directors to liability for any negligent misstatements to shareholders to whom the takeover documents are addressed.

In the case of a recommended bid the common form of responsibility statement to be given by the directors of the:

- offeror in the offer document (or Scheme circular) would be:

  *"the directors of [offeror] each accept responsibility for the information (including any expressions of opinion) contained in this document other than that relating to [target group], the directors of [target], and the persons whose interests in shares the directors of [target] are taken to be interested in pursuant to Part 22 of the Companies Act 2006. To the best of the knowledge and belief of the directors (who have taken all reasonable care to ensure that such is the case), the information contained in this document for which they accept responsibility is in accordance with the facts and does not omit anything likely to affect the import of such information.";*

- target company in the offer document (or Scheme circular) would be:

  *"the directors of [target] each accept responsibility for the information contained in this document (including any expressions of opinion) relating to [target group], the directors of [target], and the persons whose interests in shares the directors of [target] are taken to be interested in pursuant to Part 22 of the Companies Act 2006.To the best of the knowledge and belief of the directors of [target] (who have taken all reasonable care to ensure that such is the case) the information contained in this document for which they accept responsibility is in accordance with the facts and does not omit anything likely to affect the import of such information."*

A common form of responsibility statement to be given by the directors of the offeror in the offer document in the case of a hostile offer would be:

*"the directors of [offeror] each accept responsibility for the information contained in this document (including any expressions of opinion) save that the only responsibility accepted by them in respect of the information contained in this document relating to [target group], which has been compiled from published sources, has been to ensure that such information has been correctly and fairly reproduced and presented. To the best of the knowledge and belief of the directors of [offeror] (who have taken all reasonable care to ensure that such is the case) the information contained in this document for which they accept*

*responsibility is in accordance with the facts and does not omit anything likely to affect the import of such information."*

Parties to an offer should be cautious when making public statements of intention as to their future conduct, particularly in the context of their intentions about the employees or pension schemes of the target company, strategic plans for the target company or its places of business. Any such statement must be accurate at the time that it is made and made on reasonable grounds (Rule 19.6(a) of the City Code). Where a party to an offer makes any public statement during an offer period relating to any course of action it intends to take (or not take) after the end of the offer period, that party will be required to consult the Panel if, during a period of 12 months from the date on which the offer period ends, or such other period of time as is specified in the statement, it decides not to adhere to it (either by taking a course of action different from that stated, or not taking the course of action that it stated it intended to take), and must promptly make an announcement describing the course of action it has taken and explain its reasons for doing so (Rule 19.6(b) of the City Code). It must also confirm in writing to the Panel at the end of such period whether it has taken, or not taken, the intended course of action and publish that confirmation via a regulatory news service.

A party to an offer who propose to make a statement relating to any course of action that it commits to take (or not take) after the end of the offer period (a "post offer undertaking") must consult the Panel in advance of making that statement. The offeror must include any post-offer undertaking in its offer document (Rule 24.3(d)(xv) of the City Code). The statement must state that it is a post-offer undertaking, specify any time period for which the undertaking is made or the date by which the course of action will be completed, and any qualifications or conditions to which it is subject. Its terms, including any qualifications or conditions to which it is subject, must be specific and precise, capable of objective assessment and not depend on subjective judgements by the relevant party or its directors (Rule 19.5 of the City Code).

Where a party has made a post-offer undertaking, it must comply with its terms for the period of time specified in the undertaking and complete any course of action committed to by the date specified in the undertaking. It will be excused compliance (subject to Panel consent) only if a qualification or condition set out in the undertaking applies. That party is required to submit written reports to the Panel after the end of the offer period at such intervals (of not more than 12 months) and in such form as the Panel may require to enable the Panel to monitor and enforce compliance. The Panel may also require the party to appoint a supervisor to monitor compliance (Rule 19.5(i) of the City Code).

### 2.2 General Obligation as to Information

Rule 23.1 of the City Code provides that shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of an offer and the information must be available early enough to enable shareholders to make a decision in good time. There is no requirement to publish a profit forecast. The obligation of an offeror in these respects towards the target company's shareholders is no less than its obligation towards its own shareholders.

Rule 27 of the City Code provides for the updating of certain information where there has been a material change in information previously published during an offer period, or where there is any material new information which would have been required to have been disclosed in any previous document or announcement published during the offer period, had it been known at the time.

Generally, information and opinions relating to an offer or party to an offer must be made equally available to all target shareholders as nearly as possible at the same time. This supports the general principle that all shareholders be afforded equivalent treatment. If any material new information or significant new opinion relating to an offer or party to an offer is: (i) published by or on behalf of a party to the offer (other than

in a document sent to target shareholders); or (ii) provided to a holder of shares or securities (including publicly traded debt securities) in a party to the offer, or to any investment manager, investment adviser or investment analyst; or (iii) provided to the media, then Rule 20.1(b) of the City Code requires the material new information or significant new opinion to be announced via a Regulatory Information Service (RIS) at the same time. In addition, presentations or other documents relating to the offer or party to the offer provided to, or used in any meeting with, the investor community and any form of written communication relating to the offer or the financial performance of a party to the offer provided to the media, must be published on a website promptly after it is so provided or used or after it is published by the media (as the case may be). This is regardless of whether it contains any new information or opinion (Rule 20.1(c) of the City Code).

### 2.3 Offer Document

The offer document contains the formal offer to the shareholders of the target company. It must normally be sent within 28 days of the announcement of a firm intention to make an offer (Rule 24.1 of the City Code). The offer document will ordinarily contain a letter from the offeror setting out the offer and, where the offer is recommended, a letter from the chairman of the target company. In addition, the City Code lays down detailed requirements as to the content of an offer document, some of which are discussed below. The offer document is accompanied by a form of acceptance which will be used by shareholders of the target company to accept the offer.

In the case of an offer implemented by way of a Scheme, the Scheme circular will take the place of the offer document. The contents of the Scheme circular are governed by both the City Code and Section 897 of the Companies Act 2006.

The offer document must explain the long term commercial justification for the offer, and contain the offeror's intentions with regard to the business, employees and any pension scheme(s) of the target company. This information will already have been included in the offeror's announcement of its offer and the relevant requirements of the City Code are discussed in more detail in that context in paragraph 1.2 above.

The offer document must also include any post-offer undertaking made by the offeror as discussed in paragraph 2.1 above.

Rule 24.3(a) of the City Code sets out the financial and other information regarding the offeror which must be contained in the offer document where the offeror is a UK incorporated company and has its shares admitted to trading on a UK regulated market or on AIM or the AQSE Exchange Growth Market. Rule 24.3(b) of the City Code sets out the financial and other information regarding the offeror which must be contained in the offer document where the offeror is not such a company; broadly, it should disclose the information required of a listed offeror so far as is appropriate and such further information as the Panel may require. Financial and other information is required on offerors irrespective of whether the consideration includes securities or is in cash only.

The offer document must also include details of the ratings and outlooks publicly accorded to the offeror and the target company by any rating agency prior to the commencement of the offer period, any changes made to those ratings or outlooks during the offer period and prior to the publication of the offer document and a summary of the reasons given, if any, for those changes (Rule 24.3(c) of the City Code).

Where the offeror is offering its securities as consideration and it has issued a profit forecast or a "quantified financial benefits statement" prior to or during the offer period, it will usually have to repeat the forecast or statement in the offer document it sends to target shareholders.

For the purposes of the City Code, even if no figure is mentioned, any form of words which expressly states or by implication indicates a figure for, or puts a floor under, or a ceiling on, the likely profits of a particular period or contains the data necessary to calculate an approximate figure for future profits will be treated as a profit forecast (definition of "profit forecast" in the City Code). A "quantified financial benefits statement" is either a quantified statement about the expected financial benefits of a proposed takeover or merger (for example, a statement by the bidder that it would expect the target to contribute an additional £x of profit following the acquisition), or a statement by the target company quantifying any financial benefits expected from cost saving or other measures to be implemented by the target if the offer is not successful.

In the offer document the offeror must explain the bases for the forecast or statement, and include reports from its reporting accountants and financial adviser confirming, broadly, that the forecast or statement has been carefully and properly compiled. If the offeror can no longer stand behind the forecast or statement, then it must explain why it is no longer valid.

Where the offeror made the profit forecast or quantified financial benefits statement before it had approached the target, the offeror may be required to include only a confirmatory statement by the directors in the offer document that the statement was properly compiled, instead of reports by the reporting accountants and financial adviser. In some circumstances, a confirmation by the directors will also suffice where the offer document repeats profit forecasts that have been made in accordance with its established practice as part of its ordinary course communications with its shareholders and the market.

Parties must be particularly careful when making statements about "targets", "budget" or similar expressions, as these will normally be treated as a profit forecast, unless it is clear that the statement is no more than aspirational (Note 1 on Rule 28.1 of the City Code).

Rule 24.4 of the City Code requires certain holdings and dealings to be disclosed, including the holdings of the offeror in the target company and holdings in the offeror and the target company (in the case of a securities exchange offer only) in which directors of the offeror are interested.

The offeror must have sufficient funds to be able to implement the offer in full. Where the offer is for cash or includes an element of cash, Rule 24.8 of the City Code provides that the offer document must contain a confirmation by an appropriate third party (e.g. the offeror's bank or financial adviser) that the offeror has sufficient resources available to satisfy full acceptance of the offer. The party confirming that resources are available will not be expected to produce the cash itself if, in giving the confirmation, it acted responsibly and took all reasonable steps to assure itself that the cash was available.

The offer document must also include an estimate of the aggregate fees and expenses likely to be incurred by the offeror in connection with the offer and separate estimates of the fees and expenses expected to be incurred in relation to the following: financial and corporate broking services, financing, legal advice, accounting advice, public relations advice and other professional services. If a fee is variable between defined limits, a range must be given for each category, setting out expected maximum and minimum amounts payable. Where the fees and expenses within a particular category are expected to exceed the estimated maximum amounts disclosed, or the amounts actually paid exceed the estimated maximum amounts disclosed, in either case by 10 per cent. or more, the Panel must be informed and the Panel may require this information to be publicly announced (Rule 24.16 of the City Code).

The offer document must be provided to the Panel in hard copy and electronic form before publication and to the advisors to all of the other parties to the offer (Rule 30.5 of the City Code).

## 2.4 Target Response

Normally within 14 days of the publication of the offer document (Rule 25.1 of the City Code), the target board must publish its opinion on the offer to its shareholders and its reasons for forming its opinion, including a recommendation as to the action that shareholders should take, and must make known in the document circulated the substance of the advice given to it by its independent advisers in relation to the financial terms of the offer (Rule 25.2(b) of the City Code). In the case of a recommended offer (including an offer to be implemented by way of a scheme of arrangement) this is done in the offer document. Otherwise, such views will be published in the defence document. If the board is split in its views on an offer, an explanation must be given and the opinion and recommendation of the minority should also be included in the circular, in addition to that of the majority. An explanation must also be given if there is a divergence of views between the board and the independent adviser.

The target board must provide its shareholders in good time with all the facts necessary to enable them, taking into account the recommendation of the target board and the target company's financial advisers, to make an informed decision whether to accept the offer. Rule 25 of the City Code sets out the requirements for the content for the first major circular from the target board. These include requirements as to disclosure of certain holdings in relevant securities and dealings, directors' service contracts and material contracts entered into by the target in the two year period prior to the commencement of the offer period.

If the target company has issued a profit forecast that is still "live", or made a quantified financial benefits statement, then it will have to repeat that forecast or statement in the target board circular and include either reports from the target company's accountants and financial adviser, or (if certain exceptions apply) an appropriate confirmation by the target board that the forecast or statement was properly and carefully compiled. If the target company can no longer stand behind the forecast or statement, then it must explain why it is no longer valid.

The target board circular must also include an estimate of the aggregate fees and expenses likely to be incurred by the target company in connection with the offer. Further, and as with the offeror's fees and expenses in the offer document, separate estimates of the fees and expenses expected to be incurred in relation to financial and corporate broking services, financing, legal advice, accounting advice, public relations advice and other professional services are also required (Rule 25.8 of the City Code).

A separate opinion from the target company's employee representatives on the effects of the offer on employment must also be appended to the circular, provided that the opinion is received in good time before the circular's publication. If it is not received in time but is received subsequently the target company must publish it on a website and publicly announce that it has been so published, provided it is received no later than 14 days after the offer becoming or being declared wholly unconditional (Rule 25.9 of the City Code). The target company is liable for the costs of publishing the employee representatives' opinion and the costs reasonably incurred by the employee representatives in obtaining advice in relation to the verification of the information contained in that opinion so as to ensure its contents meets the required standard of care (Note 1 on Rule 25.9 of the City Code).

The trustees of the target company's pension scheme are given similar rights to those granted to target company employee representatives to have appended to the circular a separate opinion from the trustees on the effects of the offer on the pension scheme, provided the opinion is received in good time before the publication of the circular. As is the case with the employee representatives' opinion, if the trustees' opinion is not received in time but is subsequently received, the target company must publish the opinion on its website and make an announcement that it has done so (Rule 25.9 of the City Code). The target

company is liable for the costs of publishing any opinion received from the pension scheme trustees but not for costs incurred by the trustees in obtaining advice (Note 1 on Rule 25.9 of the City Code).

### 2.5 Section 89 of the Financial Services Act 2012 ("FSA") and the Financial Promotion regime under the Financial Services and Markets Act 2000 ("FSMA")

Provisions of the criminal law back up the requirement for documents not to be false or misleading.

Section 89 FSA provides that it is a criminal offence where a person makes a false or misleading statement, knowing it to be false or misleading or being reckless as to whether it is, or dishonestly conceals any material facts, if he does so intending to induce another person to enter into a relevant agreement (or refrain from doing so) or to exercise any rights conferred by a relevant investment (or refrain from exercising such rights), or if he is reckless as to whether his statement or concealment will so induce another person. The person who is so induced does not, for the purposes of the offence, have to be the person to whom the statement was made.

Relevant agreements and relevant investments are defined so as to catch agreements to acquire shares, accepting an offer for shares, and exercising rights conferred by shares, including the right to dispose of shares.

The financial promotion regime of FSMA provides that, as a general rule, an unauthorised person must not, in the course of business, communicate an invitation or inducement to engage in investment activity. This prohibition will not apply if the content of the communication is approved for the purposes of Section 21 FSMA by an authorised person in accordance with FSMA rules. The FCA's view is, however, that communications made in the course of a takeover are likely to be exempt from the financial promotions regime.

There is also criminal liability for failure to comply with the content requirements for offer documents or defence documents under section 953 of the Companies Act 2006.

### 2.6 Payments to Directors

There is an obligation to disclose in the offer document any termination payments that the offeror has agreed to make to the target directors (Rule 24.6 of the City Code). Approval of target shareholders in a general meeting will also be required unless the payment is by way of damages for breach of contract or a pension in respect of past services.

### 2.7 The Publication of Documents relating to an Offer

The City Code allows a document to be sent in hard copy form, electronic form or by publishing it on a website (Rule 30.2 of the City Code). A person who receives a document in electronic form may request that a hard copy of that document is sent to them and any such request must be satisfied within two business days (Rule 30.3 of the City Code). A person may request that all future documents are sent to them in hard copy form (Rule 30.3(b) of the City Code). Subject to any such request, the sender is free to decide the form in which any document is sent.

Alternatively, if the material is published on a website, a "website notification", giving notice of the publication of the document on a website and providing details of that website must be sent to the recipient on the same day that the material is first published (Rule 30.2(c) of the City Code). The website and any website notification must contain a statement that any person entitled to receive that document may request a copy of that document in hard copy form and may request that all future documents are sent to that person in hard copy form (Rule 30.3(e) of the City Code). The information in a website notification

must be confined to non-controversial information about an offer and should not be used for argument or invective (Notes to definition of "Website notification" of the City Code).

### 2.8 Offer-Related Arrangements

The Panel's consent is required for the target company or any person acting in concert with it to enter into any offer-related arrangement with the offeror or any person acting in concert with the offeror either during an offer period or when an offer is reasonably in contemplation (Rule 21.2(a) of the City Code).An offer-related arrangement is defined as any agreement, arrangement or commitment in connection with an offer, including any inducement fee arrangement or other arrangement having a comparable financial or economic effect. Specifically excluded from this definition are: commitments to maintain the confidentiality of information, undertakings not to solicit employees, customers or suppliers, commitments to provide information or assistance for the purposes of obtaining official or regulatory clearance, irrevocable commitments or letters of intent to assent shares to the offer, any agreement relating to any existing employee incentive arrangement, any arrangement which imposes obligations only on the offeror and an agreement between the offeror and the trustees of any of the target company's pension schemes in relation to the future funding of the pension scheme (Rule 21.2(b) of the City Code).Generally, the Panel will not allow the target company to enter into any offer-related arrangements. However there are some exceptions to the prohibition.

- **White knight**: Where an offeror has announced a firm intention to make an offer which was not recommended by the board of the target company at the time of that announcement and remains not recommended, the Panel will normally consent to the target company entering into an inducement fee arrangement with a competing offeror at the time of the announcement of its firm intention to make a competing offer, provided that:

  (A) the aggregate value of the inducement fee or fees that may be payable by the target company is de minimis, ie normally no more than 1% of the value of the target company calculated by reference to the price of the competing offer (or, if there are two or more competing offerors, the first competing offer) at the time of the announcement made under Rule 2.7 of the City Code; and

  (B) any inducement fee is capable of becoming payable only if an offer becomes or is declared wholly unconditional. The Panel may give its consent for a target company to enter into inducement fee arrangements with more than one competing offeror, subject to the cap on the aggregate value of fees payable described above.

  The Panel will not, however, permit the target company to agree an inducement fee with the first offeror, even if it were to revise its offer to above the value of that of a competing offeror. (Note 1 on Rule 21.2 of the City Code; Takeover Panel Response Statement 2011/1, paragraph 3.20).

- **Formal sale process**: Where, prior to an offeror having announced a firm intention to make an offer, the board of the target company announces that it is seeking one or more potential offerors by means of a formal sale process, the Panel will normally grant a dispensation to permit the target company to enter into an inducement fee arrangement with one offeror (who had participated in that process) at the time of the announcement of that offeror's firm intention to make an offer. Any such inducement fee arrangement will be subject to the same restrictions as set out in (i) and (ii) of the paragraph above. In exceptional circumstances, the Panel may also be prepared to consent to the target company entering into other offer-related arrangements with that offeror. The Panel should be consulted at the earliest opportunity in all cases where such a dispensation is sought. (Note 2 on Rule 21.2 of the City Code).

- **Serious financial distress**: In exceptional circumstances, for example, to facilitate the rescue of a company which is in serious financial difficulty, the Panel may derogate or grant a waiver to a person from the application of a rule notwithstanding that, in doing so, one or more of the General Principles

might not be respected (Section 2(c) of the Introduction to the City Code). The Panel has indicated that it might be appropriate to grant a dispensation to permit a target company to enter into offer-related arrangements with an offeror where the target company is in serious financial distress and where not to grant a dispensation would clearly be detrimental to the interests of the company's shareholders. However, this position is not codified in the City Code. (Takeover Panel Response Statement 2011/1, paragraph 3.22)

## 3. Defences to a Hostile Offer

### 3.1 Restraints on action under the City Code

General Principle 3 of the City Code provides that the target board must not deny the holders of securities the opportunity to decide on the merits of the bid. Rule 21.1 of the City Code supports this principle by restricting the target board from taking any action which may frustrate any offer or bona fide possible offer during the course of an offer. The rule applies from the time when the target board has been approached by a potential offeror or the beginning of the offer period (whichever is the earlier) until the end of the offer period (or the close of business on the seventh day following the date on which the latest approach is unequivocally rejected if no offer period has commenced) (the **"relevant period"**). The rule also prohibits certain specific actions as frustrating action by providing that, during that period, the board must not (to the extent it is not in the ordinary course of its business), without the approval of shareholders in general meeting or Panel consent, take or agree to take any of the following action:

- issue, or transfer or sell out of treasury, any shares or securities carrying rights of conversion into or subscription for shares;
- redeem, or purchase, its own shares, or securities carrying rights of conversion into or subscription for shares;
- grant options over or awards in respect of its shares;
- dispose of or acquire assets of a material amount (a relative value of 10 per cent. or more of assets is suggested by the City Code as a guideline of what would be material); or
- enter into, amend or terminate material contracts, for example for the significant enhancement of a director's terms of service.

Share buybacks pursuant to an established share buyback programme announced prior to the relevant period will normally be treated as ordinary course, as would a proposed grant of options over, or award in respect of, shares in line with the target company's normal practice under an established incentive scheme.

It should be noted that, by means of aggregation, transactions which are individually immaterial may be deemed frustrating action when considered together. The Panel will normally give its consent in certain circumstances, notably if the offeror consents to the proposed action, or if the proposed action is taken pursuant to a contract entered into, or an action has already been partly implemented, before the beginning of the relevant period.

Rule 3.1 of the City Code obliges the board of the target company to obtain competent independent advice on any offer; this will ordinarily be from an investment bank. The adviser to the target should have a sufficient degree of independence from the offeror to ensure objective advice. An adviser to the target company who is rewarded by the target on failure of an offer will normally be disqualified from acting as an independent adviser, due to a conflict of interest (Note 3 to Rule 3.3 of the City Code).

Other provisions of the City Code are also relevant to the conduct of a bid defence. For example, if the target company has previously provided information to one offeror or potential offeror, whether publicly identified or not, then, by reason of Rule 21.3 of the City Code, the same information (and any information

provided in the seven days following the relevant request) must be given to another offeror or bona fide potential offeror, if it requests such information, even where that other offeror is less welcome and even where the offeror has not been named and/or no formal announcement has been made. The scope of the rule extends to transactions involving the sale of a target company's assets so that where, during the relevant period, the target company commences discussions with a party with a view to pursuing a competing transaction which would involve the sale of all or substantially all its assets, any information given by the target company to the potential asset purchaser must on request be given to an offeror or *bona fide* potential offeror.

Also, during the offer period, financial advisers and stockbrokers (and persons under common control with them) to the target company are prohibited from purchasing target shares and entering into other specified arrangements relating to the purchase of such shares (Rule 4.4 of the City Code).

### 3.2 Practical Implications

A number of defensive tactics which might be prevalent in some jurisdictions are not so in the UK. For example, so-called "poison pills", whereby it is ensured that a target company cannot be bid for or can only be bid for on unattractive terms, could not be adopted by the board of directors of a target company because, first, in all but a most extreme case, to do so would be a breach of fiduciary duty and, secondly, because of General Principle 3 and Rule 21 of the City Code. Also, where the poison pill would involve amending the capital structure of the target company or the rights attaching to its share capital, then the consent of the company's shareholders at a general meeting would be required prior to implementation.

Once an offer has been made, the extent to which action by the target board is permitted depends upon the view which it has properly formed of the offer. If, for example, the board has properly formed the view that the offer, if successful, would be damaging to the target company then it might be possible (within the constraints of Rule 21 of the City Code) to take steps to frustrate the offer, for example, by seeking to persuade a relevant regulatory authority that a consent required in order for the offer to proceed should not be given (the 1989 offer by Hoylake for BAT). On the other hand, the Panel has taken the view that the bringing of litigation to frustrate an offer would not be permitted (the 1989 offer by Minorco for Consolidated Goldfields).

A further possibility is that the board of the target company forms the view that the offer does not value the target company sufficiently highly. In such circumstances, the target company will seek to persuade its shareholders as to the value of the target company. This may involve the preparation of a profit forecast or an asset valuation. Other legitimate means of persuading the shareholders of the target company of the company's value would be, for example, the defensive measure of promising shareholders the payment of a special dividend in the target company *should the offer fail* or, alternatively, to effect a repurchase of its share capital *should the offer fail*. Such proposals do not contravene Rule 21 of the City Code. Where part of the consideration being offered by the offeror is shares in the offeror, it would be common for a target company to argue that such shares are less valuable than might at first sight appear.

## 4. Timing

The City Code contains detailed Rules relating to the timing of takeover offers, and a smaller number of Rules relating to the timing of schemes of arrangement. The timetables for a takeover offer and for a scheme of arrangement are summarised below, and visual timelines of each are included in Appendix 6. All time periods are in calendar days (not business days), unless otherwise indicated.

### 4.1 Takeover Offers

The City Code defines certain key milestones in the offer timetable:

- Day 14 and Day 21 are the 14th and 21st days following the date on which the offer document is published respectively.
- Day 60 is the 60th day following the publication of the offer document or a later date set under the rules (see below). It is normally the last date by which all of the conditions to the offer must be satisfied or waived.
- Day 39, Day 46 and Day 53 are counted back from the date set for Day 60.

These milestones and other timing requirements are summarised below:

- an offer document must normally be sent to shareholders of the target company and persons with information rights within 28 days of the announcement of a firm intention to make it (Rule 24.1 of the City Code). However, the offeror may only publish an offer document within 14 days following the announcement of its firm intention to make an offer with the consent of target company (Rule 24.1 of the City Code). It should be remembered that, unless on the application of the offeror and with the consent of the target company the Panel agrees to an extension, a potential offeror is subject to a 28 day "put up or shut up" deadline following the date of the announcement in which it is first identified to announce a firm intention to make an offer or announce that it does not intend to make an offer;
- an offer must be open for acceptance until the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses. (Rule 31.2 of the City Code);
- the target company's directors must normally advise shareholders of their views within by Day 14, (Rule 25.1 of the City Code);
- any material new information to be published by the target must be published not later than Day 39 (Rule 31.8 of the City Code);
- an offer may not normally be increased or revised later than Day 46;
- an offer must normally remain open for acceptance for a further 14 days after it becomes or is declared unconditional and the offeror must give at least 14 days' notice before the offer is closed (Rule 31.2 of the City Code), as must offers of alternative forms of consideration (Rule 33 of the City Code), although, if certain conditions are satisfied, this does not apply to "mix and match" offers (Rule 33 of the City Code);
- if one or more conditions relating to an official authorisation or regulatory clearance has not been satisfied or waived by 5pm on Day 37, the Panel will normally suspend the offer timetable, either at the joint request of the offeror and the offeree company or at the sole request of either party provided that at least one of the outstanding conditions relates to an authorisation or clearance that the Panel deems to be "material" i.e. where the Panel is satisfied that failing to obtain the clearance or authorisation could give rise to circumstances which are material enough to allow the offeror to lapse its offer (see paragraph 1.4 above);
- the suspended offer timetable will resume once the last condition relating to a relevant official authorisation or regulatory clearance is satisfied or waived. The offeror must make an immediate announcement confirming the date of the new Day 60 which will normally be 28 days later (so the day the timetable resumes becomes the new Day 32);
- except with the Panel's consent, all the conditions to an offer must be satisfied or waived, or the offer will lapse, by midnight on Day 60. An offeror which wishes to specify an earlier date as the date by which all conditions must be satisfied must consult the Panel and will normally be treated as having made an "acceleration statement" (see below); and
- settlement of the consideration (in respect of acceptances which are complete in all respects) within 14 days of the date offer becomes or is declared unconditional (Rule 31.9 of the City Code).

As noted above, the offeror must include a long-stop date in its offer.

Where a competing offer has been announced, Day 60 for both offerors will normally be set by reference to the publication of the later offer document.

If there are two or more competing offers and the offer timetable is suspended for a regulatory condition, the offer timetable will normally be suspended for all the offerors and will normally only resume when it is resumed by the last offeror. Alternatively, an offeror may bring forward the unconditional date of its offer by making an acceleration statement (Note on Rule 31.4).

In addition, the Panel may extend Day 60 to allow for any auction procedure held under Rule 32.5 (Note 1 on Rule 31.3). If a competitive bid situation continues to exist in the later stages of the offer period, the Panel will normally require revised offers to follow an open auction procedure unless an alternative procedure is agreed between the competing offerors and the board of the target company (Rule 32.5 of the City Code). Unless the parties to the offer agree otherwise, an auction procedure will not normally be introduced until after the last condition relating to a relevant official authorisation or regulatory clearance has been satisfied or waived by each of the offerors.

Where one or more of the competing offers is being implemented by way of a scheme of arrangement, the parties must consult the Panel as to the applicable timetable.

A summary offer timetable is set out in Appendix 6. The summary assumes that there is no competing offeror. If there were a competing offeror then the first offeror would effectively move on to the timetable of the second offeror.

During an offer, an offeror can make an "acceleration statement" that brings forward the latest date by which off the conditions to its offer must be satisfied or waived (Rule 31.5). The statement effectively brings forward Day 60. There are various rules relating to the timing and contents of an acceleration statement. However, a key point to note is that the offeror must waive any and all unsatisfied conditions relating any official authorisation or regulatory clearance when making an acceleration statement. This means that it would usually be used by an offeror that has the regulatory consents that it needs in place, does not want to wait until Day 60 and wants to encourage the shareholders of the offeree company to accept its offer as soon as possible. The strategy is not without risk, as if it does not reach its acceptance level by the new Day 60, its offer will lapse. With the Panel's consent it is possible to include some reservations in an acceleration statement that allow it to be set aside if certain circumstances occur.

During the course of an offer, an offeror can publish an "acceptance condition invocation notice" (or "ACIN"). An offeror would typically make this where it has made an offer and subsequently something has occurred that means it now has "buyer's remorse" and wishes to lapse its offer. The ACIN gives the offeree shareholders notice that if by a specified date the offeror has not received enough acceptances to satisfy its acceptance condition, the offer will lapse. The ACIN must give at least 14 days prior notice to shareholders to allow them time to decide whether to accept the offer and put that decision into action. Although an ACIN has some superficial similarities to an acceleration statement, they are quite different in effect and strategically are used in very different circumstances.

### 4.2 Schemes of Arrangement

Most of the provisions relating to the timing of takeover offers set out above do not apply to a scheme of arrangement, which will largely be governed by the Court process. However, the City Code does impose some constraints on the Scheme timetable. In particular:

- the 28 day "put up or shut up" deadline described above applies to potential offerors whether they are proposing to proceed by way of an offer or a scheme of arrangement;
- where an offeror announces a firm intention to make an offer to be implemented by a Scheme and the target board agrees to the inclusion of a statement of its intention to recommend the Scheme in that announcement then the target company must, except with the consent of the Panel, ensure that the Scheme circular is sent to shareholders and persons with information rights within 28 days of that announcement. This obligation will cease if the target board subsequently withdraws its recommendation (Appendix 7, paragraph 3(a) of the City Code);
- the target company must set out in the circular the expected timetable for the Scheme, including, inter alia, the expected dates and times for the following: the date and time of any shareholder meetings, the date of the court sanction hearing, the record date for the purposes of the Scheme, the anticipated effective date of the Scheme and the long-stop date by which the Scheme must become effective unless extended with the agreement of the parties to the offer (Appendix 7, paragraph 3(b) of the City Code). At the same time as the Scheme circular is published, the target company must also announce that the circular has been so published and include the expected timetable in that announcement (Appendix 7, paragraph 3(e) of the City Code);
- the shareholder meetings must normally be convened for a date which is at least 21 days after the date of the Scheme circular (Appendix 7, paragraph 3(b)(iii) of the City Code);
- the target company must implement the Scheme in accordance with the published expected timetable unless the target board withdraws its recommendation of the Scheme, the target board announces a proposal to adjourn a shareholder meeting or court sanction hearing, a shareholder meeting or the court sanction meeting is adjourned, or the offeror invokes a condition to the Scheme (Appendix 7, paragraph 3(f) of the City Code). Any adjournment or delay of the shareholder meetings or the court sanction hearing that would result in that event occurring more than 21 days after the expected date of that event as set out in the timetable in the Scheme circular or which would result in it not being possible for the Scheme to become effective by the long-stop date set out in the timetable will enable the offeror to invoke a condition (if the parties have included such a condition in the Scheme) and cause the Scheme to lapse;
- except with the consent of the Panel, the offeror must confirm to the target company and the Panel that all the conditions to the offer have been either satisfied or waived (other than any conditions which can only be satisfied after the scheme has been sanctioned) prior to the court sanction hearing and at the hearing the offeror must undertake to the court to be bound by the terms of the scheme. (Appendix 7, paragraph 3(g) of the City Code). This will not apply if a condition relating to a material official authorisation or regulatory clearance is still outstanding provided it is not clear what action would be required to obtain the authorisation or clearance or, if it is sufficiently clear, the taking of that action would give rise to circumstances which are of material significance to the offeror (the test for materiality under Rule 13.5);
- revisions to the Scheme should normally be made no later than 14 days before the shareholder meetings and Panel consent is required for revisions after that date (Appendix 7, paragraph 7 of the City Code);
- if the Scheme permits shareholders to elect to receive alternative consideration or to vary the proportions of different forms of consideration they receive, then the right to elect must not be closed off any earlier than one week before the court sanction hearing. Likewise, shareholders' right to withdraw such elections may not be shut off earlier than one week before the Court sanction hearing (Appendix 7, paragraph 9 of the City Code); and
- consideration must be sent to target shareholders within 14 days of the date on which the Scheme becomes effective (Appendix 7, paragraph 10 of the City Code).

Where an offer is implemented by way of a scheme of arrangement, there is no equivalent of the "Day 39" rule (restricting publication of material new information) as with takeover offers. This means that there is no cut-off date after which the target may not publish material new information, such as profit forecasts or preliminary/interim results.

The City Code does not set a date by which the target must hold the shareholder meetings, nor – where a Scheme is used – a last date by which all of the conditions to the offer must be fulfilled or satisfied although the parties may include a long-stop date in the conditions enabling the Scheme to lapse if it has not become effective by such date.

A summary Scheme timetable is set out in Appendix 6. The summary assumes there is no competing offeror. As noted above, where one or more competing offers is being implemented by way of a scheme of arrangement, the parties must consult the Panel as to the applicable timetable.

### 4.3 No further offers for 12 months following lapsing or withdrawal

In the case of both a takeover offer and a Scheme, except with the consent of the Panel, where an offer has been announced and has been withdrawn or lapsed, neither the offeror nor any person who is or was acting in concert with the offeror may within 12 months from the date on which such offer is withdrawn or lapses make an offer for the target company or put himself in a position whereby he would be obliged under Rule 9 of the City Code to make an offer (Rule 35.1 of the City Code). This is to prevent an offeror from putting a target company under continual siege.

The notes to Rule 35.1 of the City Code specify circumstances in which the Panel will normally grant consent for a further offer to be made notwithstanding that the 12-month period has not elapsed. These include (i) where the new offer is recommended by the board of the target company (although in this case consent will not normally be granted within three months of the lapsing of an earlier offer in relation to which the offeror made a no increase statement or an acceleration statement unless that statement included an appropriate reservation), (ii) where the new offer follows the announcement by a third party of a firm intention to make an offer for the target company, or (iii) where the new offer follows the announcement by the target company of a "whitewash" proposal or a reverse takeover, or (iv) where the Panel determines that there has been a material change of circumstances (Note 1 on Rule 35.1 of the City Code).

# APPENDIX 3: DEALING AND DISCLOSURE REQUIREMENTS PRIOR TO AN OFFER ANNOUNCEMENT AND DURING AN OFFER PERIOD

All references in this Appendix to an offeror should be read as references to the offeror and all persons "acting in concert" with it. (A detailed note on who should be regarded as acting in concert for the purposes of the City Code is set out in Appendix 5.)

The City Code is concerned primarily with voting rights. It is assumed for the purposes of this Appendix that the target company has only ordinary shares in issue and that there are no other voting rights.

Except where otherwise stated, a reference to a person owning or acquiring an "interest in shares" or an "interest in securities" is a reference not only to a person owning shares or securities, but would also include a person owning or acquiring the right to exercise or direct the exercise of voting rights attaching to the shares or securities (or generally controlling the shares or securities) or having a right to call for the shares or securities or being under an obligation to take delivery of the shares or securities (whether any such right or obligation is conditional or absolute) or being party to any derivative resulting in the person having long economic exposure to changes in the price of the shares or securities. Except for the purposes of Rule 5 (see below), a person is not to be treated as having or acquiring an interest in shares or securities by virtue of obtaining an irrevocable commitment to accept an offer in respect of them.

The "offer period" as referred to below is the period that commences when the first announcement is made of an offer or possible offer for a company, or when certain other announcements are made, such as an announcement that a purchaser is being sought for an interest in shares carrying 30% or more of the voting rights of the company or that the board of the company is seeking potential offerors.

The offer period will end when an announcement is made that an offer has become or has been declared unconditional, that a scheme of arrangement has become effective, that all announced offers have been withdrawn or have lapsed or following certain other announcements having been made (such as all publicly identified offerors having made a statement that they do not intend to make an offer under Rule 2.8 of the City Code).

## 1. Dealings

### 1.1 Acquisitions Prior to an Offer

Rule 6.1 of the City Code stipulates that if an offeror acquires an interest in shares in a target company:

- within a three-month period prior to the commencement of the offer period; or
- between any announcement of a possible offer and the announcement of a firm intention to make an offer; or
- prior to that period if the Panel is of the view that there are circumstances which render it necessary to ensure that all shareholders in a target company are treated similarly, then, except with the consent of the Panel in relation to the first and second points above, any subsequent offer by such offeror for the target company must be on no less favourable terms. If a purchase of an interest in shares in the target company has given rise to an obligation to make a cash and/or securities offer pursuant to Rule 11 (see paragraph 1.5 below), then compliance with the obligation under Rule 11 will satisfy this obligation.

It is a requirement that a possible offer announcement includes details of any minimum level, or particular form, of consideration that any potential offeror(s) identified in the announcement would be obliged to

offer under Rule 6 or Rule 11 (as appropriate) (Rule 2.4(c)(iii) of the City Code). However, a negative statement is not required in the announcement if neither Rule 6 nor Rule 11 applies.

### 1.2 Acquisitions Over 30 Per Cent. Both Before and During an Offer Period

The City Code deems control of a target to arise at an interest in shares carrying 30 per cent. of voting rights of the target and seeks to prevent an acquirer from gaining such control without making a full takeover offer. Therefore, under Rule 5.1 of the City Code, if an offeror is interested in shares carrying less than 30 per cent. of the voting rights in a target company, it may not acquire an interest in any other shares which results in it being interested in shares which carry, in aggregate, 30 per cent. or more of the voting rights. Furthermore, where an offeror is interested in shares carrying 30 per cent. or more but less than 50 per cent. of the voting rights in a target company, it may not acquire an interest in any other shares carrying voting rights in that company.

However, Rule 5.2 of the City Code permits such acquisitions where:

- the purchase is from a single shareholder and it is the only acquisition within a seven-day period (this will not apply if the person has announced an intention to make an offer); or
- the purchase immediately precedes, and is conditional upon, the announcement of an offer provided that the offer will be publicly recommended by, or the purchase is made with the agreement of, the board of the target company; or
- the offeror has announced a firm intention to make an offer if:
  - (A) the purchase is made with the agreement of the target company's board; or
  - (B) the offer (or any competing offer) has been publicly recommended by the target company's board; or
  - (C) Day 21 of that offer or of any competing offer has passed; or
  - (D) the offer has become unconditional; or
- the purchase is by way of acceptance of the offer.

For the purposes of Rule 5 of the City Code only, "interests in shares" includes irrevocable undertakings to accept the offer. Rule 5, therefore, contrasts with the mandatory bid provisions (Rule 9 of the City Code) which do not encompass irrevocable undertakings; the interplay of the two rules means that a bidder can obtain irrevocable undertakings over 30 per cent. or more of the target's voting shares where permitted by Rule 5 (most significantly, where the offer is to be publicly recommended) without triggering the mandatory offer provisions under Rule 9 of the City Code.

### 1.3 Restriction on Dealings by the Offeror during the Offer Period

An offeror must not during the offer period sell any ordinary shares in a target company without having obtained the prior consent of the Panel. Twenty-four hours' public notice must be given of any such proposed sale. Once the announcement has been made an offeror may not make any further purchases. The Panel should be consulted whenever the offeror proposes to enter into or close out any type of transaction which may result in the shares of the target being sold during the offer period, either by the offeror or the counterparty, to the transaction (Rule 4.2 of the City Code).

### 1.4 Mandatory Offer (a "Rule 9 Offer")

Notwithstanding that purchases may be permitted as referred to in paragraph 1.2 above, if an offeror either:

- acquires (whether or not pursuant to a series of transactions or over a period of time) an interest in shares which, together with shares in which the offeror is already interested, carry 30 per cent. or more of the voting rights in a target company; or

- where it is interested in shares which carry 30 per cent. or more but less than 50 per cent. of the voting rights in a target company, acquires an interest in shares in that company which increases the percentage of its voting rights, then that offeror will, except with the consent of the Panel, be required to make a "mandatory offer" for all of the ordinary shares in the target company not already owned by it. There are limited purchasing freedoms for controlling shareholders and to allow shareholders to take up their entitlement under secondary issues.

  The following must be noted in relation to a mandatory offer:

  (A) the offer is usually permitted to be conditional only upon the level of acceptances referred to in ii below;

  (B) the acceptance condition is that only 50 per cent. (plus one share) acceptances are required; and

  (C) the offer must be for cash or accompanied by a full cash alternative at not less than the highest price paid by the offeror for target shares within the preceding 12 months.

When an issue of new securities by the target company would otherwise result in an obligation to make a takeover offer the Panel will normally waive the obligation if there is a vote to that effect at a shareholders' meeting (a so-called "whitewash"). Any non-independent party would not be entitled to vote at that meeting. The Panel will not normally give a waiver if the person to whom the new securities are to be issued has purchased shares in the company in the 12 months prior to the sending of the circular relating to the proposals.

Any purchase resulting in a mandatory offer becoming required must be immediately followed by an announcement that such an offer is to be made.

### 1.5 Nature of Consideration to be Offered

- Required Cash Offer

  If:

  (A) an offeror purchases for cash, during an offer period and within the 12 months prior to its commencement, an interest in shares which carry 10 per cent. or more of the voting rights in the target company; or

  (B) the offeror acquires an interest in shares in the target company for cash during the offer period; or

  (C) in the view of the Panel it is necessary to ensure that all target shareholders are afforded equivalent treatment (the Panel will not normally exercise this discretion unless the vendors are directors of, or other persons closely connected with, the offeror or target company in which case even relatively small purchases may be relevant),

  then, except with the consent of the Panel in relation to A or B above, any offer for the ordinary shares in the target not already held must be made in cash or with a full cash alternative at not less than the highest price paid by the offeror (see "Highest Price" below) during the offer period and (in the case of A above), the preceding 12 months (Rule 11.1 of the City Code).

  Any such purchase must, if appropriate, be immediately followed by an announcement that an appropriately revised offer is to be made.

- Required Securities Offer

  If:

(A) an offeror purchases for securities, during an offer period and within the three months prior to its commencement, an interest in shares which carry 10 per cent. or more of the voting rights in the target company; or

(B) an offeror purchases for securities, more than three months prior to the offer period, an interest in shares which carry less than 10 per cent. of the voting rights of the target company, but in the view of the Panel it is necessary to ensure that all target shareholders are treated similarly (the Panel will not normally exercise this discretion unless the vendors are directors of, or other persons closely connected with, the offeror or target company),

then the offeror will normally be required to offer such securities to all other holders of the ordinary shares in the target company on a same number basis (Rule 11.2 of the City Code).

There will also be an obligation to make a cash offer or provide a cash alternative (see "Required Cash Offer" above), unless any consideration securities are to be held until either the offer has lapsed or the offer consideration has been sent to all accepting shareholders.

- Highest Price

  When calculating the value of any offer required as set out in the paragraphs above, the Panel has a discretion to agree an adjusted price if the offeror considers that the "highest price" should not be paid. Factors which the Panel may take into account include the size and timing of the relevant purchases, the attitude of the target company board, whether the interests in shares have been purchased by or from directors or connected persons, and the number of shares in which interests have been acquired in the preceding 12 months (Rule 11.3 of the City Code).

### 1.6 Purchases at Above the Offer Price

If, during the course of an offer, an offeror purchases an interest in shares at above the offer price, such offeror must increase its offer to not less than the highest price paid (Rule 6.2 of the City Code).

### 1.7 Special Deals with Favourable Conditions

Except with the consent of the Panel, an offeror may not make any arrangements with some shareholders or persons interested in shares carrying voting rights, either during an offer or when one is reasonably in contemplation, if there are favourable conditions attached which are not being extended to all shareholders (Rule 16 of the City Code). This includes: a promise to make good to a vendor of shares any difference between the sale price and the price of any subsequent successful offer; an irrevocable commitment to accept an offer coupled with the granting to target shareholders of a "put option" over the target shares should the offer fail; and any financial arrangements with the management of the target company.

### 1.8 Compulsory Acquisition of Minority Shareholders

An offeror has a right to compulsorily acquire the shares of minority shareholders if it has acquired, or unconditionally contracted to acquire, both 90 per cent. of "the shares to which the offer relates" and 90 per cent. of the voting rights in the company to which the offer relates.

If an offeror purchases ordinary shares in a target company prior to the time at which it makes (and not just announces) an offer, then such shares are not "shares to which the offer relates" and may not, therefore, be counted towards this 90 per cent. acceptance condition.

If, however, an offeror purchases ordinary shares during the period within which the offer can be accepted (that is, after it is made, not just announced) then those shares can be counted towards this 90 per cent. acceptance condition, provided that:

- the consideration for the purchase does not exceed the value of the offer; or
- if it does exceed the value of the offer, the terms of the offer are increased up to at least the consideration for the purchase.

Minority shareholders have two balancing rights of lesser practical importance. First, they can apply to the Court for an order that the offeror may not acquire their shares or must alter the terms on offer. Such applications would only succeed in exceptional circumstances and are extremely rare in practice. Secondly, the minority may require the offeror to purchase their holdings on the terms of the offer once a simple 90 per cent. of both the issued shares and the voting rights in the target have been acquired, whatever the method of acquisition. This enables dissenting shareholders to resist the takeover until the eleventh hour without risking retention of a holding which has little more than nuisance value. Where alternative types of consideration were available under the offer, even if subsequently closed, they must again be made available to those whose shares are compulsorily acquired.

## 2. Disclosure

### 2.1 Increases and Decreases in a Holding of Voting Rights

Chapter 5 of the FCA's Disclosure Guidance and Transparency Rules (DTR 5) imposes an obligation on a person who acquires in aggregate 3 per cent. or more of the voting rights in a UK listed company to give notice of such acquisition within two trading days. A further notice has to be given each time a percentage holding above 3 per cent. increases or decreases through a 1 per cent. threshold (rounding down to the nearest whole percentage point). Notice must also be given of a disposal which reduces the holding of voting rights to less than 3 per cent. of the relevant company's voting share capital.

The company must notify a Regulatory Information Service (RIS) as soon as possible after receipt of notification from the shareholder, and in any event by not later than the end of the trading day following receipt.

### 2.2 Concert Parties

A notification obligation will arise under DTR 5 where the offeror agrees with a third party who holds voting rights in the target to enter into an agreement to adopt, by concerted exercise of the voting rights, a lasting common policy towards the management of the target.

### 2.3 Disclosure of Dealings by Parties to a Takeover

Any dealings in relevant securities by the parties to a takeover, by persons acting in concert with a party to the takeover and by an exempt principal trader connected with the offeror or target company during the offer period must be disclosed in writing on a daily basis to a Regulatory Information Service (RIS) with an electronic copy of such disclosure to the Panel. Disclosures must be made not later than 12.00 noon on the following business day (Rule 8 of the City Code). Where such dealing is for the account of non-discretionary clients, or is for the account of discretionary investment clients and is by an exempt fund manager connected with the offeror or target, it need only be disclosed to the Panel. Public disclosures should be made on a dealing disclosure form available from the Panel.

The term "relevant securities" broadly means securities in the offeror or target.

The term "persons acting in concert" means persons who, pursuant to an agreement or understanding, co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company. The term is explained in more detail in Appendix 5.

An “exempt fund manager” is a person who manages investment accounts on a discretionary basis and is recognised as an exempt fund manager by the Panel.

A “principal trader” is registered as a market-maker with the London Stock Exchange, or is a London Stock Exchange member firm dealing as principal in order book securities. An “exempt principal trader” is a principal trader recognised as being exempt by the Panel.

### 2.4 Disclosure of Dealings by 1 Per Cent. Shareholders

Under Rule 8.3 of the City Code, any person (whether or not an offeror) who is interested, either directly or indirectly, in 1 per cent. or more of any class of relevant securities of either the target company, or an offeror, must report any dealings during the offer period in relevant securities of the target company, or (where shares are being offered as consideration) an offeror to a Regulatory Information Service (RIS) not later than 3.30 pm on the following business day and an electronic copy of such disclosure must be sent to the Panel. Public disclosures should be made on a dealing disclosure form available from the Panel.

Two or more persons who act to acquire an interest in relevant securities pursuant to an agreement or understanding (whether formal or informal) will be deemed to be a single person for these purposes.

If a person manages investment accounts on a discretionary basis, he, and not the person on whose behalf the relevant securities are managed, will be treated as interested in the relevant securities concerned.

These requirements do not apply to recognised intermediaries acting in a client-serving capacity.

### 2.5 Disclosure of Irrevocable Undertakings and Letters of Intent

During an offer period, if an offeror or target or any of their concert parties procures an irrevocable undertaking to accept an offer or a letter of intent, the offeror or target (as appropriate) must disclose the details in writing to a Regulatory Information Service (RIS) and publish the relevant document on a website (Rule 2.10(a) of the City Code). This disclosure and the website publication must be made not later than 12.00 noon on the following business day. If irrevocable undertakings or letters of intent are procured prior to the commencement of the offer period, their details must be publicly disclosed and the relevant document must be published on a website by the relevant party no later than 12 noon on the business day following either the commencement of the offer period or (in the case of an offeror) the date of the announcement that first identifies the offeror as such (Rule 2.10(b) of the City Code).

Where the offeror announces a firm intention to make an offer, details of any irrevocable undertaking or letter of intent procured must be included in the firm intention announcement. Where the details are, as required, included in a firm intention announcement which is published no later than 12 noon on the business day following the date on which the irrevocable undertaking or letter of intent is procured, no separate disclosure is required under Rule 2.10(a) or (b) of the City Code in respect of that undertaking or letter of intent (Note 1 to Rule 2.10). A copy of any irrevocable undertaking or letter of intent must also be published on a website no later than 12.00 noon on the business day following the announcement of a firm intention to make an offer (or, if later, the date of the relevant document).

### 2.6 Disclosure of Opening Positions at start of Offer Period

In addition to the requirements during the offer period for disclosure of dealings and disclosure of irrevocable undertakings and letters of intent as described in paragraphs 2.3, 2.4 and 2.5 aboveabove, the City Code imposes additional disclosure obligations relating to holdings of relevant securities at the start of an offer period, called an “Opening Position Disclosure”.

Opening Position Disclosures are announcements identifying all long and short positions in shares of the target and (on a securities exchange offer) the offeror company. They must be made by the offeror (including interests of its concert parties), the target (including interests of its concert parties), any person holding 1 per cent. or more of relevant securities and certain connected exempt principal traders.

An Opening Position Disclosure must be made no later than 10 business days after the start of the offer period or the announcement that first identifies the offeror in connection with the bid (as the case may be). If the offeror announces a firm intention to make an offer under Rule 2.7 before the 10 business day deadline, details of its (and its concert parties') interests and positions in the relevant securities are required to be included the firm intention announcement. However, it must still make a separate

Opening Position Disclosure containing all the relevant information within the deadline. Thereafter dealing disclosures must be made on the basis summarised above.

### 2.7 Prohibited Dealings

An offeror and a person acting in concert with it must not deal as principal with an exempt principal trader connected with the offeror in relevant securities of the target company during the offer period (Rule 38.2(a) of the City Code).

To underpin this rule, it used to be the case that the offeror and its concert parties are prohibited from purchasing target securities through SETS or other anonymous order book system, and any purchases must be effected by negotiated dealings outside SETS. However, this rule has been abolished as disproportionate as it places unduly onerous restrictions on offerors seeking to purchase target shares during the offer period. Dealings through an anonymous order book system are now permitted provided that neither party to the transaction is aware of the identity of the other party.

### 2.8 Insider Dealing and Market Abuse

Both the offeror and its financial adviser will be prevented from making market purchases of the target's shares if they have inside information relating to the target's shares other than the fact that the offer is to be made. Under the insider dealing provisions contained in the Criminal Justice Act 1993, an individual may commit a criminal offence if he deals, or encourages another person to deal, in securities of a company on the basis of inside information which has not been made public and which, if made public, would significantly affect the price. For example, where the offeror has secured inside information about the target in negotiations with the target, or where an informal clearance has been secured from the relevant regulator of a utilities sector, market purchases would not be permissible until the particular item of information is made public.

The criminal offence of insider dealing is supplemented and extended by the market abuse regime imposed by the UK version of the Market Abuse Regulation (EU) No 596/2014 (commonly known as the UK Market Abuse Regulation or UK MAR). Pursuant to FSMA, the FCA has powers to impose unlimited fines on individuals and firms which contravene Article 14 (prohibition of insider dealing and of unlawful disclosure of inside information) or Article 15 (prohibition of market manipulation) of UK MAR or has contravened, or been knowingly concerned in the contravention of, any other provision of UK MAR.

The UK Market Abuse Regulation identifies the following types of behaviour as market abuse: (i) engaging or attempting to engage in insider dealing; (ii) recommending that another person engage in insider dealing or inducing another person to engage in insider dealing; (iii) unlawfully disclosing inside information; and (iv) engaging or attempting to engage in market manipulation.

# APPENDIX 4: IMPORTANT THRESHOLDS OF SHAREHOLDINGS IN TAKEOVERS

The summary below is intended as a general checklist, but it should be noted that certain of the thresholds relate only to equity or voting shares, and may have to be applied separately to separate classes of shares. It should also be noted that in relation to Rule 5, Rule 9 and Rule 11 of the City Code, references to "shares" include having a long economic position in relation to such shares.

| Percentage of shares or voting rights in target | | Consequence |
|---|---|---|
| Any amount | - | must disclose upon request by target company (Section 793 of the Companies Act 2006) |
| | - | may be prohibited (Rule 5 of the City Code) or require a cash offer to be made for the target company (Rule 9 of the City Code) if it takes aggregate holding of shares to 30 per cent. or more or if additional to existing 30 per cent. holding |
| | - | if the acquiring company is listed on the London Stock Exchange the FCA's Listing Rules may require the acquiring company to obtain shareholders' consent (Class 1), or make an announcement (Class 2) (Chapter 10 of the Listing Rules) |
| | - | where a company holds 30 per cent. or more but less than 50 per cent. of the ordinary shares in the target company, any acquisition of ordinary shares in the target company which leads to percentage increase in shares with voting rights will lead to a requirement to make a cash offer (Rule 9 of the City Code) |
| | - | offeror and its concert parties must disclose interests in target shares at the start of an offer period and dealings in target shares during an offer period (Rule 8 of the City Code) |
| | - | if any interest in shares was acquired for cash during the offer period, any offer must be in cash or accompanied by a cash alternative at not less than the highest price paid (Rule 11.1(b) of the City Code) |
| 1 per cent. | - | must disclose dealings in shares during an offer period (Rule 8.3 of the City Code) |
| 3 per cent. | - | must disclose holdings of voting rights to the target and the FCA (Chapter 5 of the FCA's Disclosure Guidance and Transparency Rules) |
| | - | thereafter, if a person's percentage holding of voting rights increases or decreases through a 1 per cent. threshold (rounding down to the nearest whole percentage point), or ceases to be at least 3 per cent., this must be notified under DTR 5 |
| 5 per cent. | - | power of minority to apply to Court for cancellation of a resolution by public company to re-register as a private company (Section 98 of the Companies Act 2006) |

| Percentage of shares or voting rights in target | | Consequence |
|---|---|---|
| 10 per cent. | - | power of minority to block compulsory purchase (Section 979 of the Companies Act 2006) |
| | - | if the shares were acquired for cash during the 12 months prior to the offer period and during the offer period, any offer must be in cash or accompanied by cash alternative at not less than the highest price paid (Rule 11.1(a) of the City Code) |
| | - | if the shares were acquired in exchange for securities during the three months prior to the offer period and during the offer period, such securities must be offered as part of any offer (Rule 11.2 of the City Code) |
| 15 per cent. | - | possible "merger" ("material influence") which can be referred to for a Phase 2 investigation by the CMA |
| more than 25 per cent. | - | power of minority to block special resolutions or takeover by way of Scheme (although for practical purposes this blocking ability will arise with a smaller shareholding) |
| 30 per cent. | - | may be prohibited dealing (Rule 5 of the City Code) |
| | - | possible requirement to bid for whole of target (Rule 9 of the City Code) |
| more than 50 per cent. | - | Companies Act subsidiary and legal control |
| | - | offer capable of becoming unconditional as to acceptances (Rule 10 of the City Code) |
| | - | City Code generally ceases to be applicable |
| 75 per cent. | - | power to pass special resolutions |
| | - | offeror will be able to de-list the target company |
| | - | UK tax grouping for group relief may be possible and stamp duty relief may be available for transactions between the members of the enlarged group (Section 42 of the Finance Act 1930) |
| 90 per cent. | - | UK merger relief may be available on share for share exchange (Section 612 Companies Act 2006) |
| | - | minorities may be entitled to require their holdings to be bought out, but note that this test is applied to each class of shares separately |
| 90 per cent. of the shares and voting rights subject to the offer | - | power compulsorily to purchase minorities, but note that this test is applied to each class of shares separately |

# APPENDIX 5: DEFINITION OF "PERSONS ACTING IN CONCERT"

Note: references to the "offeree" mean the target.

For the purposes of the City Code "persons acting in concert" comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate "control" (defined in the Definitions section of the City Code as meaning 30 per cent.) of a company or to frustrate the successful outcome of an offer for a company. This Appendix summarises the definition in the City Code of acting in concert. Many of the rules imposing obligations treat persons acting in concert as one person. The definition of acting in concert differs from what would for the purposes of DTR 5 be regarded as an agreement between two or more persons which may give rise to an obligation to disclose voting rights under that Chapter (see paragraph 2.2 of Appendix 3 above).

## 1. Presumptions

The definition of "acting in concert" includes the following persons who will be presumed to be acting in concert with other persons in the same category, unless the contrary is established:

- company ("X") and any company which controls, is controlled by or is under the same control as X, all with each other;
- a company ("Y") and any other company ("Z") where one of the companies is interested, directly or indirectly, in 30% or more of the equity share capital in the other, together with any company which would be presumed to be acting in concert with either Y or Z under presumption (1), all with each other;
- (3) a company's pension schemes, and the pension schemes of any company with which the company is presumed to be acting in concert under presumption (1) or (2), with the company;
- the directors of a company (together with their close relatives and the related trusts);
- an investment manager of or investment adviser to:

  (a) an offeror;

  (b) an investor in a new company(or other vehicle) formed for the purpose of making an offer; or

  (c) the offeree company,

  with the offeror or offeree company (as appropriate), together with any person controlling,
- controlled by or under the same controls as that investment manager or investment adviser;
- a connected adviser (defined in the Definitions section of the City Code to include, most importantly, an organisation which is advising the offeror or offeree in relation to the offer) with its client and, if its client is acting in concert with an offeror or with the offeree company, with that offeror or with that offeree company respectively, in each case in respect of the interests in shares of that adviser and persons controlling, controlled by or under the same control as that adviser (except in the capacity of an exempt fund manager or an exempt principal trader);
- directors of a company which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent; and
- a person, the person's close relatives, and the related trusts of any of them, all with each other;
- the close relatives of a founder of a company to which the Code applies, their close relatives, and the related trusts of any of them, all with each other; and

- shareholders in a private company or members of a partnership who sell their shares or interests in consideration for the issue of new shares in a company to which the City Code applies, or who, in connection with an initial public offering or otherwise, become shareholders in a company to which the City Code applies.

### 2. Affiliates

In addition, a person and each of its affiliated persons will all be deemed to be acting in concert with each other. An "affiliated person" means any undertaking in respect of which that person:

- has a majority of the shareholders' or members' voting rights;
- is a shareholder or member and at the same time has the right to appoint or remove a majority of the members of its board of directors;
- is a shareholder or member and alone controls a majority of the shareholders' or members' voting rights pursuant to an agreement entered into with other shareholders or members; or
- has the power to exercise, or actually exercises, dominant influence or control.

For these purposes, a person's rights as regards voting, appointment or removal shall include the rights of any other affiliated person and those of any person or entity acting in its own name but on behalf of that person or of any other affiliated person.

### 3. "Control"

In the Code, "control" means an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights of a company, irrespective of whether such interest or interests give de facto control.

For these purposes, the test for "control" is that a company will be regarded as "controlling" another company if it is interested in:

(a) shares carrying 30% or more of the voting rights of that other company; or

(b) a majority of the equity share capital in that other company,

and references to a company being "controlled by" or "under the same control as" another company are to be construed accordingly. A reference to a company includes any other undertaking (including a partnership or a trust) or any legal or natural person.

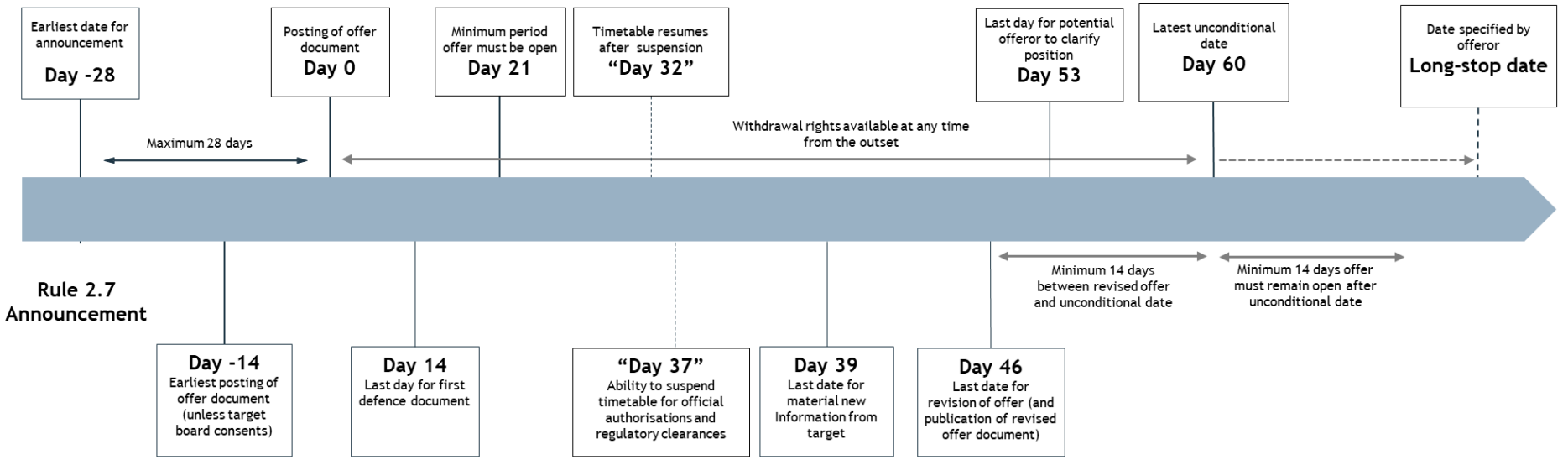
Shareholders and their supporters and proposed directors who requisition or threaten to requisition the consideration of a board control-seeking proposal at a general meeting, will be presumed to be acting in concert once an agreement or understanding is reached between them (Note 2 on Rule 9.1). Accordingly, any purchase of shares by any member of the group could give rise to a mandatory offer obligation (see paragraph 1.5 of Appendix 3).

# APPENDIX 6: SUMMARY OFFER TIMETABLES

The timetable for an offer will differ depending on whether it is structured as a takeover offer or a scheme of arrangement. All time periods are in calendar days (not business days), unless otherwise indicated.

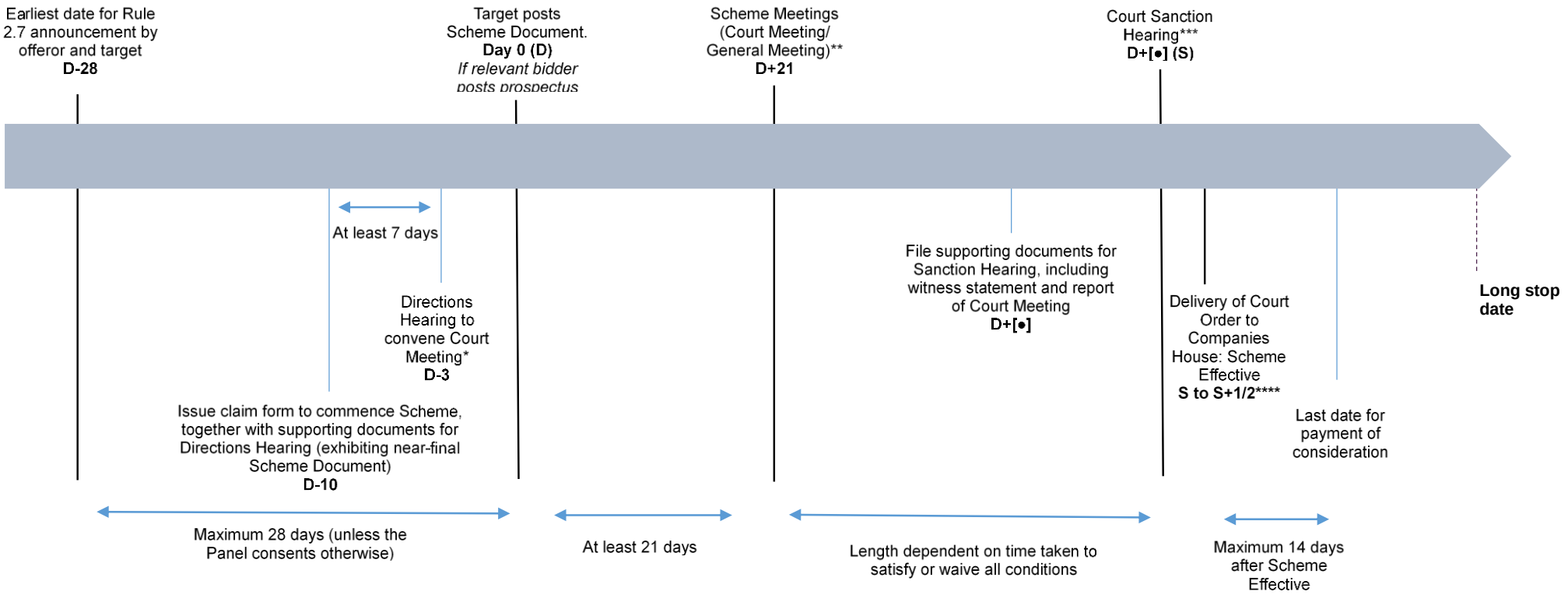
## Takeover Offer

Assumes a hostile offer with no competing offer. If at any stage a competing offeror emerges, (a) the offer timetable will normally be reset such that Day 0 becomes the day on which the later offer document is posted and (b) if the offer timetable is suspended for a regulatory clearance, the offer timetable will normally be suspended for all the offerors and will normally only resume when it is resumed by the last offeror.




H = normally only relevant in the case of a hostile bid

## Scheme of Arrangement - visual timetable




*This hearing is usually conducted before an Insolvency and Companies judge (previously known as Companies Court Registrars).

**Given the requirement for clear days for a notice for a general meeting under CA 2006 (see section 360 CA 2006), this is likely to be at least D+23 unless the Target company has in place authorisation to hold general meetings on 14 days' notice.

***Date for sanction hearing must be booked with the Court in advance. The Court will generally not sanction a scheme that remains subject to conditions. The sanction hearing will be before a High Court judge.

****Depending on timing of the sanction hearing, it is possible to deliver the Court Order to Companies House on the same day as the hearing and have the Scheme become effective on the same day. However, timing issues relating to the record date (when the shareholder register is cut) and suspension of dealing in shares by the FCA means that it is not unusual to have the Court Order delivered, and the Scheme become effective, one or two days after the Scheme is sanctioned.

| Scheme of arrangement<br>Key dates explained | | |
|---|---|---|
| Day -28 to 0 | Offeror and target announce offer | Rule 2.2 |
| Between announcement and Day 0 | Court hearing seeking directions for convening of shareholder meetings | Section 896 of the Companies Act 2006 |
| Day 0 | Target sends Scheme circular including expected timetable to shareholders and persons with information rights | Rule 30.1 |
| | Offeror sends prospectus (where applicable) to shareholders and persons with information rights | |
| Day 7 (assuming shareholder meetings will be held on Day 21) | Latest date for revision to the terms of the Scheme (i.e. the offer) | Appendix 7, paragraph 10 |
| | (NB: Where a Scheme is used, there is no end date for target to publish material new information– compare the Day 39 requirement for takeover offers) | |
| No earlier than Day 21 | Shareholder meetings (Court meeting and general meeting of target shareholders) held to approve the Scheme and related resolutions | Appendix 7, paragraph 6 |
| As early as 2 business days after shareholder meetings provided hearing date booked on time (and subject to satisfaction/waiver of conditions) (the "Sanction Date") | Court hearing to grant order sanctioning the Scheme | Section 899 of the Companies Act 2006 |
| Usually within 2 days following the Sanction Date* (the "Effective Date") | Court order delivered to the Registrar of Companies. The Scheme becomes effective | Section 899 of the Companies Act 2006 |
| | Offeror acquires 100% control of the target | |
| | End of offer period under the City Code | |
| | (NB: In the case of a Scheme, the City Code does not set a date by which all of the conditions to the offer must be fulfilled or satisfied) | |

| Scheme of arrangement<br>Key dates explained | | |
|---|---|---|
| 14 days after the Effective Date | Last date for sending consideration to target shareholders | Appendix 7, paragraph 10 |

* Assuming the Court order is not stampable, i.e. not subject to stamp duty in the UK (as would normally be the case if the scheme terms envisage that the transfer will be effected by means of a separate instrument of transfer which would then be stampable). If the Court order is stampable, then, ordinarily, the original Court order would have to be sent to HMRC's Stamp Office to be affixed with a physical stamp denoting the amount of stamp duty that has been paid before it can be delivered to the Registrar. However, to limit the spread of COVID-19, HMRC has temporarily made certain changes to the normal stamping process, meaning that, at present, an electronic copy of the Court order would have to be sent to HMRC by email and HMRC would return (again, by email) a confirmation that the applicable stamp duty has been paid. In either case, if the Court order was stampable, there would likely be a longer delay.

# APPENDIX 7: UK MERGER CONTROL REGIME

| | |
|---|---|
| **4. Key Legislation** | • Enterprise Act 2002. |
| **5. Competent authorities** | • CMA: may initiate competition investigations of takeovers and has sole jurisdiction to clear or refer a merger for a detailed Phase 2 investigation (except in very limited circumstances as defined by statute). Also has sole jurisdiction to take final decisions on substantive competition issues and remedies at the end of the Phase 2 investigation (except in very limited circumstances as defined by statute).<br>• Secretary of State: where applicable, competent authority for national security assessments under the NSI Act (see section 3.5 above); may also intervene in limited circumstances where a merger meets the notification thresholds and raises defined 'public interest considerations' e.g. plurality of the media, stability of the UK financial system and public health.<br>• Decisions of the CMA and Secretary of State under the Enterprise Act 2002may be appealed to the Competition Appeal Tribunal (decisions made under the NSI Act are subject to a different appeals regime). |
| **6. Application** | Merger control provisions apply where it is proposed that two or more enterprises will cease to be distinct (or have become indistinct). Two enterprises cease to be distinct if they are brought under common ownership or control:<br>• legal control (controlling interest)<br>• de facto control (control of commercial policy)<br>• material influence (ability to influence commercial policy). |
| **7. Joint ventures** | Joint ventures will fall within the criteria and thus qualify to be referred for investigation if they involve the coming under common control of previously distinct business activities (i.e. more than one shareholder has "control" in the defined sense). |
| **8. Notification thresholds** | Either<br>the turnover in the UK of the enterprise to be acquired exceeds £70 million per annum (the "turnover test");<br>*or*<br>as a result of the merger a 25% share of supply of goods or services of a particular description is created or enhanced in the UK or a substantial part of the UK (the "share of supply" test). |

| | |
|---|---|
| **9. Notification and sanctions** | Unlike the EU Merger Regulation there is no system of mandatory notification of mergers.<br><br>No sanction for failure to notify consequently (although incurs the risk of subsequent investigation and imposition of remedies/prohibition). |
| **10. Time-limits for notification** | There is no requirement to notify and so no time-limit for notification. Timely notification is however recommended if notification is advisable. |
| **11. Procedural time-frame and suspension requirements** | Where a merger is notified, the CMA must decide whether to clear a merger or refer it for a detailed Phase 2 investigation within an "initial period" of 40 working days.<br><br>In addition, the CMA must refer a completed merger within four months of completion or the date at which the merger becomes public knowledge (whichever is later). Where there has been a 'creeping merger' over a period of two years, the CMA is entitled to treat the merger as having occurred on the date of the last event.<br><br>No automatic suspension, though if the merger is referred to Phase 2 pre-closing, there is an automatic prohibition on further share purchases (subject to some exceptions). |
| **12. Substantive test** | Substantial lessening of competition test under the Enterprise Act 2002. |
| **13. Enforcement** | The Enterprise Act 2002 gives the CMA the authority to decide whether to clear a merger (with or without remedies), prohibit it and force the parties to unwind any completed arrangements. |

# APPENDIX 8: OUTLINE OF NATIONAL MERGER CONTROL REGIMES IN THE EEA

This list is for indicative purposes only. Please note that special rules and jurisdictional thresholds may apply for certain sectors such as banking, insurance, media and regulated utilities. National rules and exchange rates are subject to change; for countries not in the eurozone, the approximate euro figures below are calculated by reference to average 2021 exchange rates.

## The 27 EU Member States

| Jurisdiction | Jurisdictional criteria | Notification requirements |
|---|---|---|
| **Austria** | • Combined worldwide turnover of €300m; and<br>• Combined turnover in Austria of €30m; and<br>• At least two parties each have worldwide turnover of €5m<br>• At least two undertakings have turnover in Austria of more than €1m each<br>However, even if above thresholds are met, transaction is not notifiable (*de minimis* exemption) if:<br>• Only one of the parties has turnover of €5m within Austria; and<br>• All other parties have combined worldwide turnover of less than €30m<br>Alternative size of transaction:<br>• Combined worldwide turnover of €300m; and<br>• Combined turnover in Austria of €15m; and<br>• Value of consideration for concentration exceeds €200m, and<br>• Target is active in Austria to a considerable extent | Mandatory prior notification to<br>Bundeswettbewerbsbehörde (Federal Competition Authority) |
| **Belgium** | • Combined turnover in Belgium of €100m; and<br>• At least two parties each have turnover in Belgium of €40m | Mandatory prior notification to Authorité de la Concurrence (Competition Authority) |
| **Bulgaria** | • Combined turnover in Bulgaria of BGN 25m (c. €12.8m); and | Mandatory prior notification to Commission |

| Jurisdiction | Jurisdictional criteria | Notification requirements |
|---|---|---|
| | • Either (1) at least two parties each have turnover in Bulgaria of BGN 3m (c. €1.5m); or (2) target has turnover in Bulgaria of BGN 3m (c. €1.5m) | for Protection of Competition |
| **Croatia** | • Combined worldwide turnover of HRK 1,000m (c. €133m); and<br>• At least one party has its seat or a subsidiary in Croatia; and<br>• At least two parties each have turnover in Croatia of HRK 100m (c. €13.3m) | Mandatory prior notification to (Agencija za Zaštitu Tržišnog Natjecanja) (Croatian Competition Agency) |
| **Cyprus** | • At least two parties each have worldwide turnover of €3.5m; and<br>• At least two of the participating undertakings have turnover in Cyprus; and<br>• Combined turnover of all participating undertakings in Cyprus of €3.5m | Mandatory prior notification to Commission for the Protection of Competition |
| **Czech Republic** | • Combined turnover in Czech Republic of CZK 1,500m (c. €61m); and<br>• At least two parties each have turnover of CZK 250m (c. €10.7m) in Czech Republic;<br>or<br>• Target, or at least one party or (in the case of a JV) at least one of the parent undertakings, has turnover in Czech Republic of CZK 1,500m (c. €61m); and<br>• At least one other party has worldwide turnover of CZK 1,500m (c. €61m) | Mandatory prior notification to Úrad pro Ochranu Hospodárské Souteže (Office for the Protection of Competition) |
| **Denmark** | • Combined turnover in Denmark of DKK 900m (c. €121m); and<br>• At least two parties each have turnover in Denmark of DKK 100m (c. €13.4m)<br>or<br>• At least one party has turnover in Denmark of DKK 3,800m (c. €510m); and<br>• At least one other party has worldwide turnover of DKK 3,800m (c. €510m) | Mandatory prior notification to Konkurrence - og Forbrugerstyrelsen (Competition and Consumer Authority) |
| **Estonia** | • Combined turnover in Estonia of €6m; and | Mandatory prior notification to |

| Jurisdiction | Jurisdictional criteria | Notification requirements |
|---|---|---|
| | • At least two parties each have turnover in Estonia of 2m | Konkurentsiamet (Competition Authority) |
| **Finland** | • Combined turnover generated in Finland exceeds €100m<br>• At least two parties each have turnover in Finland of €10m | Mandatory prior notification to Kilpailuvirasto (Competition and Consumer Authority) |
| **France** | • Combined worldwide turnover of €150m; and<br>• At least two parties each have turnover in France of €50m<br>Special thresholds (reduced to €75m and €15m respectively) for concentrations in the retail trade sector or undertakings operating in French overseas territories | Mandatory prior notification to l'Autorité de la concurrence (Competition Authority) |
| **Germany** | • Combined worldwide turnover of €500m; and<br>• At least one party has turnover in Germany of €50m; and<br>• At least one other party has turnover in Germany of €17.5m<br>or<br>• Combined worldwide turnover of €500m and<br>• At least one of the undertakings concerned had turnover of more than €50m in Germany; and<br>• Neither the target turnover nor the turnover of any other undertaking concerned in Germany exceeds €17.5m; and<br>• Value of consideration exceeds €400m and the target is "significantly active" in Germany ("size of transaction test") | Mandatory prior notification to Bundeskartellamt (Federal Cartel Office) |
| **Greece** | • Combined turnover of €150m worldwide; and<br>• At least two parties each have turnover in Greece of €15m | Mandatory prior notification to Hellenic Competition Commission |

| Jurisdiction | Jurisdictional criteria | Notification requirements |
|---|---|---|
| **Hungary** | • Combined turnover in Hungary of HUF 20000m (c.€51.1m); and<br>• At least two parties have turnover in Hungary of HUF 1500m (c.€3.8m)<br>NB: Authority has power to review transactions below the thresholds if parties' combined turnover of HUF5000m (c. €12.8m), and it is not obvious that the transaction does not significantly restrict competition) | Mandatory prior notification to Gazdasági Versenyhivatal (Office of Economic Competition) |
| **Ireland** | • Combined turnover in Ireland of €60m; and<br>• The turnover of each of two or more undertakings exceeds €10m in Ireland | Mandatory prior notification to Competition Authority |
| **Italy** | • Combined turnover in Italy of €532m; and<br>• Each of at least two undertakings involved had turnover in Italy of at least €32m<br>(*Thresholds are revised annually to take account of inflation; above figures were effective from May 2023)*<br>NB: Notification may also be required if only one of the thresholds is met or where the relevant combined worldwide turnover exceeds €5000m, if the transaction raises prima facie competition concerns in the relevant market and the closing of the transaction did not take place more than six months ago. | Mandatory prior notification to Autorità Garante della Concorrenza e del Mercato (Competition Authority) |
| **Latvia** | • Combined turnover in Latvia of €30m; and turnover of parties each exceeds €1.5m in Latvia<br>NB: notification may be required post-completion (but no later than 12 months after completion) if the parties were/are direct competitors with a combined market share of 40% as a result of the merger. | Mandatory prior notification to Konkurences Padome (Competition Council) |
| **Lithuania** | • Combined turnover in Lithuania of €20m; and<br>• At least two parties each have turnover in Lithuania of €2m | Mandatory prior notification to Konkurencijos Taryba (Competition Council) |
| **Luxembourg** | No specific merger control figure | Not applicable |

| Jurisdiction | Jurisdictional criteria | Notification requirements |
|---|---|---|
| **Malta** | • Combined turnover in Malta of €2.4m; and<br>• Each party has turnover in Malta equivalent to at least 10% of parties' combined turnover | Mandatory prior notification to Director General of the Office for Competition |
| **Netherlands** | • Combined worldwide turnover of €150m; and<br>• Each of at least two parties has turnover in the Netherlands of €30m | Mandatory prior notification to Autoriteit Consument<br><br>en Markt (Authority for Consumers and Markets) |
| **Poland** | • Combined worldwide turnover of €1,000m; or<br>• Combined turnover in Poland of €50m<br>De minimis exemption:<br>• In the case of both mergers and joint ventures, the turnover of each of the parties does not exceed 10m in Poland in each of the two financial years preceding the transaction<br>• In the case of the takeover of control or acquisition of assets, the €10m threshold applies to the turnover of the target in Poland in the two financial years preceding the transaction | Mandatory prior notification to the Prezes Urzędu Ochrony Konkurencji i Konsumentów (President of the Office of Competition and Consumer Protection) |
| **Portugal** | • Combined turnover in Portugal of €100m; and<br>• At least two parties each have turnover in Portugal of €5m<br>or<br>• Concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 50%<br>or<br>• Concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 30% and less than 50%, provided that at least two parties each have turnover in Portugal of €5m | Mandatory prior notification to Autoridade de Concorrência (Competition Authority) |

| Jurisdiction | Jurisdictional criteria | Notification requirements |
|---|---|---|
| **Romania** | • Combined worldwide turnover of €10m; and<br>• At least two parties each have turnover in Romania of €4m | Mandatory prior notification to Consiliul Concurentei (Competition Council) |
| **Slovakia** | • Combined turnover in the Slovak Republic of €46m; and<br>• At least two parties each have turnover in the Slovak Republic of €14m<br>or<br>• Turnover in Slovak Republic of at least one party of €14m; and<br>• Worldwide turnover of at least one other party of €46m | Mandatory prior notification to Protimonopolny úrad (Antimonopoly Office) |
| **Slovenia** | • Combined turnover in Slovenia of €35m;<br>and either<br>• Target has turnover in Slovenia of €1m;<br>or<br>• In the case of the creation of a joint venture, at least two parties, including affiliated companies, have turnover in Slovenia of €1m<br>NB: If thresholds are not met, but parties and affiliated companies have more than 60% market share in the Slovenian market, the parties are obliged to inform the CPO of the concentration (but need not submit a formal notification) | Mandatory prior notification to Urad Republike Slovenije za Varstvo Konkurence (Competition Protection Office) |
| **Spain** | • Combined turnover in Spain of €240m; and<br>• At least two parties each have turnover in Spain of €60m<br>or<br>• Creation or strengthening of combined market share in Spain of 30%, or acquisition of target which has 30% market share (even if no overlap)<br>NB: The market share threshold will not apply when target's turnover in Spain was under €10m in the last financial year, provided that | Mandatory prior notification to Comisión Nacional de<br>la Competencia (National Competition Commission) |

| Jurisdiction | Jurisdictional criteria | Notification requirements |
|---|---|---|
| | the parties' individual or combined market share is under 50% | |
| **Sweden** | • Combined turnover in Sweden of SEK1,000m (c. €94m); and<br>• At least two parties each have turnover in Sweden of SEK200m (c. €18.8m)<br>NB: Where there are particular substantive competition concerns, the Swedish Competition Authority may require notification even if the second threshold is not met | Mandatory prior notification to Konkurrensverket (Swedish Competition Authority)<br><br>Voluntary notification may be submitted by the parties if only the first turnover threshold (SEK1,000m) is met |

## The 3 Contracting EFTA States

| Jurisdiction | Jurisdictional criteria | Notification requirements |
|---|---|---|
| **Iceland** | Prior notification if:<br>• Combined turnover in Iceland of ISK 3,000 m (c. €21m); and<br>• At least two parties each have turnover in Iceland of ISK300 m (c. €2.1m)<br>Post merger notification may be required for mergers not meeting the above thresholds if the Competition Authority believes that there is a significant probability that the merger will substantially reduce competition. This is subject to the parties having combined turnover in Iceland of ISK1,500m (c. €10.5m) | Mandatory prior or post merger notification to (Samkeppniseftirlitið) (Competition Authority) |
| **Liechtenstein** | No specific merger control regime | Not applicable |
| **Norway** | • Combined turnover in Norway of NOK1,000m (c. €99m); and<br>• At least two parties each have turnover in Norway of NOK 100m (c. €9.9m) | Mandatory prior notification to Konkurransetilsynet (Competition Authority) |