UK (England and Wales)

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MARKET AND REGULATION

1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year? Please distinguish between trade buyers and private equity backed deals.)

The Lehman Brothers collapse and the economic crisis that followed had a profound impact on the M&A arena in the UK and globally. During 2009, there was a continued decline in overall M&A volumes, led by a contraction of the bank lending market and a continued lack of volume of transactions. Activity continued in key segments of the market, most notably in financial services, telecommunications, consumer and the energy sectors, where growth was fuelled by strategic joint ventures, consolidation and distressed M&A.

Private equity suffered worse than most, though the end of 2009 and first quarter of 2010 showed the robustness of the asset class, as activity levels rose, though not to 2007 levels. M&A more generally is making its way back onto the corporate agenda, and there were optimistic signs from early 2010.

Notable deals involving UK bidders or targets announced in 2009 included:

- Kraft's GB£11.7 billion (about US$13 billion) takeover of Cadbury plc.
- HM Treasury's investments in the Royal Bank of Scotland plc and Lloyds Banking Group plc.

Notable deals outside the public company arena included:

- Global Infrastructure Partners' GB£1.455 billion (about US$1.62 billion) acquisition of Gatwick Airport from BAA.
- Apax Partners LLP's GB£975 million (about US$1.5 billion) acquisition of Marken from Intermediate Capital Group plc.

2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

The main means of obtaining control of a public company are through a takeover offer or a court approved scheme of arrangement. In both cases, the bidder and the target remain separate companies and the target becomes a subsidiary of the bidder.

Takeover offer

A takeover offer involves the bidder making an offer to the target's shareholders to acquire their shares in the target.

Scheme of arrangement

This is a statutory court process, involving a compromise or arrangement between a company and its members. It is generally used in recommended offers where a competing bid is unlikely. It results in the bidder holding all of the target's shares.

It has the following principal advantages:

- Stamp duty can be avoided (*see Question 24*).
- It only requires approval from a majority in number, representing at least 75% in value, of those target shareholders who vote on the scheme (together with court approval) to bind all of the target's shareholders. The threshold for exercising squeeze-out rights on a takeover offer is higher (*see Question 20*).

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Hostile bids are allowed, and they are well-established. However, they are less common than recommended bids. This is because hostile bids have a lower chance of success, as the target's board will not support the bidder during the offer phase (for example, when the bidder attempts to carry out due diligence (*see Question 6*)).

For certain companies however, the need for a recommendation may be less acute, for example, where a large percentage of the shareholder register consists of hedge fund investments. In addition, a hostile bid may become recommended during the offer period (for example, Kraft's offer for Cadbury plc).

Increasingly, potentially unwelcome bidders have (often publicly) pressurised a target's board to recommend an offer if formally made, rather than announce a full hostile offer. These are sometimes known as "virtual bids".

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

Main regulations

The main regulations are the:

- **City Code on Takeovers and Mergers (Code).** This is the main source of regulation, which has been placed on a statutory footing by Part 28 of the Companies Act 2006.

Country Q&A

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The Code is based on six General Principles, which set standards of good commercial behaviour to ensure the fair and equal treatment of shareholders.

The detailed Rules and Notes on the Rules develop these principles further. However, as parties must observe the Code's spirit as well as its letter, the General Principles apply in situations not expressly covered by the Rules, and the Rules can be relaxed if necessary.

The Code applies to:

- all offers for companies which have their registered offices in the UK, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market in the UK or on any stock exchange in the Channel Islands or the Isle of Man;
- all offers for public and (in certain circumstances) private companies which have their registered offices in the UK, the Channel Islands or the Isle of Man and which are considered by the Takeover Panel (Panel) (*see below, Regulatory authorities*) to have their central place of management and control in one of those jurisdictions.

The Panel shares jurisdiction over certain companies incorporated or admitted to trading in the European Economic Area (EEA) where the location of the registered office of the company and/or admission to trading is split between the UK and another EEA country.

- **Companies Act 2006.** This contains a number of relevant provisions, including those:
  - relating to compulsory acquisitions of minority shareholdings (*see Question 20*);
  - relating to a public company's right to investigate who has an interest in its shares; and
  - preventing unlawful financial assistance in relation to a public company.
- **Listing Rules.** The Listing Rules of the UK Listing Authority (the Financial Services Authority (FSA)) (*see below, Regulatory authorities*) are relevant when one of the parties to the takeover is admitted to the UK Listing Authority's Official List (Main Market). The Listing Rules require a listed company with a premium listing of equity shares to obtain consent from its shareholders if the takeover is a relatively large acquisition, and to produce a circular to shareholders.
- **Prospectus Rules.** These contain requirements to issue a prospectus whenever there is:
  - an offer of transferable securities to the public in the UK; or
  - a request for the admission to trading of transferable securities on a regulated market in the UK.

  There are certain exemptions: for example, a takeover by means of a securities exchange offer is exempted from the prospectus requirement if a document with equivalent information is available.
- **Disclosure Rules and Transparency Rules (DTRs).** These contain provisions for the notification and disclosure of major shareholdings.
- **Criminal Justice Act 1993.** This contains insider dealing provisions which make certain dealings in securities with inside information a criminal offence (*see Question 8*).
- **Financial Services and Markets Act 2000.** This contains a number of relevant provisions, including those prohibiting behaviour which amounts to market abuse and those regulating the way financial promotions of investments are made.
- **Enterprise Act 2002.** This contains provisions relating to the merger control regime in the UK, which has an impact on larger mergers and those producing market concentration above a set threshold (*see Question 25*).

Regulatory authorities

The main regulatory authorities are the:

- **Panel.** This is an independent body, made up of representatives of financial institutions and professional bodies. It amends and administers the Code. It has an Executive, which can be consulted and gives rulings on points of interpretation before or during transactions.

  The Executive's decisions can be appealed to the Hearings Committee of the Panel (whose ruling may in turn be appealed to the Takeover Appeal Board).

  The Panel has statutory powers under Part 28 of the Companies Act 2006 in relation to offers and certain of the Code's rules.

  See box, *The regulatory authority*.
- **FSA.** This is the main UK financial regulator and is the UK Listing Authority. It also regulates certain sectors (for example, banking and insurance). This means that it can have a role when approving a regulated target's takeover. The Panel can ask the FSA to take action against authorised persons (for example, a bidder's financial adviser) for a breach of the Code committed by itself or its client.
- **AIM.** This is an exchange-regulated market, which reduces the additional obligations imposed by European Directives (for example, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading). As an exchange-regulated market, AIM is primarily regulated by the London Stock Exchange. It retains flexibility in its regulatory structure which has proven successful in recent years.
- **Office of Fair Trading (OFT) and Competition Commission.** The OFT can refer a merger to the Competition Commission if it believes that the merger has resulted, or may result, in a substantial lessening of competition. This can delay takeovers considerably or even prevent them from happening (*see Question 25*). Mergers that meet certain thresholds may be subject to the jurisdiction of the European Commission under Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (EU Merger Regulation).

PRE-BID

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

Recommended bid

Due diligence can be extensive, especially if the bid is financed by private equity capital. The bidder uses publicly available information to undertake due diligence before it approaches the target (*see below, Public domain*). If the target is prepared to

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support the offer, the bidder can present the target with a list of matters on which it requires further information as a condition to proceeding with the offer.

Hostile bid

Due diligence is usually limited to reviewing publicly available information. However, the bidder may be able to obtain information from the target that it has already provided to a competing bidder. This is because the target has a duty to provide equal information to rival bidders in a competitive situation (*Rule 20.2, Code*).

Public domain

The following information is in the public domain:

- The articles of association and related documents filed at Companies House. These give details of:
  - share capital structure;
  - voting rights;
  - other limits on the transfer or holding of shares.
- Details of directors filed at Companies House.
- Details of issued share capital and shareholders filed at Companies House. In addition, a company must keep its register of shareholders open for inspection and any person can require a company to provide a copy of it.
- Published accounts and the related directors' and auditors' reports (filed at Companies House and often available on the target's website).
- Any past listing particulars or prospectuses (often available on the target's website or from public sources).
- Any market filings, for example, in relation to major new developments, including significant acquisitions and disposals and material trading developments (published via a Regulatory Information Service (RIS) and publicly available).
- Analysts' research.
- For listed companies, half-yearly financial information and other routine information, such as results of meetings and dividend details (often available on the target's website).

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

It is a fundamental principle of the Code that a potential bid must be kept secret until it is formally announced and the risk of leaks must be minimised (*Rule 2.1, Code* and *Note 1 on Rule 2.1*). The Panel can require a bidder, or if the target has already been approached, the target, to make an early announcement if news of the deal leaks into the market (*see Question 12*).

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

A bidder will usually, to increase its chances of success, seek acceptance undertakings (irrevocable undertakings) from key target shareholders before making an offer. In a recommended bid, the bidder may approach major shareholders and shareholding target directors. In a hostile bid, the bidder may seek irrevocable undertakings from major shareholders.

Irrevocable undertakings can be made binding on the shareholder in all circumstances, unless the offer lapses (hard irrevocables). However, most institutional shareholders insist that their undertaking ceases to apply if there is a higher offer, or an offer that is at least a specified percentage higher than the original bid (soft irrevocables). In some circumstances, key institutional investors may only be prepared to give non-binding letters of intent, details of which must be disclosed in broadly the same manner as an irrevocable undertaking.

The Code limits the number of shareholders who can be approached before the offer is announced (for confidentiality reasons). The Panel must be consulted before the bidder approaches a private individual or small corporate shareholder (*Rule 4.3, Code*).

From 19 April 2010, a new Rule 2.11 has taken effect in the Code in relation to irrevocable commitments and letters of intent. This requires the disclosure of the procuring of an irrevocable commitment or a letter of intent, including those procured prior to the commencement of an offer period.

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there circumstances in which shareholdings, or derivative holdings, of associates could be aggregated for these purposes?

There are restrictions under statute and under the Code on the bidder's ability to acquire shares or rights over shares (including through derivatives). These provisions can affect the terms of the offer, trigger notification requirements, or require the bidder to make a mandatory offer (*see Question 16*).

Restrictions

The following restrictions apply:

- **Insider dealing.** If a bidder has inside information about the target's affairs, it cannot buy the target's shares outside the offer (for example, through the market) until the information is, broadly, no longer price-sensitive. Purchases that a potential bidder makes to facilitate a bid where the potential bidder has no price-sensitive information other than the knowledge that it will make an offer, do not necessarily breach the insider dealing legislation. However, if the bidder has received price-sensitive inside information through due diligence, it must generally wait until the information has been published in the offer document before purchasing target shares. The bidder's directors and possibly its advisers will face criminal sanctions if the insider dealing legislation is breached.
- **Market abuse.** A bidder should consider the prohibition against market abuse when acquiring shares in the target. However, the market abuse rules are not usually breached where a bidder (or potential bidder) deals in a target's shares to build a stake with a view to pursuing a takeover bid. The FSA's Code of Market Conduct (which provides guidance on market abuse) states that behaviour based on inside information relating to

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another company in the context of a public takeover bid or merger for the purpose of gaining control of that company or proposing a merger with that company, does not in itself amount to market abuse, including:

- seeking irrevocable undertakings from shareholders;
- making arrangements for the underwriting or placing of securities that are to be offered as consideration; and
- making arrangements for a cash alternative.

- **The Code.** There are a number of restrictions in the Code:
  - Rule 4 contains restrictions on dealings in bidder and target securities, including preventing any person (other than the bidder) that has price-sensitive information about the offer from:
    - acquiring securities in the target before the offer is announced (*Rule 4.1(a)*); or
    - making a recommendation to any other person to deal in the securities (*Rule 4.1(b)*).
  - Rule 5 restricts a bidder (including its concert parties) from acquiring an interest in target shares carrying voting rights which would take a bidder's shareholding to 30% or more of the voting rights (subject to certain exceptions);
  - Rule 16 provides, subject to limited exceptions, that no shares may be bought on any special terms since these terms will have to be made available to all target shareholders.

Disclosure obligations

The following disclosure obligations apply:

- **DTRs.** Broadly, certain acquisitions of a public company's voting shares must be notified to the target, regardless of whether a takeover is contemplated (*DTR 5*).

  The trigger for disclosure under the DTRs is where a person controls the exercise of voting rights. The obligation is imposed on a "shareholder", which is defined under the DTRs to include a person that holds shares, directly or indirectly, in its own name and on its own account, or on the account of another person.

  For UK issuers, notification must be made if the percentage of voting rights held reaches, exceeds or falls below 3% or any subsequent 1%.

  Non-UK issuers are also caught by the UK regime if they have:

  - shares admitted to trading on a UK regulated market; and
  - the UK as their home member state.

  The thresholds for non-UK issuers are 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.

  Direct and indirect holdings (and holdings of financial instruments) must be aggregated when calculating whether a relevant threshold has been crossed.

  The notification deadline where shares are held in a UK issuer is two trading days and four trading days for non-UK issuers. The deadline for issuers to make public notifications they have received is the end of the following trading day for a UK issuer with shares admitted to a regulated market. For other issuers the public notification must be made by the end of the third trading day.

- **The Code.** The bidder must disclose its own and any concert party's opening positions following the start of an offer period or an announcement which first identifies the bidder as the bidder (*Rule 8, Code*). An opening position disclosure must contain details of long interests and short positions in the relevant securities of the parties to the offer.

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

In a takeover offer, the announcement and the offer documents (and the documents for the bidder's shareholders, if relevant) are usually the only documents recording the terms of the agreement between the parties. Formal implementation or transaction agreements are, however, becoming more common when the offer is structured as a scheme of arrangement and the bidder wishes to exert some control over the target's actions.

The target can also agree, whether on a takeover offer or a scheme of arrangement, to some form of non-solicitation undertakings which are intended to restrict a target's ability to solicit or engage with other potential bidders. Any such undertakings must be considered carefully in light of the directors' general fiduciary duties.

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable, and any restrictions on the size of the payment.

It is normal market practice to use break fees. The fee is payable if specified events cause the offer to fail, such as where the target board recommends a higher competing offer. However care must be taken not to express this fee as a penalty for terminating the agreement.

The Panel has established limits on the setting of break fees. A break fee agreed by a target is generally restricted to a maximum of 1% of the offer value (*Rule 21.2, Code*). The target's directors and its financial adviser must both confirm to the Panel in writing that they believe the fee to be in the best interests of the target's shareholders and the fee must be fully disclosed in the Rule 2.5 announcement and offer document (*see Question 12*). This also applies to other favourable arrangements with a bidder that have similar financial effects to a break fee.

Even where a target board has concluded that the negotiation of a break fee is in the company's best interests, the target board cannot authorise the fee if it could be considered to amount to unlawful financial assistance for the acquisition of shares.

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11. Is committed funding required before announcing an offer?

The announcement of a firm intention to make an offer effectively commits the bidder to make the offer (*Rule 2.7, Code*). Therefore, the announcement should only be made when the bidder has every reason to believe it can and will be able to continue to implement the offer.

The offer announcement for a cash offer must include an appropriate third party's confirmation that sufficient funding is in place for the bidder to satisfy full acceptance of the offer (Cash Confirmation). This confirmation must be repeated in the offer document. In practice, this is likely to mean that the bidder's financial adviser will want to ensure that the bidder, before announcement of the offer, has either:

- The consideration in cash in a bank account.
- A right to borrow the consideration in cash under a specially tailored loan facility.

ANNOUNCING AND MAKING THE OFFER

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements), and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

Announcement of the offer

Requirement to make an announcement. When the bidder is ready to announce the bid, it must first put forward the offer to the target's board (*Rule 1, Code*). Where a serious source has notified the target's board of a firm intention to make an offer which is not subject to a precondition, this triggers the requirement for an announcement (*Rule 2.2(a), Code*). The announcement must be made to a RIS.

However, Rule 2.2 provides that an obligation to make an announcement can arise in other circumstances, including where:

- There is an acquisition which gives rise to a Rule 9 mandatory bid (*see Question 16*).
- The target is the subject of rumour and speculation, or there is an untoward movement in its share price.
- Negotiations are about to be extended beyond the parties and their immediate advisers.

Parties should consult the Panel if they are in any doubt as to whether an announcement is required.

Responsibility to make an announcement. If the announcement is required before the bidder has approached the target, or a Rule 9 obligation has arisen, the bidder has responsibility for making the announcement. If the announcement is required after the bidder has approached the target but before the bidder is ready to proceed with the offer, then responsibility lies with the target.

Types of announcement. There are two types of announcement:

- **Rule 2.5 announcement.** This is the announcement of a firm intention to make an offer. The bidder should make this announcement only if it believes it can and will implement the offer (financially and otherwise). If it has any doubts about this, it must make a Rule 2.4 announcement instead (*see below*).

  The content of a 2.5 announcement must include, among other things:

  - the terms of the offer;
  - the identity of the bidder;
  - the conditions of the offer; and
  - where the offer is for cash, or includes an element of cash, a Cash Confirmation (*see Question 11*).

- **Rule 2.4 (holding announcement).** If the bidder must issue an announcement under Rule 2.2 but is not in a position to issue a Rule 2.5 announcement, then it can issue a temporary holding announcement under Rule 2.4. This would generally be a brief announcement that talks are taking place.

  Once this announcement has been made, the target can request the Panel, under Rule 2.4(b), to require the bidder to "put up or shut up". This means the Panel can impose a time limit (usually six to eight weeks) within which the bidder must either make a Rule 2.5 announcement or a statement under Rule 2.8 that it does not intend to make an offer. The effect of this Rule 2.8 statement is that the bidder will not be able to make an offer for a period of six months from the date of the statement, subject to certain exceptions.

Offer timetable

The following are key dates in the timetable for recommended and hostile bids made through a takeover offer (days are calendar days, not business days, unless otherwise indicated):

- **Announcement day.** Date of announcement of intention to make the offer.
- **Day 0 (no later than 28 days after the Announcement day).** The bidder must post the offer document to the target's shareholders.
- **Day 14 (hostile only).** This is the latest date for the target to post a circular advising its shareholders of its views on the offer (in a recommended offer, this is included in the offer document).
- **Day 21.** This is the earliest first closing date for acceptance of the offer (although the bidder can extend the offer beyond this date).
- **First business day after the first closing date (and all subsequent closing dates) by 8.00 am.** Announcement of specified details about acceptances of the offer and of any extension of the offer (stating the next closing date).
- **Day 39.** This is the latest date for the target to publish material new information. This date may be extended if there is a significant delay by the OFT or the European Commission in deciding whether there is to be a reference to the Competition Commission under the UK merger control regime or initiation of proceedings under the EU Merger Regulation.

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- **Day 42 (assuming first closing date is Day 21).** The shareholders who have accepted the offer can withdraw their acceptances if the offer has not yet become or been declared unconditional as to acceptances.
- **Day 46.** This is the last date for the bidder to post any revised offer document improving its offer or to publish information which may increase the value of its bid where it is offering securities. This date is extended if Day 39 is extended.
- **Day 60.** 1.00 pm: this is the latest time for acceptances or purchases.

  5.00 pm: this is the latest time by which announcement of acceptances and purchases must be made and the offer must be declared unconditional as to acceptances.

  12.00 midnight: if the offer has not been declared unconditional as to acceptances, it is deemed to have lapsed.

  This date is extended if Day 39 is extended.
- **Day 74 (assuming offer became unconditional as to acceptances on Day 60).** This is the earliest date on which the offer can close.
- **Day 81 (assuming offer became unconditional as to acceptances on Day 60).** This is the last date by which all other conditions to the offer must be fulfilled or satisfied.
- **14 days after offer becomes wholly unconditional.** Consideration for the offer must be posted by this date.
- **3 months from day following last day on which offer can be accepted (or if earlier 6 months from date of offer).** This is the last possible date for the bidder to send compulsory acquisition notices to minority shareholders to activate the squeeze-out procedure (*see Question 20*).

The timetable for a scheme of arrangement will be markedly different to the above given the involvement of the court and different mechanism to acquire control.

Competing offer

If a competing offer is announced, the timetable started by the posting of the competing offer document usually binds both offers, and the timetable for the first offer is extended accordingly. If a competitive situation continues to exist in the later stages of an offer, the Panel usually imposes an auction procedure on the competing bidders:

- Requiring final revisions to their offers to be announced by Day 46 of the latest competing offer.
- Allowing them to revise their offer upwards again within a set period after that date.

Where auction procedures have not swiftly identified a clear highest bidder, the Panel has in the past imposed a requirement for the competing bidders to provide sealed bids.

Schemes of arrangement

The Code sets out which rules of the Code apply to schemes of arrangement and which do not, including the Panel's approach to the timetable for competing offers where one of the offers is implemented by scheme of arrangement (*Appendix 7, Code*).

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

A voluntary takeover offer is usually made subject to the satisfaction of a number of conditions, the fulfilment of which must not be in the bidder's control or be dependent solely on the bidder's subjective judgement.

Any offer must contain a condition that it will lapse unless the bidder acquires or agrees to acquire more than 50% of the voting rights in the target (*Rule 10, Code*). However, a bidder may wish to be able to withdraw from an offer unless it can take advantage of the compulsory acquisition procedure. Therefore the acceptance condition normally requires the bidder to acquire at least 90% of the target shares for which the offer is made (*see Question 20*). In practice, the bidder may decide to waive or lower the 90% condition when it has reached a sufficient percentage over 50%, since most shareholders will not continue to resist an offer when it becomes obvious that it will complete. However, this condition allows the bidder to keep its options open while it monitors the target's shareholder register for any hostile shareholders.

The conditions attached to a voluntary bid vary depending on the particular circumstances, but common conditions that usually form the basis for most offers include:

- The bidder's shareholders passing any resolutions necessary to implement the offer.
- Where the consideration involves the issue of new listed securities in the bidder, the UK Listing Authority granting a listing for those securities.
- The OFT indicating that it does not intend to refer the bid to the Competition Commission or an announcement that the European Commission has no intention of initiating proceedings under the EU Merger Regulation.
- All other competition filings and notifications being made in relevant jurisdictions.
- All authorisations for undertaking the business of the target group being in full force and effect.
- No material litigation or arbitration proceedings having been started or threatened against the target group, and no material liability for the target group either arising or being disclosed.
- No material adverse change in the target group's financial or trading position having occurred, other than those already disclosed in its previous documents or announcements.
- No material inaccuracy having been discovered in the target's accounts or public announcements.

Although the bidder may invoke the acceptance condition and any anti-trust condition, it will only be allowed to invoke other conditions if it can satisfy the Panel that the circumstances giving rise to the right to invoke the conditions are of material significance to it. In practice this is a very high hurdle (for example,

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WPP was not able to invoke the material adverse change condition following the terrorist attacks in the United States in 2001).

14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)

The main documents received by the target's shareholders (together with responsibility for those documents) on a recommended bid are the:

- Circular summarising the terms and conditions of the offer or a copy of the Rule 2.5 announcement to shareholders (target).
- Offer document (bidder and target).
- Acceptance form (used to accept the offer) (bidder).
- Prospectus or equivalent document (if required) (bidder and target).

In addition, the target's shareholders receive the following on a hostile bid:

- Defence documents (target).
- Revised offer document (bidder).

The offer document contains extensive information on the bid, the bidder and the target and, in a recommended bid, the target board's recommendation to its shareholders to accept the bid.

If the offer consideration includes shares to be listed in the UK, the target's shareholders may also be sent a prospectus. If a prospectus is required, it must contain further information on the bidder and the consideration shares (as required by the Prospectus Rules).

All documents and promotions issued during an offer must satisfy the highest standards of accuracy and the information given must be adequately and fairly presented (*Rule 19.1, Code*).

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

The bidder and target must make readily available a copy of the Rule 2.5 announcement (or a circular summarising the terms and conditions of the offer) to their employee representatives or in the absence of these, to the employees themselves (*Rule 2.6(b), Code*).

This information can be given through the usual means the company uses to communicate with its employees. Note 1 on Rule 2.6 suggests posting the announcement on the website of the relevant bidder or target as a means of making the communication.

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

A mandatory offer to acquire all the equity share capital of a company is required to be made if a person, together with its concert parties, either (*Rule 9, Code*):

- Acquires an interest in voting shares (which includes an interest arising through derivatives) resulting in a stake of 30% or more of the voting rights in the target.
- Is interested in shares which carry between 30% and 50% of the voting rights in the target, and either the person or any person acting in concert with it acquires an interest in any other voting shares in the target.

CONSIDERATION

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

Restrictions on consideration

There is generally no restriction on the type of consideration that can be offered in a voluntary offer. Consideration can therefore include cash, loan notes, shares, warrants or convertible/exchangeable bonds.

For a mandatory offer, the consideration must be in cash, or be accompanied by a cash alternative and comply with minimum consideration requirements (*see Question 18*).

Where a bidder acquires any shares for cash in the offer period or has acquired 10% or more of the target's shares during the offer period and within 12 months before its start, it must offer cash or make available a cash alternative (*Rule 11, Code*).

Consideration in practice

A large proportion of takeover bids have a cash element as part of their consideration. However, other forms of consideration include:

- **Loan note alternative.** Accepting a cash offer counts as a disposal for UK capital gains tax purposes. Therefore, cash consideration is sometimes accompanied by a loan note alternative. Loan notes are generally unlisted and have a rate of interest which is below the applicable bank rate. If the bidder (or its parent) does not have an acceptable credit rating, the target may request a bank guarantee for the loan notes. Individual shareholders who accept loan notes can delay capital gains tax on the sale of their shares until they dispose of the loan notes. Shareholders can therefore dispose of the loan notes over a number of years, depending on the duration of the loan notes, and use their annual tax allowances.
- **Securities exchange offer.** The target's shareholders can be offered shares in the bidder (or its parent) as consideration, especially if the:
  - bid is intended to create an equal merger between the parties; or
  - target is being acquired for a price which could be seen as favourable to the bidder and the target's shareholders wish to share in the bidder's future growth.
- **A choice of cash and shares.** The consideration can include a mix-and-match election. This is helpful if the bidder has a maximum amount of cash available to offer, and believes that different members of the target's shareholders are likely to want different proportions of cash and shares. The

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basic offer can therefore be of 50% cash and 50% shares, but a target's shareholder can, for example, elect to receive more cash, which will be available to the extent that other shareholders have instead elected for more shares.

18. Are there any regulations that provide for a minimum level of consideration? If so, please give details.

Generally, the offer price must be at least the highest price paid by the bidder or any concert party for the target's shares during the three months prior to the offer period or during any period between the start of the offer period and the announcement of a firm intention to make an offer (*Rule 6.1, Code*). The Panel may also count purchases made before the three-month deadline if, for example, they were made from directors of the target.

In relation to mandatory bids, the consideration must be at least the highest price paid by the bidder or any concert party during the 12 months prior to the announcement of the offer (*Rule 9.5(a), Code*). If after a Rule 9 offer has been made (but before it closes for acceptance), the bidder or any concert party acquires a further interest in shares above the offer price, the bidder must increase the consideration under the offer (*Rule 9.5(b), Code*).

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.

There are no specific restrictions on the form of consideration that a foreign bidder can offer to shareholders.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.

Following a takeover offer for a UK company, a bidder (whether UK or not) has a squeeze-out right to acquire minority shareholdings on a compulsory basis, if it has acquired or contracted to acquire both of the following (*section 979, Companies Act 2006*):

- At least 90% in value of the shares to which the offer relates.
- At least 90% of the voting rights of the shares to which the offer relates.

Treasury shares and shares held before the offer is made are disregarded when calculating this threshold.

For the squeeze-out right to apply, the offer must be made on the same terms to all target shareholders, including foreign shareholders. Variations are permitted to deal with overseas regulatory or foreign law issues.

To exercise the squeeze-out right, the bidder must send compulsory acquisition notices to the minority shareholders no later than the earliest of:

- Three months from the day after the last day on which the offer can be accepted.
- Six months from the date of the offer.

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

If an offer is withdrawn or lapses, the bidder and its concert parties cannot make a new offer for the same target or acquire any shares in the target if those shares would in aggregate carry 30% or more of the target's voting rights, within 12 months of its original offer being withdrawn or lapsing, except with the Panel's consent (*Rule 35.1, Code*).

The Panel will usually grant consent if, among other things the new offer either:

- Is recommended by the target's board.
- Follows a third party announcement of an offer for the target (*Note on Rules 35.1 and 35.2, Code*).

In addition, if an offer succeeds but the bidder fails to reach the 90% squeeze-out level and subsequently either wishes to make a new offer, or propose a scheme of arrangement, to the remaining minority shareholders, it cannot acquire the target's shares on better terms than the first offer for a six-month period from the closure of that offer. The bidder cannot agree any special deal with any of the minority shareholders during that period.

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

Main Market

A Main Market company with a premium listing that wishes the FSA to cancel the listing of any of its equity shares with a premium listing must:

- Obtain shareholder approval. It must send a circular to shareholders which must:
  - fulfil certain content requirements;
  - include the anticipated date of cancellation which must be at least 20 business days following the date of the special resolution to be passed (*see below*); and
  - be submitted to the FSA for approval prior to publication.
- Pass a special resolution approving the de-listing.
- Notify a RIS of the intended cancellation and also of the passing of the special resolution.

However, a circular need not be sent to shareholders where that listing is intended to be cancelled, and shareholder approval need not be obtained, when, in the case of a takeover offer, the following both apply:

- The bidder has by virtue of its shareholdings and acceptances of the offer, acquired or agreed to acquire issued share capital carrying 75% of the voting rights of the target.

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- The bidder has stated in the offer document or any subsequent circular sent to the shareholders that a notice period of at least 20 business days before cancellation will start on the bidder attaining the required 75%.

AIM

75% shareholder consent is required for an AIM company that wishes to cancel admission of its AIM securities, although commonly such requirement is dispensed with if a takeover offer becomes wholly unconditional and valid acceptances are received in excess of 75% of the shares.

TARGET'S RESPONSE

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

After the target's board has reason to believe that a bona fide offer might be imminent, it must take no action which could effectively result in (*Rule 21, Code*):

- Any bona fide offer being frustrated.
- The target's shareholders being denied an opportunity to decide on the merits of the offer.

However, it can take this action if it is either:

- Carried out under a pre-existing contract.
- Approved by the target's shareholders in a general meeting.

Examples of frustrating actions include:

- Issuing shares or granting options, or selling treasury shares.
- Selling or acquiring assets of a material amount.
- Entering into contracts other than in the ordinary course of business.
- Creating structural defences, such as poison pills (devices by which the target is rendered unattractive, such as preventing control of the target from passing).

However, there are preparatory steps a target can take before receiving a hostile bid to be aware as early as possible of the presence of a potential bidder and to be able to marshal its defences rapidly. These steps include:

- Monitoring changes in the target's shareholdings to report any substantial acquisitions.
- Issuing statutory notices (a section 793 notice) to request information about the identity of underlying owners of any significant new shareholdings.
- Approaching the Panel to request it to make enquiries of rumoured potential bidders, to see whether they are required to make an announcement under the Code.
- Ensuring that the directors are aware of their duties in a takeover situation.
- Preparing outline announcements and up-to-date financial information that supports the target's argument that the offer undervalues the target and/or that the offer carries an insufficient premium for control.

If faced with a hostile bid, a target must be able to present and enhance its financial position effectively and as quickly as possible. Preparation for this can also be made in advance of a bid, for example:

- The target can check whether it can produce a profit forecast and/or asset valuation within the necessary timetable and have these independently reported.
- The target's board can be prepared for the logistics of a hostile bid, for example, by producing defence manuals, so that the target's board has all the information it needs to hand if it decides to make a defence to the bid (if it is in the best interests of the target shareholders).
- There is generally no legal objection to a target's board seeking a third party (a white knight) to make an alternative offer for the target.
- In theory, the target can make a counter offer to acquire the bidder, if the target's board considers it in the best interests of the target (for example, if the target could benefit by that expansion while remaining independent). This is known as the Pac-Man defence, and generally requires the approval of the target's shareholders. However, these defences have been very rarely used.

TAX

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

Transfer duty on the sale of shares is generally payable at the rate of 0.5%, which is called:

- Stamp duty if payable on a written instrument of transfer.
- Stamp duty reserve tax (SDRT) in other cases.

It is possible to avoid payment of stamp duty and SDRT by acquiring the shares in the target using a scheme of arrangement, involving the cancellation of the existing shares in the target and an issue of new shares to the bidder, rather than transferring the existing shares in the target. Stamp duty is generally payable on a transfer of the target's existing shares but not on the issue of new shares under a scheme of arrangement.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

Regulated industries

There are specific statutory regimes in place for certain industries, for example defence, financial services, newspapers, broad-

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casting and the water industry. Regulatory consent is required before acquiring a controlling interest in certain industry sectors, for example financial services and broadcasting. Takeovers in the defence industry may require the approval of, and the giving of undertakings to, the UK Secretary of State for Trade and Industry.

The Secretary of State also has powers to intervene in relation to mergers in other sectors, notably financial services and media, on certain specified public interest grounds (including media plurality and the stability of the UK financial system).

Competition law

Bidders must also take into consideration the possible application of competition law. If merger rules apply there will be a significant impact on the timetable.

UK thresholds and substantive test. The UK test is based on the UK turnover of the target or the parties' market share (including stakebuilding). Merger control applies where either the (*Enterprise Act 2002*):

- Transaction creates or enhances a 25% share of supply in the UK or a substantial part of the UK.
- UK turnover of the target acquired exceeds GB£70 million (about US$78.18 million).

Notification is voluntary. However, the OFT may refer a transaction to the Competition Commission at any time up to four months after the transaction becomes unconditional or is made public. The substantive test is whether the merger has resulted or may be expected to result in a substantial lessening in any market or markets in the UK for goods and services.

EU thresholds. The EU test is based on the parties' turnovers worldwide, within the EU and within EU member states. The EU Merger Regulation requires pre-notification if certain turnover criteria are met.

Effect on timetable. The OFT conducts the initial review of any takeover falling within the thresholds and decides whether the bid should be referred to the Competition Commission for an in-depth review. A takeover can be completed while it is being considered by the OFT; however, the bid must lapse if there is a reference to the Competition Commission or second stage EU competition investigation before the later of the:

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

The Panel has discretion to suspend the bid timetable (usually at Day 39) if there is significant regulatory delay in a decision (*see Question 12*).

Where the European Commission is notified under the EU Merger Regulation, it normally has 25 working days from notification to decide whether to clear or further investigate the merger. If it decides to conduct an extended investigation, the offer lapses for a basic period of 90 working days. At the end of this period, the European Commission must clear, block or approve the merger with qualifications.

THE REGULATORY AUTHORITY

Takeover Panel (Panel)

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Main area of responsibility. The Panel is an independent body, which amends and monitors the City Code on Takeovers and Mergers.

Contact for queries. See contact details above.

Obtaining information. See contact details above.

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

There are generally no specific restrictions on investment in UK companies by overseas investors. Practical differences in treatment may exist: for example, the bidder's ability to send documents and offer consideration to overseas shareholders may be limited due to local laws.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

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

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

Parties to the offer and persons acting in concert with them must disclose all dealings in the relevant securities of any party to the offer (other than a cash bidder) during an offer period. This disclosure must be made no later than 12.00 noon on the business day following the date of the transaction.

Dealing disclosures are also required during an offer period where a person is, or becomes, interested (directly or indirectly) in 1% or more of any class of relevant securities of any party to the offer (other

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than a cash bidder). This disclosure must be made no later than 3.30 pm on the business day following the date of the transaction.

Finally, opening position disclosures are required of parties to the offer and 1% long holders even if they do not trade during an offer period (*see Question 12*).

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

The Code Committee of the Panel issued a consultation on 5 March 2010 in relation to profit forecasts, asset valuations and merger benefit statements. The proposals would make various changes to the Code requirements on unaudited financial information to improve the coherence and consistency of the Code's approach. In summary, the proposals include:

- Relaxing the reporting requirements on profit forecasts and asset valuations where these were published in the normal course of a company's business.
- Extending the periodic reporting exemptions to the profit forecast rules to cover interim management statements required to be published by DTR 4 and also to cover certain results announcements by AIM and PLUS-listed companies.
- Expanding the scope of the merger benefits statement requirements.

Finally, in response to a speech by the Secretary of State for Business Innovation and Skills following the successful offer by Kraft for Cadbury plc, the Panel announced that it had decided to initiate a consultation to consider whether certain Code provisions and the timetable determining the outcome of offers could usefully be improved. It is expected that this consultation might address such matters as whether to increase the acceptance threshold on an offer beyond the current acceptance threshold set by Rule 10 of the Code. The consultation is yet to be published.

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