SQUIRE SANDERS

THE UK TAKEOVER CODE – 12 MONTHS ON FROM THE OVERHAUL

On 19 September 2011 (the "Implementation Date") the City Code on Takeovers & Mergers (the "Takeover Code") underwent the most significant overhaul of recent times in the wake of the controversy around Kraft Foods' takeover of Cadbury the previous year.

Significant market interest and press commentary surrounded those changes. Some argued they were unnecessary or too extensive. Others welcomed the changes as long overdue and necessary to curb unfair advantages which favoured the bidder and disadvantaged the target, and others said the changes did not go far enough in protecting the various parties affected by takeovers (including, notably, potential target companies themselves, their pension funds and their employees).

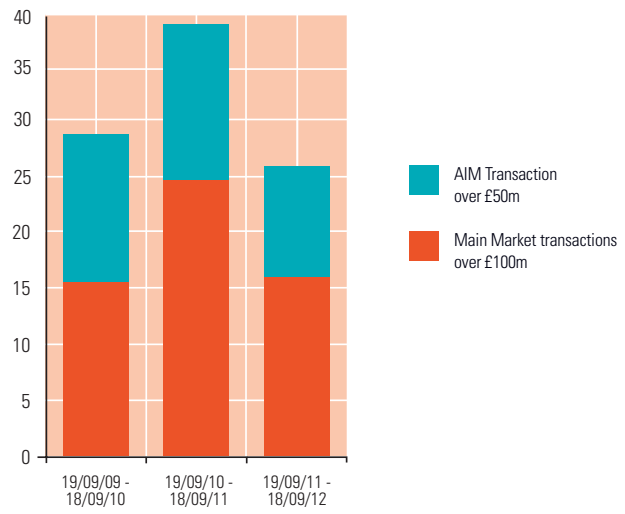
The Panel on Takeovers & Mergers (the "Takeover Panel") undertook, during the consultation process, to review the impact of these regulatory changes at some point following 12 months after the implementation of those changes.

In advance of any formal review (were that to occur), this note looks at some of the impacts of the regulatory changes so far and what further changes (either reversing or extending the original changes) might be considered as part of the Takeover Panel's review.

Impact on UK public M&A levels and re-assessment by the Takeover Panel of the Takeover Code changes

In the 12 months since the Implementation Date 17 firm offers in excess of £100m were announced for target companies on the London Stock Exchange's Official List. This compares with 25 such offers in the preceding 12 months and 16 such offers in the 12 months before that. Offers for AIM companies show a similar pattern, with 10 firm offers in excess of £50m in the 12 months since the Implementation Date compared with 14 and 12 in the equivalent successive 12 month periods beforehand.

Number of bids by year

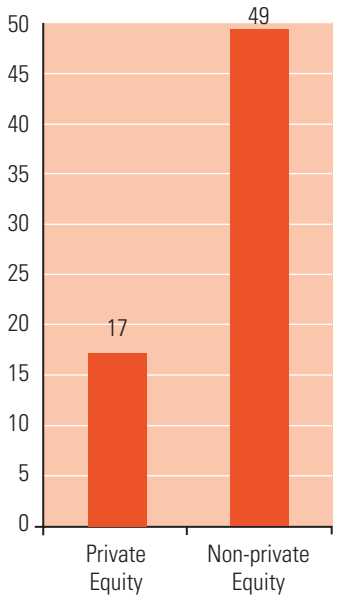


One might conjecture that the changes may have had a small effect on bid activity given the decline in bid activity since the Implementation Date compared with the preceding 12 months (which, in turn, were an increase on the preceding 12 months), but it is difficult to draw any decisive conclusion on this point, given the effects of the current economic environment and its impact on risk appetite amongst bidders and the limited availability of funding for bids.

In the consultations before the implementation of the revised Takeover Code, the BVCA had expressed significant concern, on behalf of the UK private equity industry, over the proposed changes. Whilst the level of takeover activity supported by private equity bidders has declined, it is notable that private equity bidders both in the UK and abroad still have a significant interest in making takeover bids for UK companies.

UK private equity firms such as Lloyds Development Capital appear to remain interested in making takeover bids, where the business opportunity merits a bid, and US private equity firms (such as Francisco Partners, TPG Capital and Vista Equity Partners) appear prepared to make bids for UK public companies, despite the regulatory changes. Out of the 66[1] firm offers announced for companies on AIM or the Official List in the 12 months since the Implementation Date, 17 of such offers involved private equity backers.

Bids in the 12 months since 19 September 2011 which have involved private equity backers



[1] This is the total of all bids in the period, irrespective of size. It includes 6 bids that have lapsed. Of those 6 lapsed bids, the target, in 4 instances, subsequently received a firm offer from a different bidder. These 4 subsequent offers have also been included in the total number of bids.

It is also notable that during this period around half of takeover bids were made by foreign acquirers, a trend that has continued to increase during 2012. Indeed, in the first 6 months of 2012, it would appear that approximately 70% of UK takeover activity by value has involved foreign acquirers (source: *Dealogic*).

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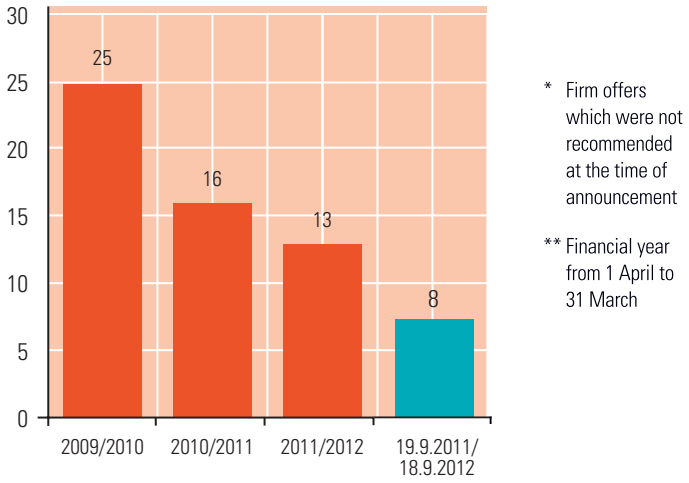
Having regard to the current relatively depressed share prices for many midcap UK listed companies (despite the perceived high quality of the business and assets owned by many of such companies), the relatively weak Pound against various foreign currencies, less competition from UK bidders for UK targets, the number of international businesses listed on the London Stock Exchange, the UK's position in Europe but not the Eurozone and the overall benign and litigation free environment in which bidders can conduct takeover bids in the UK, there seem to be good reasons why interest from foreign bidders should remain strong, notwithstanding the regulatory changes.

Since the regulatory changes, hostile bids have not been particularly prevalent (8 bids, including 5 bids which have since lapsed, which were still "hostile" when firmly announced) when compared to the position in the Takeover Panel's financial years ending 31 March 2010, 2011 and 2012 (which respectively saw 25, 16 and 13 such hostile bids according to the Takeover Panel's annual reports for those periods).

Number of hostile* bids in previous financial years vs number of hostile bids since the Implementation Date**



The fall in the number of hostile bids since the Implementation Date is perhaps not significant or surprising, although it is arguable that any reduction in the number of such bids would be perceived by many commentators as a "successful" result from (and, indeed, could be argued as one of the purposes of) the regulatory changes. Certainly the changes seem to have made almost extinct unsolicited "virtual bids" for UK companies (see further below).

Since the Implementation Date, relatively few competitive bids have been firmly announced for UK targets (only the competitive bids for GlobeOp Financial Services S.A., Kewill plc, Invista Real Estate Management Holdings plc and Cove Energy plc). It is difficult to draw any correlation between the absence of competitive bids and the regulatory changes but the absence of such bids would suggest that the Takeover Panel's hope that the prohibition on deal protections (see further below) would result in greater competition between potential bidders for UK plcs (for the benefit of target shareholders) was not realistic, at least in the short term.

Since the Implementation Date, relatively few competitive bids have been firmly announced for UK targets

The difficulty in detecting any obvious major impact on M&A levels as a result of such changes and the lack of any groundswell of objections from interested parties in relation to the operation of the regulatory changes might lead one to the conclusion, however, that the Takeover Panel will not feel unduly pressured to make any immediate substantial revisions to the new rules. Indeed, in his chairman's statement in the Takeover Panel's annual report, published on 18 July 2012, Sir Gordon Langley wrote "*early indications are that these changes are meeting their principal aims of reducing the tactical advantage obtained by offerors and redressing the balance in favour of offeree companies. At the same time the concerns of some critics, to the effect that the UK would become a difficult place in which to execute takeover offers and that many bidders would be deterred, do not seem to have been borne out*". However, some themes have emerged from recent practice since the new rules took effect, which may warrant consideration by the Panel as and when it comes to undertake its review.

The Takeover Panel will not feel unduly pressured to make any immediate substantial revisions to the new rules

Naming of potential bidders and put up or shut up ("PUSU") deadlines and extensions

The requirement that target companies should name all potential bidders with whom they are in discussions (save in limited circumstances) when announcing any possible offer (or offer talks), has led to many potential suitors being named at a much earlier stage than was customarily the case before the new rules took effect.

It is not clear to what extent the regulatory changes have resulted in a very significant drop in the number of possible transactions that may have leaked to the market (resulting in a possible offer announcement) and it is still common to see target companies going in to offer periods before a firm offer is announced.

Indeed, in the discussions preceding the new rules, some argued that targets would be more tempted to leak possible deals, especially if the bidder was unwelcome, so as to set in motion the new 28 day 'Put-up-or-shut-up' ("PUSU") deadline in which the bidder would have to make a firm announcement of its offer, or withdraw. Such a deliberate practice would, of course, infringe the Takeover Code and, potentially, other regulation.

The effect the new rules do appear to have had, however, is to make practitioners and their clients (particularly bidders) ever more sensitive to the need for secrecy before a bid is formally announced, including restricting the number of individuals (including within the bidder and target deal teams) who know about a possible bid and maintaining the use of codenames in all communications.

It is now extremely rare to see unsolicited/semi-hostile virtual bids by potential bidders

It is difficult to assess, however, the extent to which potential bidders have utilised, on an anonymous basis, the "downing tools" provisions in Note 4(a) on Rule 2.2 of the Takeover Code, allowing them to cease considering a possible offer and avoid being publicly named and the extent to which the naming requirement has, even if indirectly, killed possible takeover transactions (since the use of the private "downing tools" provision will result in the unnamed bidders being ruled "offside" from bidding for 6 months). In addition, it is notable that a significant number of "formal sale processes" have been initiated by targets since the Implementation Date (see further below), which might lead one to the conclusion that such processes are being used very commonly, with the direct goal of avoiding the need to name potential bidders.

A direct result of the automatic imposition of PUSU deadlines under Rule 2.6 of the Takeover Code is that it is now extremely rare to see unsolicited/ semi-hostile virtual bids by potential bidders, attempting to put a target board under pressure to open up discussions and/or to grant access to target due diligence. Such devices appear to lack significant tactical advantage under the new regime (there have only been 3 or 4 possible examples since the Implementation Date). Again, some respondents to the consultation which suggested the regulatory changes will see this development as a positive result. It is arguable, however, that these changes do not mean that the virtual bid is fully dead and that there will be examples, in the future, where virtual bidders will seek to convince target shareholders to exert pressure on a target's board to seek an extension (or extensions) of PUSU deadlines previously set.

Extensions of [PUSU] deadlines have been granted on a significant number of occassions

In relation to the PUSU deadlines imposed on potential bidders, since the Implementation Date, under Rule 2.6, following the naming of potential bidders in possible offer announcements, extensions of such deadlines have been granted on a significant number of occasions, at the request of targets and with the consent of the Takeover Panel. The extensions granted have ranged from 1 day (in the case of one of the deadline extensions granted in the takeover offer for Parseq plc) to 28 days, with an extension of 28 days being the length of extension most commonly sought.

No single extension of greater than 28 days has been sought, even though multiple such extensions have been (see, for example, the takeover bid for Harvard International plc).

It might be speculated that a target, playing matters cautiously and wanting to retain control of any takeover process, might think it preferable to grant several extensions (rather than one longer extension) although there is nothing in the Takeover Code preventing a target either from seeking an extension of longer than 28 days or for a longer period than in any previous extension, nor is there precedent to suggest that the Takeover Panel would be likely to reject such requests, if made. It would not be surprising if a similar and relatively relaxed approach by the Takeover Panel to granting extensions (where requested by targets) continued in the future.

More recently, the Takeover Panel granted a dispensation under Rule 2.6, agreeing (on an ex-parte basis) not to apply a PUSU deadline to China National Gold Group Corporation ("CNGGC") in respect of their discussions with Barrick Gold Corporation ("BGC") regarding the possible sale of BGC's stake in African Barrick Gold plc ("ABG"). In this case it should be noted that the initial announcement regarding a possible offer was made by BGC, the shareholder, and that the Takeover Panel's dispensation was granted in view of the fact that BGC, the party in discussion with CNGGC, held a 73.9% stake in ABG.

Formal sale processes

The formal sale process has, since the first announcement of such process by Point York Group plc in September 2011 (technically before the implementation of the regulatory changes), been a popular mechanism used by target companies and their advisers in relation to the possible sale of a UK listed company. 16 formal sale processes (excluding processes announced purely as strategic reviews) have been formally announced since the Implementation Date. This is, perhaps, not surprising bearing in mind the possibility that (i) potential bidders can avoid being publicly named (under Note 2 on Rule 2.6) and (ii) a preferred bidder may benefit from an inducement fee agreement (under Note 2 on Rule 21.2), where a formal sale process is initiated. It is potentially interesting to note, however, that such formal sale processes have resulted in only two firm takeover bids being announced (with the overwhelming majority of announced formal sale processes or strategic reviews being subsequently withdrawn).

16 formal sale processes have been formally announced since the Implementation Date

Many questions still surround the use of the formal sale process which will not be obvious from the wording of the relevant Takeover Code provisions themselves including:

(i) what characteristics need to be satisfied for a process to qualify as a formal sale process? Some such characteristics can be identified by a review of the structure of the formal sale process announced by Point York Group plc which, seemingly, has been very closely copied by most other companies subsequently initiating such processes;

(ii) can a target delay in publicly announcing a formal sale process, once that process is supposed to have commenced and, if so, how long a delay is permitted (for example, if the target's management wish to continue to auction the target on a formal but private basis)?;

(iii) can a formal sale process be initiated at a stage significantly later than the original entry into (private and less structured) discussions by a target with only one or a small number of potential bidders?; and

(iv) what flexibility does a target have to deal more favourably with certain potential bidders rather than others, at various stages during a formal sale process?

Guidance from the Takeover Panel (for example, in an Executive Practice Statement) would be helpful in this area. It is predicted that such processes will continue to be popular in the future, particularly where potential bidders include private equity bidders who might be proportionately more nervous about being publicly named and who, from previous practice, appeared concerned to obtain inducement fees from targets in order to help cover their professional advisory fees incurred on takeover bids.

The consultation process initiated by the Code Committee indicated that it was not enough, for a target to avoid the naming of potential bidders, to announce a strategic review of possible options for the target and that such announcements might, in accordance with Rule 2.4(a), result in the need for potential bidders to be named. It is notable, however, that several announcements of formal sale processes that avoid the naming of bidders also refer, at the same time, to a strategic review process.

Removal of deal protections and restrictions on break fees

The regulatory changes prohibit a vast array of previously allowable deal protection measures in favour of bidders and potential bidders including, for example, break fees or inducement fees payable by targets, implementation agreements imposing obligations on targets, non-solicitation and exclusivity arrangements, requirements to notify a bidder of rival expressions of interest in the target and matching or topping rights granted by the target. Indeed, the prohibition in Rule 21.2(a) is drafted in the widest possible sense, prohibiting all "offer related arrangements", except those specifically permitted in Rule 21.2(b). These changes have resulted in the vast majority of deal protections sought by potential bidders disappearing and attempts to re-insert milder forms of protection have been firmly rejected by targets and/ or the Takeover Panel.

Notes 1 and 2 on Rule 21.2 do allow, with the consent of the Takeover Panel, a "simple" form of inducement fee (equal to no more than 1% of the target's fully diluted offer value): (i) where a target wants to offer such agreement in order to attract a white knight following the announcement of a firm offer by a third party which is not recommended by the target board; or (ii) with a preferred bidder, following the conclusion of a formal sale process. The target may also be permitted, with the consent of the Takeover Panel, to grant an inducement fee where it is in severe financial distress (see paragraph 3.16 of the Response Statement 2011/1 of the Code Committee of the Takeover Panel (the "Code Committee")) and feels it needs to offer an inducement fee in order to attract potential bidders, although the directors of a target, having regard to their duties in near insolvency situations, would face a difficult decision in determining whether it was prudent to offer such arrangements to potential bidders.

Despite the large number of formal sale processes announced since the Implementation Date, only one such process has resulted in the agreement of an inducement fee agreement

It is notable that, despite the large number of formal sale processes announced since the Implementation Date, only one such process has resulted in the agreement of an inducement fee agreement with the preferred bidder (in Royal Dutch Shell plc's bid for Cove Energy plc). No inducement fee agreements have been granted in order to entice white knights (although, this would not be surprising having regard to the low number of hostile bids in the relevant period) and no such arrangements appear to have been granted by companies in financial distress, seeking potential bidders. Cove Energy's inducement fee agreement with Shell may well set a precedent for the much more basic nature of break fees expected in the future, where such arrangements are allowable.

As commented on earlier, private equity bidders (who historically have been concerned to obtain costs coverage for professional advisory fees through break fee agreements) still appear willing to make bids for UK listed companies, despite the lack of costs coverage and offers by foreign bidders (particularly from the US and Canada, where break fees are common) still continue in some numbers despite the lack of deal protection.

One might speculate that bidders will learn to live without deal protection (as they used to do before the deal protection trend emerged around 15 years ago), providing the acquisition opportunity is sufficiently attractive.

Permitted deal protections

Notwithstanding the patterns developing above, deal protections solely in favour of targets (or more precisely, which impose obligations only on a bidder or any person acting in concert with a bidder) remain permissible under the new regime, meaning that the playing field for bidders and targets is potentially far from level. That said, it is not obvious that significant deal protections have been sought by targets since the Implementation Date and it may be that such protections, whether in favour of the bidder or target, will be rare in the future. As per above, it is also not obvious that such a lack of deal protection has resulted in rival bidders intervening in previously announced deals.

It is not obvious that significant deal protections have been sought by targets since the Implementation Date

An area where some protection is sought by targets, however (as it was sometimes historically) is in relation to reverse break fees. Examples include in the bid by Glencore International plc for Xstrata plc (where a fee, of marginally less than 1% of offer value, might be payable by Glencore in certain circumstances where the Glencore board withdrew, amended, modified or qualified its recommendation to its own shareholders of the merger) and in Chengdu Geeya Technology Co., Ltd's bid for Harvard International plc (where an amended break fee agreement provided for the payment of a fee by Chengdu Geeya, of marginally more than 2% of offer value, and was conditional on the target itself complying with certain conditions e.g. not recommending third party bids; no declaration or payment of dividends).

Such arrangements raise the interesting question as to whether, in future, certain deal protection measures (e.g. break fees) and other confirmations granted in favour of the target can legitimately be linked to certain conditions in favour of the bidder which effectively control the behaviour of the target but which still should be seen as resulting in a "net benefit" to the target and should, on balance, be allowable. It would not be surprising if professional advisers tried to "stretch" the possibilities further in this area and for the Takeover Panel to be watching closely.

Co-operation agreements have since the Implementation Date become increasingly popular

Co-operation agreements (or information and assistance/ bid conduct agreements) have since the Implementation Date (and the prohibition on implementation agreements) become increasingly popular (see, for example, in the bids for Cove Energy plc, Misys plc, Logica plc and Cable & Wireless Worldwide plc), driven perhaps by the provision in Rule 21.2(b)(iii) of the Takeover Code, allowing commitments from a target to provide information and assistance for the purposes of obtaining an official authorisation or regulatory clearance. One could question whether the generic nature of the mutual assistance provisions in such agreements in relation to regulatory approvals are a significant benefit for a bidder, particularly where a bid remains recommended and the target will be willingly co-operating with the bidder and regulators in obtaining clearances.

It will be interesting to see how the termination provisions in these agreements develop over time and whether, for example, in the future (which is not the case currently) the obligations in such agreements are made to continue, even after a bid is no longer recommended (again, question, whether legal provisions to assist the bidder in front of a regulator will, in practice, be of significant use, where a bid has become hostile). In addition, the obligations in relation to regulatory clearances imposed by targets on bidders are gradually becoming more specific.

Whilst dealing with regulatory approvals was the original purpose of such co-operation agreements, these agreements have now been "stretched" (slightly by bidders but particularly by targets) to cover a multitude of matters relating to a takeover bid. Certainly where a regulatory consent is required, such agreements are very common (although not universal).

Such agreements have now begun to appear, however, dealing often only (or largely) with share incentive/ employment related matters (perhaps encouraged by the provision in Rule 21.2(b)(vi) of the Takeover Code allowing confirmations from targets in relation to existing employee incentive arrangements) and/ or the proposals required to be made by a bidder to target optionholders under Rule 15 of the Takeover Code (see for example the share option deed in respect of Genivar Inc.'s offer for WSP Group plc and the co-operation agreement in respect of CGI Group Inc.'s bid for Logica plc, which included detailed provisions in relation to Logica's share incentive arrangements but also dealt with the termination of certain Logica employee service agreements, the payment of bonuses going forward and the provision of D&O cover). The drafting of such agreements is an area on which the Takeover Panel will want to focus closely, in order to ensure that such agreements could not have the effect of frustrating or even dissuading rival potential bidders.

The Panel has also granted several case-by-case dispensations from the general prohibition in Rule 21.2(a), including in relation to financing agreements relating to the bids for Deo Petroleum plc (where a bidder provided a working capital loan to the target and took certain charges over its assets), Synchronica plc (where the bidder provided an unsecured loan to the target, which subsequently became a secured loan, in relation to payroll costs) and GoIndustry-DoveBid plc (where the bidder financed the professional advisers' fees of the target). One could speculate that such arrangements were accepted by the Takeover Panel, having regard to the peculiar nature of those cases and the financial distress of the target. Other examples of arrangements allowed by the Takeover Panel include a proxy-solicitation agreement (to which the target was also a party, in the bid for Cable & Wireless Worldwide plc, but which the target could terminate at any point) and tax planning arrangements in relation to the pre-completion transfer of certain assets of the target group to the bidder (in the case of the bid for GoIndustry-DoveBid plc), where the transfer could be reversed at no loss to the target, if the takeover did not subsequently complete. Again, one could speculate that the Takeover Panel will be more minded to permit arrangements/ obligations which are either themselves conditional on a takeover completing or can be terminated or unwound, without loss to the target, if a takeover does not complete.

Practitioners currently question the extent to which any of the arrangements referred to above can legitimately protect a bidder from, in effect, being required to pay more for a target's business, if a target decides to declare or pay a dividend or agree and issue further incentive awards to target employees, during an offer period in each case, potentially, in compliance with the provisions in notes 3, 5 and 6 of Rule 21.1 (allowing such payments, if such payments are in line with normal practice).

A bidder would not normally be allowed the benefit of any agreement preventing dividend payments but it is also questionable whether an agreement can legitimately prevent new incentive awards (which might not fall under "existing employee incentive arrangement[s]" under Rule 21.2(b)(vi)).

Unless and until these points are clarified, or unless either Rule 21.1 or Rule 21.2 are amended to deal with these issues, in relation to the payment of dividends, bidders may wish to describe offer prices in offer announcements/ documentation in the alternative, depending on whether or not a dividend is paid during offer period – see, for example, the offers for Umeco plc and Cable & Wireless Worldwide plc. It would not be so easy, however, to qualify an offer price by reference to whether additional awards are made to target employees.

It is also possible to envisage greater use of specifically negotiated offer conditions to attempt to control the behaviour of the target, although no significant developments have occurred in this area and one might question whether the subject matter of such conditions would ever be so material as to persuade the target to accept their inclusion or persuade the Takeover Panel that such conditions should be capable of being utilised (by reference to materiality test applied by the Takeover Panel under Rule 13.5(a)).

Irrevocable undertakings

An increasing focus of bidders regarding deal protection is now in relation to irrevocable undertakings sought from target shareholders. A few patterns can be identified. It is notable that several undertakings (whether from the "independent" third party shareholders and/or from target director-shareholders) entered into in respect of takeovers since the Implementation Date, include bolt-on undertakings in favour of bidders covering, amongst other things, matters such as non-solicitation of third party bids and notification if third party expressions of interests are received. Whilst it might be argued that such undertakings are allowable (under Rule 21.2(b)(iv), where sought from independent third party shareholders (question whether, however, such shareholders and, in particular, institutional shareholders, will be prepared to give such undertakings)), the better view is that bolt-on undertakings from target director-shareholders (not truly related to the acceptance or voting of their shares in favour of an offer) are not permissible, since target directors will always be, in such circumstances, concert parties of the target. It would be helpful if the Takeover Panel could issue further clarification in this area, particularly since otherwise professional advisers will no doubt seek to "stretch" the drafting of such undertakings.

An increasing focus of bidders regarding deal protection is now in relation to irrevocable undertakings sought from target shareholders

Other deal protection patterns emerging include:

(i) irrevocable undertakings (particularly from third party shareholders) increasingly including matching or topping rights; and

(ii) a gradual increase in the level of price hurdles in "semi-hard" undertakings sought from such shareholders (past which hurdle an undertaking ceases to remain binding) – a 5 to 10% price hurdle used to be common whereas examples of 15% and even 20% are now appearing.

One could also question whether, bearing in mind the relative lack of other forms of deal protection, irrevocables will, in the future, sometimes be sought much earlier in the process (i.e. significantly in advance of a firm offer announcement). This had happened (albeit very rarely) in the past but no identifiable patterns are emerging in this area, at present. It would also potentially raise announcement obligations pursuant to Rule 2.2(e).

Although not an express requirement of the new rules, bidders can expect the Takeover Panel, on occasions, to ask to see the proposed wording of irrevocable undertakings.

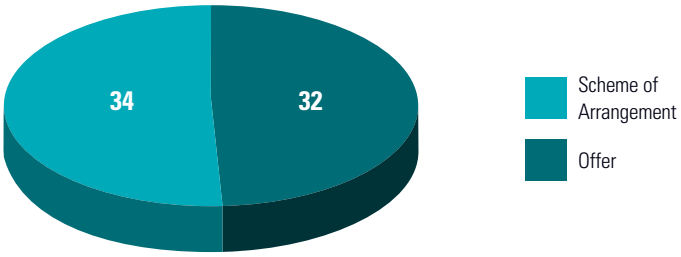
Stakebuilding

Stakebuilding has, subject to the many regulatory issues involved, been used frequently in the past by bidders or potential bidders as a deal protection measure. It is not obvious that stakebuilding has, since the Implementation Date, taken on greater significance although that result would not be surprising bearing in mind relatively low level of hostile or competitive bids.

Schemes of arrangement

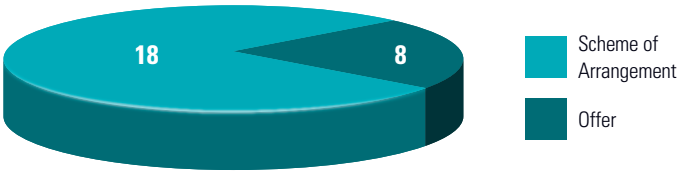
Before the regulatory changes were implemented, commentators questioned whether or not the changes (and in particular, the prohibition on implementation agreements) would make takeovers by scheme of arrangement (as compared to by way of contractual offer) less popular. The clear answer to that question is that schemes of arrangement have remained (at least in the short term) as popular as ever, with the possible stamp duty savings and the ease with which bidders can deal with minority shareholders being two key features which continue to make schemes of arrangement attractive. Since the Implementation Date, of the 66 takeover bids firmly announced for target companies quoted on AIM or the Official List, 32 have been by way of scheme of arrangement and 34 have been by way of contractual offer.

Bids the Implementation Date which are structured by way of scheme of arrangement or offer



In relation to takeovers where the offer consideration is £100 million or more, nearly 70 per cent. of such takeovers have been effected by way of scheme of arrangement.

Bids since the Implementation Date with consideration in excess of £100m which are structured by way of scheme of arrangement or offer



In relation to the timing longstop conditions now permitted by Appendix 7 paragraph 3(b) of the Takeover Code (whereby, for example, a bidder can lapse its offer if the target's shareholders meetings or the court hearing to approve the takeover scheme are delayed by more than 21 days past the date announced for the holding of such meetings/ hearings), such timing conditions (save in relation to the scheme effective longstop date) have not been universally adopted by bidders and targets. One could speculate that it will not be easy for a target to concede conditions in relation to the timing of court hearings, in particular, if the bidder is required to obtain various regulatory approvals for its offer before such court hearings and the timetable for the obtaining of such approvals is not precisely clear upfront.

Additional disclosure information

One of the additional disclosure requirements introduced by the regulatory changes (in a new Rule 24.16) concerned the disclosure of the fees and costs of the bidder and target associated with the offer and, in particular, the fees (or estimated fees) of professional advisers, which are now provided in some detail by reference to category of adviser. A basic analysis of such fee disclosures does not uncover in any obvious patterns but it would not appear that the disclosure of such fees has (yet) led to a marked increase or decrease in the level of professional advisory fees charged on takeover transactions nor that advisers within the same category are now seeking to charge similar fees to those charged in previous deals. Although such figures may not prove to be particularly instructive as a guide to the level of fees likely to be charged in the future, the average fees charged since the Implementation Date by various categories of advisers (and by reference to offer value) are approximately as follows: bidders' financial advisers (including broking fees): 1.7% (in the range of 0.05% to 15.16%); bidders' lawyers: approximately 1.8%; (in the range of 0.04% to 18.75%); targets' financial advisers (including broking fees): 1.7% (in the range of 0.05% to 18.75%); targets' lawyers: 1% (in the range of 0.03% to 9.38%).

There have been no obvious examples, to date, of bidders or targets being required to make further public disclosures where any category of expense previously disclosed in offer documentation has exceeded 10% of the estimate stated (as potentially required under Rules 24.16(c) and (d)).

Disclosure of intentions for target's employees

Amongst the changes brought in on the Implementation Date were amendments (incorporated into Rule 24.2) aimed at giving greater recognition to the interests of target group employees, including the requirement that a bidder make a negative statement if it did not intend to make any changes to (or that its strategic plans would not have any repercussions on) target group employee arrangements going forward and requiring that, where such statements of intention were open ended in time, they would be regarded (in the absence of a material change of circumstances) as commitments for 12 months from the end of the offer period.

These changes have generally led to some, albeit modest, enhancement in the level of detail provided by bidders about their intentions regarding target group employee arrangements and about their plans for the enlarged group following completion of an offer. Before the Implementation Date such statements were often limited to an assurance that employment rights would be fully safeguarded. Whilst such wording is habitually still included, statements now go on to provide a little more detail and timelines, along with further reassurances, to the extent possible, regarding the possibility of redundancies or relocations or redeployment of fixed assets, sometimes with further explanations where such reassurances cannot be given. Over the last 12 months the Takeover Panel has been known to request sight of the draft offer document in order to review what bidders are intending to say in this area, as well as reviewing compliance with the other new Takeover Code provisions which result in additional disclosure items in offer documents.

Bidders have regularly sought to circumnavigate the Takeover Code's requirement that open ended statements of intention will be regarded as commitments for 12 months from the end of the offer period, by:

- qualifying any statement to the effect that there was no 'current' intention to make any changes (or material changes) to employee numbers or relocations or redeployment of fixed assets; and
- including a separate statement of intention to commence a strategic review upon completion of the takeover (usually accompanied by an estimate of the timescale within such review would be concluded), together with the additional statement that, until such a review has been completed, the bidder could not be certain as to what, if any, repercussions there would be on employment, the locations of places of business or any redeployment of fixed assets of the target group.

Since the Implementation Date there have been no obvious examples of bidders acting contrary to their previously stated intentions.

Employee representatives' opinions on takeover offers... have, since the Implementation Date, become much more widespread

Employee representatives' opinions on takeover offers (see Rule 25.9) have, since the Implementation Date, become much more widespread, either being published on a target's website (as was the case in the offers for 1Spatial Holdings plc, Logica plc, Umeco plc and Lees Foods plc) or in the scheme or offer documents (as was the case in the offers for Prologic plc, Xstrata plc, Hamworthy plc, Cosalt plc and Alterian plc). Whilst some opinions have come out in favour of an offer (for example, as was the case in the offer for Cosalt plc and, subject to the provision of certain requested assurances, the offer for Alterian plc) more often opinions have tended to shy away from any outright endorsement of an offer and to focus more on general concerns caused by the offer (even if acknowledging the financial or strategic logic behind the offer and/or stating that there were no specific objections to it, or to state that insufficient information had been provided on which to form a view).

Fresh consultations

On 5 July 2012, the Code Committee published three consultations (with a consultation period running to 28 September 2012) on proposed amendments to the Takeover Code. Although these consultations are not connected with any review of the impact of the regulatory changes brought in on the Implementation Date, one of the consultations, dealing with pension scheme trustee issues, does link directly back to the views expressed during the consultation exercise which preceded the overhaul on 19 September 2011. During that consultation, a number of advisers to, and representatives of, pension scheme trustees and the pension fund industry had expressed the view that the provisions of the Takeover Code, which relate to the employee representatives of a target company, should be extended so as to apply also to the trustees of the target company's pension scheme(s). At the time, the Code Committee said in its response to such consultation that it considered such suggestions to fall outside the scope of the consultation exercise, but at the same time it made clear its intention to consider those suggestions in due course.

Although the provisions of the Takeover Code which relate to employee representatives derive substantially from requirements imposed by the European Takeovers Directive, that Directive does not extend to target company pension scheme(s) or for the benefit of its/their trustees. However, whilst acknowledging that pensions schemes already enjoy protection under the powers conferred on the UK Pensions Regulator, and that the principal purpose of the Takeover Code is the protection of target company shareholders, the Code Committee considers that, on balance, noting that the Pensions Regulator does not have powers to require a bidder to disclose publicly its intentions regarding the target company's pension scheme(s), scheme beneficiaries (being current and former employees of the target group) should be included amongst the classes of persons to which offer documentation and information is relevant.

The changes proposed, therefore, would require bidders to publicly disclose their intentions in relation to the target group pension scheme(s) and would require targets to provide certain offer announcements and documents to target pension scheme trustees. The changes would include a requirement that the circular from the target company board considers the offer's impact on the target company's pension scheme(s) and that any opinion received from target pension scheme trustees, in relation to the impact of the offer, be appended to the circular or displayed on the target's website. The changes would also require that, if the bidder and the trustees of the target's pension scheme(s) reach an agreement regarding future funding arrangements, such agreement be publicly displayed and a summary provided in the offer document.

The other consultations launched on 5 July 2012 cover:

- Widening the application of the Takeover Code, by removing the 'residency test' in paragraph 3(a)(ii) of the Introduction to the Takeover Code (which currently determines the jurisdiction of the Takeover Panel over certain companies). The result would be that, for those target companies with registered offices in the UK, Isle of Man or Channel Islands, but whose securities are not already listed on a regulated market in the UK (as is the case for a number of companies on AIM), instead of applying the Takeover Code only if the target company has its place of central management and control in one of those jurisdictions (i.e. the 'residency test'), the location of management and control would become irrelevant and the Takeover Code would be extended to apply to all such companies (subject to the pre-existing '10 year rule' for private companies which have not publicly marketed their shares in the previous 10 years, although the consultation intends to clarify the interpretation of that rule); and

- Revising Rule 28 on the verification and publication of profit forecasts/estimates and merger benefits statements (to be renamed "quantified financial benefits statements" and to be extended so as to include other quantified statements of the potential financial effects of an offer completing and any other quantified benefits expected to arise from alternative measures if an offer is unsuccessful), strengthening provisions requiring the announcement of material changes to information previously published, and proposing other miscellaneous amendments to the Takeover Code.

Any further questions

We would be pleased to advise further on the general matters discussed in this note as well as on any other specific questions you may have in relation to possible takeover transactions in which you are or might become involved

For more information, we suggest you contact one of the Squire Sanders partners whose details are shown below. Alternatively, you may wish to contact one of our other lawyers whom you already know.

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