Chapter 5

CONDITIONS

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Overview

INTRODUCTION

5.1 Save in the case of a mandatory bid[1], offers will invariably include a number of conditions which must all be included in the firm offer announcement.

The only circumstances in which new conditions can be added after an offer has been announced are where new conditions are required to implement a later revised offer (for example, shareholder approval for a new share alternative[2]).

Standard conditions include:

(a) an acceptance condition – ie the minimum level of acceptance of the offer below which the offeror may decline to proceed with the offer;

(b) matters relating to the target's business (for example, its financial condition, litigation, contracts, financing, change of control issues, issues of new shares or rights to acquire shares, and any other material adverse changes in the target's business, the latter being commonly known as a 'material adverse change' (MAC) condition); and

(c) matters relating to the offeror's ability to implement the offer (for example, offeror shareholder approvals, approval of the admission to listing of new offeror shares from the UK Listing Authority or other regulatory authority, admission to trading and anti-trust and/or regulatory conditions).

Being part of the terms of the offer, these conditions are contractual in nature and form part of the agreement between the offeror and accepting target shareholders. In addition to this, however, the Code contains various Rules concerning specific conditions, and others constraining the general ability of an offeror to invoke a condition in order to lapse an offer even when, as a matter of contract law, it might well be able to do so.

If an offer is implemented by way of a scheme of arrangement, the scheme will typically be subject to the same conditions as a contractual offer save that, instead of the acceptance condition, the scheme will be subject to a number of conditions relating to the steps required under the *Companies Act 2006 (CA 2006)* to implement the scheme – ie holding a court-convened scheme meeting at which a majority in number representing not less than 75% in value of target shares held by target shareholders, present and voting, approve the scheme; a separate extraordinary general meeting being held to approve the scheme and, in most cases, amendments to the articles of association of the target; and the sanction of the scheme and the necessary delivery and registration of the associated court orders[3].

An offer implemented by way of a scheme of arrangement may also include 'walk-away conditions' relating to the long stop date for the scheme becoming effective, the date of shareholder meetings and the date of the court sanction hearing; if these specified dates are not met the offeror may invoke the relevant condition (unless the dates are extended with the consent of the offeror)[4].

1 A mandatory bid can normally only be subject to a 50% acceptance condition and any necessary UK or EC anti-trust condition. See Rule 9.3 and Rule 9.4 of the Code.
2 Rule 32.4 of the Code.
3 See CHAPTER 12.
4 Section 3(b) of Appendix 7 of the Code.

THE ACCEPTANCE CONDITION – RULE 10 OF THE CODE

5.2 It must be an unwaivable condition of any voluntary offer (other than a partial offer under Rule 36) for voting equity share capital or for other transferable securities carrying voting rights that the offer will not become or be declared 'unconditional as to acceptances' unless the offeror has acquired or agreed to acquire (either under the offer or otherwise) shares carrying over 50% of the voting rights[1].

As noted in paragraph **5.1**, this condition is disapplied in an offer implemented by way of a scheme of arrangement[2] which would, instead, be conditional on, *inter alia*, the shareholder approvals required by *CA 2006*.

1 Rule 10 of the Code.
2 Section 16(b) of Appendix 7 of the Code.

5.3 The rationale for having to include an unwaivable acceptance condition is that an offeror ought not to be entitled to acquire 'de facto control' (ie for the purposes of the Code, 30% of the voting rights) without making an offer to acquire actual control (ie the 50% threshold described above), unless the offeror accepts the additional constraints applicable to partial offers under the Code.

The rationale for the 50% threshold is that, once the offeror has acquired over 50% of the voting rights, management control of the target is in reality transferred to the offeror (as although it will not necessarily be able to pass special resolutions, it will be able to pass ordinary resolutions at shareholder meetings and, therefore, be able to determine the composition of the board of directors) and, on all other conditions being satisfied, the target will become a subsidiary.

5.4 The 50% condition is, in the case of a voluntary offer, a minimum and not a maximum. In practice the offeror will invariably impose a higher threshold, which will usually be carefully drafted to be 90% of each class of shares to which the offer relates to ensure that the offeror is able to take advantage of statutory compulsory acquisition procedures[1]. However, the offeror may reduce this threshold to a lower level (above 50%), if it wishes to do so. The offeror will then be taking the risk that it will never acquire 100% of the capital of the subsidiary.

Waiving a 90% acceptance condition when acceptances in excess of 75% have been achieved is relatively common especially since the offeror will then be able to pass special resolutions, delisting (if relevant) is likely to be possible, institutional shareholders (including index-linked and passive funds) are likely to accept the offer rather than remain as minority investors in a controlled company, particularly if it is delisted and, if not already recommended, the board of the target may then recommend that the shareholders accept the offer[2].

By contrast, waiving the condition when acceptances of more than 50% but less than 75% have been achieved is less common.

Where the offer is highly leveraged, waiving a 90% acceptance condition is likely to require the consent of the lenders and a commercial discussion with them. An offeror should also include the power to vary the acceptance condition in the event that the voluntary offer becomes a mandatory offer.

Any restriction on the ability of the offeror to waive down the level of acceptances required must be set out in the announcement of the firm offer[3].

1 *CA 2006, sections 974–991*, as discussed in CHAPTER 14. The Panel would not allow the acceptance condition at more than 90% as there is no legitimate reason for requiring such a condition, given that the *CA 2006* compulsory acquisition procedure can be invoked at the 90% level.
2 See CHAPTER 10 and the discussion on recommendations by target directors.
3 Rule 2.7(c)(iv) of the Code.

5.5 In certain 'exceptional cases', the Panel will 'consider waiving the requirements' of Rule 10 of the Code 'subject to prior consultation and to appropriate safeguards'[1]. In practice such waivers are seldom granted; however, they may be where, following a major change of management policy, it is desirable to provide an opportunity for shareholders to dispose of their shares

and where the offer is made on behalf of a group of investors who are otherwise wholly unconnected and whose purpose is not to gain control[1].

In addition, the Panel will sometimes waive Rule 10 in respect of offers for investment trusts where such investment trusts are nearing the end of their lives.

1 Note 1 on Rule 10 of the Code.

5.6 Any new shares carrying voting rights which are unconditionally allotted or issued before the offer becomes or is declared unconditional as to acceptances must be counted. If any shares have been allotted in renounceable form (for example, pursuant to a rights issue), the Panel must be consulted[1].

1 Note 2 on Rule 10 of the Code.

5.7 The shareholdings of concert parties cannot count towards the achievement of the voluntary offer acceptance condition[1] (in contrast to the position in the case of a mandatory offer).

In a voluntary offer, the offeror alone must hold shares carrying over 50% as a result of the offer. The Panel will allow shares held by wholly owned subsidiaries to count towards this threshold. This can be important to note in consortium bids as shares held by the consortium members cannot count towards the acceptance condition unless they are transferred to the offeror. In reality, this will only be an issue where the acceptance condition of the offer can only be satisfied by including such shares.

In contrast, in a mandatory offer, the 50% acceptance condition includes interests held by the offeror and its concert parties[2]. This is because a mandatory offer might not be triggered voluntarily and the offeror might not wish to proceed with the bid. Consequently, in order to ensure that a mandatory bid does not lapse as a result of concert parties of the offeror failing to accept the offer, shares held by the concert party are counted towards the acceptance condition regardless of whether they accept the offer.

1 Rule 10 of the Code, and specifically, Note 5 on Rule 10.
2 Rule 9.3 of the Code.

5.8 Where a takeover is effected by way of a scheme of arrangement, instead of an acceptance condition, the scheme of arrangement will be conditional on the *CA 2006*-prescribed shareholder voting requirements (a majority in number holding 75% in value of the shares voted) and the approval of the court.

Although the acceptance condition to a contractual offer and the shareholder approval conditions to a scheme of arrangement are not directly comparable, the Code does allow offerors to switch the structure of an offer from a contractual offer to a scheme, and vice versa, with the consent of the Panel, regardless of whether the offeror has reserved the right to do so[1]. However, when considering whether to give its consent to a switch, the Panel will take into account whether the switch is likely, or is intended, to make the offer less 'deliverable' such that the offeror might avoid an obligation which it would otherwise have to implement the offer[2]. For example, a switch from a scheme

to a contractual offer with a 90% acceptance condition or a switch from a contractual offer with a 50% acceptance condition to a scheme, is unlikely to be permitted by the Panel.

1 Section 8(a) of Appendix 7 of the Code.
2 Paragraph 9 of PCP 2007/1 (Schemes of Arrangement) and paragraph 9 of RS 2007/1 (Schemes of Arrangement).

MECHANICS OF ACCEPTANCE, PURCHASES AND PAYMENT

5.9 The Code contains detailed rules for determining whether or not acceptances and share purchases by the offeror can be counted towards fulfilling the acceptance condition. In the words of the introduction to Appendix 4 of the Code:

> 'It is essential when determining the result of an offer under the Code that appropriate measures are adopted such that all parties to the offer may be confident that the result of the offer is arrived at by an objective procedure which, as far as possible, eliminates areas of doubt.'

The offeror's receiving agent plays the central role in this process. Before an offer can become or be declared unconditional as to acceptances, the offeror's receiving agent is required to issue a certificate to the offeror or its financial adviser stating the number of acceptances received and number of shares otherwise acquired which are permitted to be counted towards fulfilling the acceptance condition[1]. Copies of the receiving agent's certificate must be sent to the Panel and the target's financial adviser by the offeror or its financial adviser as soon as possible after it is issued.

1 Note 7 on Rule 10 of the Code.

5.10 In view of the importance of the role of the offeror's receiving agent in determining whether the acceptance condition has been fulfilled, Appendix 4 to the Code sets out a 'Receiving Agents' Code of Practice'. This, amongst other things:

(a) sets out minimum qualifications for a receiving agent to an offer[1];
(b) provides for the essential co-operation between the receiving agent and the target's registrar to ensure that the receiving agent has up-to-date and accurate information about, among other things, the target's share register[2];
(c) provides for the offeror's receiving agent to have direct access to the Panel if it believes that there is insufficient co-operation or it is being instructed to act in a way which is contrary to the Code of Practice[3];
(d) places the responsibility on the receiving agent for determining the validity of acceptances and purchases to be counted towards the acceptance condition[4]; and
(e) specifies the limited term of disclaimer which is permitted to be included in the receiving agent's certificate[5].

1 Section 2 of Appendix 4 to the Code.
2 Section 3 of Appendix 4 to the Code. In addition, pursuant to Note 3 on Rule 10 of the Code, the target must also provide information to the offeror on its share capital (including issued shares, shares held in treasury and conversion and subscription rights).
3 Section 1 of Appendix 4 to the Code.

4 Sections 5 and 6 of Appendix 4 to the Code.
5 Section 8 of Appendix 4 to the Code.

5.11 The method by which shareholders can accept an offer varies depending on the form in which shareholders hold their shares.

Target shareholders who hold certificated shares send their share certificate to the offeror's receiving agent together with a completed form of acceptance. When the share certificate is not in the name of the accepting shareholder, other evidence will be required that the accepting shareholder has the right to become the holder of the relevant shares (such as a completed transfer of those shares into the shareholder's name).

Forms of acceptance are sent to target shareholders at the same time as the offer document is published. They vary in style but the trend is towards a simple form with detailed terms set out in the offer document. These forms authorise an agent, such as a director of the offeror or its financial adviser, to complete a stock transfer form on the acceptor's behalf[1]. The authorised agent will generally execute a block stock transfer form covering all the shares for which acceptances have been received. On the final closing date of an offer, usually Day 60, acceptances may be counted towards the acceptance condition from registered holders of shares even though they are not, for example, accompanied by a relevant share certificate[2].

1 Note 4 on Rule 10 of the Code.
2 Paragraph (c)(iii) of Note 4 on Rule 10 of the Code. See also Note 6 on Rule 10 of the Code which limits this to the final closing date.

5.12 Purchases of shares by an offeror or its nominee may be counted towards fulfilling an acceptance condition only if:

(a) the offeror or its nominee is the registered holder of shares; or
(b) a transfer of the shares in favour of the offeror or its nominee (executed by and on behalf of the registered holder and otherwise completed to a suitable standard and accompanied by the relevant share certificates or certified by the target's registrar) is:
    (i) delivered by or on behalf of the offeror to the offeror's receiving agent on or before the last time for acceptance; and
    (ii) the offeror's receiving agent has recorded that the transfer and the accompanying documents have been so received[1].

1 Note 5 on Rule 10 of the Code.

5.13 Shareholders with shares held in CREST may have a choice of acceptance method. The offeror can decide whether to allow CREST shareholders to accept an offer electronically without the need for a form of acceptance, provided that the method chosen is made clear in the offer document[1]. If an offeror allows shareholders to accept the offer electronically, shareholders wishing to do so must send a 'transfer to escrow' instruction to CREST: this is an instruction by such shareholders to CREST requiring it to transfer their shares to an escrow account controlled by the offeror's receiving agent.

The receiving agent will subsequently transfer the shares from this account to the offeror when the offer becomes unconditional. If the offer lapses, or the

shareholder withdraws its acceptance, the receiving agent transfers the shares back to the shareholder's CREST account. Acceptances made electronically in this way do not count towards fulfilling an acceptance condition unless the transfer to the relevant member's escrow account has settled in respect of the relevant number of shares on or before the last time for acceptance set out in the offer document[2].

1 Note 4 on Rule 10 of the Code.
2 Note 4(a) on Rule 10 of the Code.

5.14 If the offeror has not provided for electronic acceptance, CREST shareholders must complete a form of acceptance in the normal way and return it to the offeror with their CREST participant ID and account ID as well as sending a transfer to escrow instruction to CREST.

5.15 The payment of consideration is co-ordinated, although not made, through the CREST system using the assured payment mechanism. For payment to be made, CREST debits the offeror's cash memorandum account with the amount of the consideration payable and credits the offeror's stock account with the accepting shareholder's shares. Simultaneously with the debit, CREST sends a payment instruction to the offeror's settlement bank which, under an agreement with CREST, makes a corresponding payment to the accepting shareholder's bank as instructed when the offeror puts its bank in funds.

5.16 In a scheme of arrangement, there will not be any acceptances and typically there will not be a receiving agent. Instead, the target company's registrar will be involved in determining whether or not the relevant resolutions are passed by the requisite majorities at the target general meeting and the court-convened meetings. The payment mechanics will form part of the terms of the scheme and typically CREST shareholders will be paid through CREST and certificated shareholders will be paid via cheques.

THE LEVEL OF CERTAINTY CREATED BY A FIRM OFFER ANNOUNCEMENT

5.17 According to the Panel, the withdrawal of a bid after a firm offer announcement is:

> 'a most undesirable step, which should not normally be considered except in the most extreme circumstances'[1].

The rationale for this is that it is in the interests of target shareholders and the market that, once an offer is announced, there should be a high level of certainty that it will not be withdrawn.

As the Panel states in PCP 2004/4 (Conditions and Pre-Conditions):

> 'The announcement of a firm offer will inevitably have a profound effect upon the offeree company and the market price of its shares. While investors in a company which is the subject of an offer appreciate that it may fail due to lack of acceptances

ACCEPTABILITY OF PRE-CONDITIONS

5.23 This chapter focuses on conditions to offers and pre-conditions to the making of an offer which are set out in a firm offer announcement. However, the Code also allows 'pre-conditions' in possible offer announcements under Rule 2.5 of the Code.

In summary, the Code permits both:

(a) a potential offeror to make a possible offer announcement stating that it is considering making an offer but that any decision to do so is subject to the prior satisfaction (or waiver) of pre-conditions; and

(b) an offeror to announce a firm intention to make an offer under Rule 2.7 subject to pre-conditions which must be satisfied (or waived) before it is committed to publish its offer document and thereby make the offer.

5.24 Pre-conditions in possible offer announcements can be subjective rather than objective because, since the offeror is not committed to proceed with the offer even if the pre-conditions are satisfied, the making of the offer is within the discretion of the potential offeror. There is, therefore, no real benefit to be gained in terms of certainty from requiring any such pre-conditions to be objective[1].

However, in order to avoid false market concerns, it must be clear from the wording of any possible offer announcement referring to pre-conditions whether or not the pre-conditions must be satisfied before an offer can be made, or whether they are waivable and the Panel must be consulted in advance[2].

1 See Section 6 of PCP 2004/4 (Conditions and Pre-conditions). See CHAPTER 3.
2 Rule 2.5(c) of the Code.

5.25 In limited circumstances, the Panel does not object, in principle, to a firm offer announcement which is subject to the satisfaction of a pre-condition. Although the usual offer timetable will not start until any pre-conditions have been satisfied or waived (thereby potentially extending the period of siege for the target), this structure provides greater certainty for shareholders and the market than a possible offer announcement as once the pre-condition to the making of an offer is satisfied, the offeror must proceed with its offer on the terms announced.

Unlike possible offer announcements, a firm offer announcement under Rule 2.7 is intended and required to provide a high level of certainty. The use of wide and/or subjective pre-conditions might mean that the offeror is no more committed to proceed with the offer than if it had made a possible offer announcement. The use of pre-conditions is therefore very limited and is an area in which the Panel acts with circumspection to avoid undermining the certainty that is otherwise caused by a firm offer announcement.

5.26 Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition:

(a) relates to a decision that there will be no UK or EC anti-trust reference or proceedings[1]; or

(b) relates to a decision that there will be no such anti-trust reference or proceedings, or if there is such a reference or proceeding, the relevant authority allows the offer to proceed; or

(c) involves another material official authorisation or regulatory clearance relating to the offer and:
  (i) the offer is publicly recommended by the target board; or
  (ii) the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the Code timetable[2].

Therefore, for example, a pre-condition relating to the recommendation of the target board, whilst acceptable in a possible offer announcement, is not acceptable as a pre-condition to a firm offer announcement.

Pre-conditions are not widely used and are limited to situations where a material regulatory condition is unlikely to be able to be obtained in the normal Code timetable and the offer is not being implemented by way of a scheme of arrangement. Where an offer is being implemented by way of a scheme of arrangement the Code timetable does not apply in the same way and so there is much greater flexibility for accommodating long regulatory clearance processes within the scheme timetable without the need to use pre-conditions.

However, if the offer is not being implemented by way of a scheme of arrangement and an anti-trust, regulatory or other approval is likely to take a prolonged period of time that would not fit within the normal Code timetable, it may be necessary to make a pre-conditional offer.

There has been an increase in offers involving long regulatory approval processes outside the UK or EU (for example, the MOFCOM approval in China does not have a fixed timetable and can be a lengthy process). This does not raise Code timetable issues in the context of schemes of arrangement but might require a hostile offeror to make a pre-conditional firm offer[3].

1 For an example, see the BHP Billiton pre-conditional offer for Rio Tinto in 2008.
2 Rule 13.3(c) of the Code.
3 See CHAPTER 17.

5.27 As noted above, an offer must not normally be made subject to a condition or pre-condition relating to financing.

Exceptionally, however, the Panel may be prepared to accept a pre-condition relating to financing[1] either in addition to another pre-condition or otherwise; for example, where, due to the likely period required in order to obtain any necessary material official authorisation or regulatory clearance, it is not reasonable for the offeror to maintain committed financing throughout the offer period.

In such a case, the financing pre-condition must be satisfied (or waived), or the offer must be withdrawn, within 21 days after the satisfaction (or waiver) of any other pre-condition or pre-conditions permitted by the Panel. In addition, the offeror and its financial adviser must confirm in writing to the Panel before announcement of the offer that they are not aware of any reason why the offeror would be unable to satisfy the financing pre-condition within that 21-day period.

Chapter 11

TYPES OF CONSIDERATION

Mark Gearing

Overview

INTRODUCTION

11.1 The announcement of a firm intention to make an offer must include the terms of the offer[1]. An offeror will, therefore, need to establish the type(s) of consideration it wishes (or is required) to offer before it can make a firm offer announcement. The basic choice is between cash and shares or other securities, or a combination of cash and shares or other securities.

The City Code on Takeovers and Mergers (the 'Code') provides, fundamentally, that all holders of target company securities of the same class must be afforded equivalent treatment[2]. The Code also provides that an offeror should only announce a bid after ensuring that it can fulfil any cash consideration offered in full, and after taking all reasonable measures to secure the implementation of any other type of consideration offered[3].

This chapter discusses the implications under the Code of the choice of particular types of consideration, as well as certain implications under the *Companies Act 2006 (CA 2006)* and the *Financial Services and Markets Act 2000 (FSMA 2000)*, as amended by the *Financial Services Act 2012 (FSA 2012)*.

While not the subject of this chapter, it is also important to note that the Code further provides for a comparable offer to be made for different classes of equity share capital in the target[4], although in practice listed target companies with different classes of share are relatively rare and the Code requires an appropriate proposal to be made for convertible securities, options or warrants to subscribe, although in practice this usually applies to employee share arrangements[5].

1 Rule 2.7(c)(i) of the Code. Also note the effect of Rule 2.5(a) of the Code if any earlier statement is made in relation to the terms on which an offer might be made (eg in a 'possible offer' announcement). See further CHAPTER 3.
2 See General Principle 1 of the Code.
3 See General Principle 5 of the Code and Rule 2.7(d) and Rule 24.8; see further paragraphs 11.4–11.9.
4 See Rule 14 of the Code.

[5] See Rule 15 of the Code and Chapter 16.

CASH

Introduction

11.2 An offeror is required to provide cash in three circumstances (unless the Panel on Takeovers and Mergers (the 'Panel') agrees otherwise):

(a) if it makes a voluntary offer and it (and/or any of its concert parties) has acquired an interest in shares which in aggregate carry 10% or more of the voting rights in the target company in the 12 months prior to the start of (and during) the offer period, in which case the price payable for such shares under the offer must not be less than the highest price paid during this period[1];

(b) if it (and/or any of its concert parties) wants to acquire any interest in the target's shares during the offer period[2], in which case the price payable for such shares under the offer must be not less than the highest price paid during the offer period and, if the aggregate purchases of interests in shares amount to 10% or more of the voting rights in the target company, in the 12 months prior to the start of the offer period; or

(c) if it is required to make an offer under Rule 9 of the Code (the mandatory offer rule), in which case the price payable under the offer must be not less than the highest price paid during the offer period and within 12 months prior to its commencement (irrespective of the percentage purchased during this period)[3].

It should be noted that an offeror will not be able to purchase an interest in target shares if to do so would cause it to have to increase or revise its offer at a time when it is precluded from doing so (eg because it has made a 'no increase' statement or its offer has entered the final 14-day period ending on the last day it is able to become unconditional as to acceptances)[4].

A cash offer may also be required where, although there have been no purchases and no mandatory offer requirement has arisen, the Panel views it as necessary so that all shareholders of the same class are afforded equivalent treatment[5]. The Panel also has a discretion to dispense with the minimum price requirement, which it may exercise in certain circumstances[6].

An offeror may of course choose to offer cash as part of its offer consideration in circumstances where it is not otherwise required.

[1] Rule 11.1(a) of the Code. Note 1 on Rule 11.1 of the Code sets out the method of determining the price where the acquisition is of interests in shares rather than the shares themselves. Furthermore, where the consideration for an acquisition is securities, the acquisition will normally be deemed to be a purchase for cash unless the selling shareholder is required to hold the securities received until either the offer has lapsed or the offer consideration has been posted to accepting shareholders (Note 5 to Rule 11.1 of the Code).
[2] Rule 11.1(b) of the Code.
[3] Rule 9.5 of the Code. See further CHAPTER 6.
[4] See Rule 32.2 of the Code and Note 2 on Rule 32.1 of the Code.
[5] Rule 11.1(c) of the Code.

[6] For the factors that the Panel might take into account when considering an application for an adjusted price, see the Note on Rule 11.3 of the Code (for voluntary offers) and Note 3 on Rule 9.5 of the Code (for mandatory offers).

Source of funds

11.3 Cash may be provided from the offeror's existing cash resources[1], from existing or new debt financing[2] or, possibly, from the proceeds of an issue of new securities, either as a result of a cash underwriting of the shares being offered as consideration under the terms of the offer[3] or directly through an issue of new securities separately from the terms of the takeover offer itself[4].

[1] See paragraph 11.5.
[2] See paragraphs 11.6–11.13.
[3] See paragraphs 11.14–11.16.
[4] See paragraphs 11.17–11.20.

Cash confirmation

11.4 The Code requires that the announcement of a firm intention to make an offer should only be made after the most careful and responsible consideration and when the offeror has every reason to believe that it can and will continue to be able to implement its offer[1]. The Panel attaches great importance to this requirement as it considers that, if an offer subsequently has to be withdrawn, a false market in the shares of the target is likely to have been created and target shareholders may have been treated unfairly[2].

One manifestation of this principle is the requirement that, when an offer is in cash or includes an element of cash, an appropriate third party (usually the offeror's financial adviser)[3] must confirm that resources are available to the offeror which are sufficient to satisfy full acceptance of the offer (so-called 'cash confirmation')[4]. This confirmation is required to be included in the firm offer announcement and again in the offer document[5]. The offeror and its financial adviser must, therefore, be satisfied that the cash will be available before an offer announcement is made.

In the event that sufficient cash is not available to satisfy the consideration due to target shareholders under the offer when it becomes unconditional, the Panel can require the party which gave the cash confirmation to produce the cash itself. However, the cash-confirming party will not be expected to do so provided that, in giving the confirmation, it acted responsibly and took all reasonable steps to assure itself that the cash was available[6]. This will be a matter of judgement in each case. In making that judgement, a variety of factors will need to be taken into account by the person giving the cash confirmation, including the standing of the offeror, the extent and nature of that person's relationship with the offeror and the size of the offer. If, in the extremely rare event that the cash is not made available following the announcement of a firm intention to make an offer, the Panel Executive will investigate what steps were taken by any person giving the cash confirmation and whether that person acted responsibly and reasonably[7].

It follows that an offer cannot normally be made subject to a condition or pre-condition relating to financing, except in certain very limited circumstances[8].

1 See Rule 2.7(a) of the Code.
2 See General Principle 4.
3 The Panel will not usually regard another member in the same group as the offeror, or a person that is in the same group as one of the members of a consortium that is making the offer, as an appropriate third party to give a cash confirmation. See the Panel's Annual Report 2001 to 2002 at page 14.
4 In circumstances where a target shareholder has given an irrevocable legally binding and enforceable commitment not to accept the cash offer, or the cash alternative limb of an offer, the amount of cash to be cash confirmed can be reduced by an amount corresponding to the shares subject to that irrevocable.
5 See Rules 2.7(d) and 24.8 of the Code.
6 See the last sentence, in parenthesis, in Rule 2.7(d) of the Code.
7 See the Panel Annual Report 1990 to 1991 at page 8, which refers to an occasion where the Panel Executive ruled that the adviser concerned should pay the outstanding consideration due under the offer because he had not exercised adequate care in ensuring that cash would be available to the offeror.
8 See Rule 13.4(a) of the Code. See also Rule 13.4(b) and paragraph **11.17** in relation to cash offers financed by the issue of offeror securities, and Rule 13.4(c) and CHAPTER 5 in relation to the possibility of the Panel accepting a financing pre-condition in exceptional cases (eg where the likely period required to obtain any necessary material official authorisation or regulatory clearance makes it unreasonable for the offeror to maintain committed financing throughout the offer period).

Existing resources

11.5 Providing a cash confirmation will be relatively straightforward to the extent that the offeror is providing cash from its existing resources (ie without relying on new or existing debt facilities). In these circumstances, it often used to be felt sufficient for the financial adviser giving the cash confirmation to seek written confirmations from the offeror (and the offeror's bank(s)) that it had access to the requisite funds, and only in certain cases would the financial adviser also request some degree of control over the account in which those funds were held[1]. Practice has, however, become stricter in this area and a financial adviser will often now require the relevant sum to be put in a ring-fenced or escrow account over which it is able to exercise control in order to prevent the utilisation of those funds for any purpose other than the offer.

There remains the risk that the bank which provides the account in question might itself fail (a point brought sharply into focus by the 2008 financial crisis), leaving a different financial adviser who has provided the cash confirmation potentially exposed. This may be addressed in practice, at least from the financial adviser's standpoint, by having the same institution provide the account and the cash confirmation.

1 See, for example, Panel Statement 2001/2 (Corporate Resolve Plc/Focus Dynamics Plc).

Debt financing

'Certain funds'

11.6 If cash is to be provided by a new debt financing, the practical effect of the Code requirements is that the offeror must have a signed loan agreement (or so-called 'bid facility') in place by the time of its firm offer announcement, the terms of which are such that both the offeror and its financial adviser can be satisfied that the offeror will be able to draw down the funds needed to satisfy the full amount of the cash consideration required under the offer (so called 'certain funds')[1].

Given that an offer cannot normally be made subject to a condition or pre-condition relating to financing, the conditions precedent that are permissible in any such loan agreement are severely constrained. In practice, it would be usual to limit any conditions precedent (other than those directly linked to or matching the offer conditions) to ones which are fundamental to the lenders and which they cannot be reasonably expected to do without (eg the solvency of the offeror) or which are within the control of the offeror (eg documentary conditions precedent). In the case of the former, the financial adviser or other third party giving the cash confirmation will want to satisfy itself as to the continuing solvency of the offeror over the period in question. In the case of the latter, it will usually seek a direct commitment from the offeror that it will satisfy (or procure the satisfaction of) any such documentary conditions precedent.

1 See, for example, Panel Statement 1991/4 (Proposed offers by Luirc Corp for Merlin International Properties Limited) and Panel Statement 2001/2 (Corporate Resolve Plc/Focus Dynamics Plc), both instances where an offer was announced without a formal, binding agreement for the provision of funds in place and the offer was withdrawn or allowed to lapse because of insufficient funds. In both cases, the offeror's financial adviser was publicly criticised by the Panel for failing to discharge the duty imposed upon it by the Code in giving a cash confirmation.

11.7 Both the offeror and the third party giving the cash confirmation will wish to be satisfied that the necessary funds will be available for the full period that may be needed for the offer to become wholly unconditional and for the settlement in full of the cash consideration due under the terms of the offer once it becomes unconditional. The loan agreement will therefore include the concept of a so-called 'certain funds period', which will commence on the signing of the agreement and the release of the firm offer announcement and which will terminate after a sufficient period has been allowed for this purpose.

Where the takeover is to be effected by means of a contractual offer, the certain funds period will, typically, need to cover the period likely to be required for the offeror to reach the 90% level and, if still reliant on borrowing for this purpose, to implement the compulsory acquisition procedures[1].

Relevant time periods to consider in determining what is an appropriate 'certain funds period' in these circumstances, include the following:

(a) the offer document should normally be posted within 28 days of the announcement of a firm intention to make an offer[2];

(b) in order to implement the compulsory acquisition procedures, the offeror must have acquired or contracted to acquire not less than 90% of the target shares to which its offer relates (and 90% of the voting rights carried by the target shares) within three months of the last date on which its offer can be accepted or, where the offer is not one to which the Takeover Directive applies[3], within six months of the date of the offer if that period ends earlier[4]; and

(c) the obligation to pay the consideration to shareholders who have been given a compulsory acquisition notice will, assuming no objections have been lodged with the court, arise six weeks thereafter[5].

In practice, given that it is usual to keep an offer open indefinitely once it has been declared unconditional in all respects, the period allowed to satisfy the required 90% test may theoretically be indefinite in the case of an offer to which the Takeover Directive applies. A view therefore has to be taken on the certain funds period in such cases, and typical longstop dates in these circumstances are often set between six and nine months from the date on which the offer document is despatched.

Different considerations will apply in the case of a takeover which is to be effected by means of a scheme of arrangement, where the relevant time periods to consider will include the period for convening the necessary shareholder meeting(s) and for the various court procedures, including arranging the necessary court hearings[6]. In all cases, in determining an appropriate certain funds period, careful consideration also needs to be given to whether there are any specific conditions needed which may prove particularly time-consuming to satisfy. These may include, for example, certain merger control or other regulatory approvals, depending on the facts of any particular case.

1 See *CA 2006, sections 974–991* (including the obligations under *CA 2006, section 981* and, if applicable, *section 983*) and CHAPTER 14.
2 See Rule 30.1 of the Code.
3 See paragraph 1.6.
4 See *CA 2006, section 980(2)–(3)*.
5 See *CA 2006, section 981(6)*.
6 See *CA 2006, Part 26* and CHAPTER 12.

11.8 The nature of the offeror and the lender(s) to the offeror, and the financial adviser's familiarity with their financial credibility, will also have a bearing on the lengths to which the relevant adviser is required to go in order to satisfy itself that the necessary funds will be available. Accordingly, for example, where a financial adviser is acting for a newly created offeror, such as an 'off-the-shelf' overseas company, the Panel has taken the view that the only way in which the adviser can be sure that funds will be available is to have an irrevocable commitment from a third party (eg a bank) upon whom reliance can reasonably be placed at the time of the announcement of the offer[1].

1 See Panel Statement 1991/4 (Proposed offers by Luirc Cop for Merlin International Properties Limited). In the circumstances underlying Panel Statement 2001/2 (Corporate Resolve Plc/Focus Dynamics Plc), the Panel also referred to it being 'necessary as a minimum to have an irrevocable and effective commitment from a party upon whom reliance can reasonably be placed'.

11.9 Where an offeror wishes to use existing debt facilities, it will be necessary to determine what 'draw stops' there are and whether it would be necessary, or prudent, to obtain some form of relaxation from the existing lender(s) for the purposes of the offer. This may not, however, be practical because of timing or secrecy concerns. An alternative would be to check, if possible, that no event of default will arise, all relevant covenants and ratios will remain satisfied, no representations or warranties will be breached and acquiring the target group will not cause the loan to go into default. If this is not practically possible, it may be necessary to exclude the target's group from events of default, negative pledges and any other relevant restrictions in the offeror's existing facilities, for what is called a 'clean up' period following its offer, so that any problems can be sorted out without triggering, for example, a cross-default in the facilities. The practical difficulties of obtaining such relaxations may, however, mean that a specific bid facility needs to be put in place even though there may be sufficient headroom in the offeror's existing debt facilities.

Disclosure of financing terms

11.10 Any document relating to the financing of an offer needs to be made publicly available by the offeror by being published on a website by no later than 12 noon on the business day following its announcement of a firm intention to make an offer[1].

The offer document must also contain a detailed description of how the offer is to be financed and the source(s) of the finance, and details must be provided of the debt facilities or other instruments entered into in order to finance the offer and to refinance the existing debt or working capital facilities of the offeree company[2]. This applies irrespective of the nature of the takeover – ie irrespective of whether it is to be effected by way of a contractual offer or by way of a scheme of arrangement, and irrespective of whether the offer is a securities exchange offer or a 'cash only' offer[3].

The details required include, in particular, the amount, the repayment terms, interest rates (including any 'step up' or other variation), any security provided, a summary of key covenants, the names of the principal financing banks and, if applicable, details of any deadline for refinancing the facilities and the consequences of any failure to do so[4]. This level of detail is required irrespective of whether or not the offer is leveraged (ie where the offeror intends that payment of interest on, repayment of, or security for, any liability will depend to any significant extent on the business of the target)[5].

In a hostile or competitive situation, the offeror will not usually wish to disclose any additional debt financing capability that it may have available to it if it wishes to increase its offer (ie 'headroom'). The Code Committee has said that it understands that an offeror may be commercially disadvantaged if it was required to disclose such headroom, and accordingly it considers that any potential increase in a bid facility that has been agreed need not be disclosed in the offer document, nor included in the documents made publicly available[6]. In practice, any such agreement will often be set out in a separate agreement or side letter to facilitate its exclusion from disclosure.

Another commercially sensitive area is so-called 'market flex'. These provisions typically allow the lead arranger(s) of the debt financing to vary (or 'flex')

certain terms, within defined limits, in order to facilitate the syndication process[7]. The concern has been that, if the potential syndicatees know these limits in advance of syndication, they can negotiate better terms for themselves and thereby potentially increase the offeror's financing costs. In practice, the Panel Executive has been known to grant limited dispensations permitting the exclusion of market flex arrangements from the financing documents required to be published on a website following the announcement of a firm offer. However, these dispensations do not generally extend to the detailed description of how an offer is to be financed which is required to be included in the offer document. Accordingly, lead arranger(s) have in practice been given up to 28 days (being the maximum period normally allowed in which to publish the offer document[8]) in order to syndicate the debt without having to disclose any market flex provisions. If the debt is successfully syndicated in that time, the actual terms syndicated are disclosed in the offer document and the market flex arrangements cease to be relevant and do not need to be made public. If, however, the debt remains to be syndicated by that time, the market flex arrangements do then have to be described in the offer document and the full terms published on a website[9].

The Code Committee has also said that it understands that the structures by which equity may be provided to private equity offeror vehicles may be commercially sensitive, and accordingly it does not consider that such underlying equity financing arrangements need be disclosed in detail and that disclosure need only be made in broad terms[10].

1 See Rule 2.7(c)(xi) and Rule 26.2(b) of the Code.
2 Rule 24.3(f) of the Code.
3 See section 5(c)(ii) in Panel Statement 2010/22 (Review of certain aspects of the regulation of Takeover Bids) in relation to increasing transparency and improving the quality of disclosure. See also section 6(d) in each of PCP 2011/1 and RS 2011/1 in relation to offer financing and the changes made to the rules on disclosure of the financing of an offer. Previously, the view of the Panel had been that detailed information in relation to the financing of an offer was only likely to be relevant where non-assenting offeree shareholders could become minority shareholders in a company controlled by the offeror (so not in offers effected by way of scheme) or where offeree shareholders could become shareholders in the offeror (so not in 'cash only' offers).
4 Rule 24.3(f)(i)–(vii) of the Code. As described in paragraph 6.28 of PCP 2011/1, the Code Committee 'believes that, together with the disclosure of financial information required in respect of all offerors . . . this information will assist the reader in forming an analysis of the balance sheet and debt of the combined group following completion of the transaction'.
5 Prior to the changes made to the Code which came into effect on 19 September 2011, detailed disclosure of financing terms had only been required in relation to leveraged offers.
6 See paragraph 6.29 of PCP 2011/1.
7 See paragraph 11.13 in relation to debt syndication generally.
8 See Rule 24.1 of the Code.
9 See Panel Statement 2012/8 (Review of the 2011 Amendments to the Takeover Code), section 6.
10 See paragraph 6.30 of PCP 2011/1 and paragraphs 6.22–6.23 of RS 2011/1. For example, a statement of the respective amounts to be provided by a private equity sponsor's different underlying funds should suffice, without it being necessary to disclose the leverage within such funds or the split, categorisation or identity of the different partners or other underlying participants in the equity financing.

Financial assistance by target group

11.11 In leveraged offers, financial assistance considerations may also arise. Where an offeror is acquiring or proposing to acquire shares in a target that is a public company to which the *CA 2006* (or a former Companies Act) applies, it is not lawful for the public company target, or any company that is a UK incorporated subsidiary of that company, to give financial assistance directly or indirectly for the purpose of the acquisition before or at the same time as the acquisition takes place[1]. Examples of unlawful financial assistance would include any agreement by the target to lend money from the target group to the offeror for the purpose of servicing its acquisition finance (as distinct from working capital finance), and any agreement to provide guarantees or security from the target group for the purpose of supporting the offeror's acquisition financing[2].

It is also unlawful for a public company target, or any company that is a subsidiary of that company, to give any financial assistance after an acquisition of shares has taken place directly or indirectly for the purpose of reducing or discharging any liability incurred for the purpose of that acquisition, but only if the company in which the shares were acquired is a public company at the time the assistance is given[3]. Accordingly, provided the target company is re-registered as a private company following the acquisition and before any post-acquisition assistance is given, this prohibition will not apply.

1 *CA 2006, section 678(1)*. Given the definition of 'company' in *CA 2006, section1(1)*, it is clear that *section 678* does not prohibit a foreign subsidiary of a UK public company target from giving financial assistance for the acquisition of the target's shares (thus giving statutory effect to the decision in *Arab Bank Plc v Mercantile Holdings Ltd* [1994] Ch 71, [1994] 2 All ER 74). The laws applicable in the jurisdiction of the foreign subsidiary (eg as to corporate benefit and directors' duties) would, however, need to be considered in any given instance and it is important that the giving of any assistance by the subsidiary is not funded by the UK parent.
2 See *CA 2006, section 677*, for the meaning of 'financial assistance'.
3 *CA 2006, section 678(3)*.

11.12 Also in leveraged offers, the lending banks will usually be concerned to ensure that the offeror cannot declare its offer unconditional as to acceptances until it has reached the 90% threshold necessary to be able to implement the compulsory acquisition procedures and acquire 100% of the target's share capital[1]. One reason for this is that it would then be possible to obtain financial assistance from the target group, following the acquisition of 100%, without the need to consider the interests of minority shareholders and to guard against possible objections by them[2].

In certain circumstances, lending banks may be prepared to agree that the offeror can declare its offer unconditional as to acceptances once it has reached 75%, being the level at which it can procure the passing of any necessary special resolutions to re-register the target (and any other relevant company) as a private company so as to permit the giving of financial assistance[3]. The interests of minority shareholders will, however, need to be carefully considered in these circumstances and, in determining whether or not to approve the giving of financial assistance, the directors of the target (and any subsidiary in the target group involved in giving the assistance) will need to have regard to their fiduciary duty to promote the success of the company concerned.

The lending banks, and the offeror, will wish to satisfy themselves that there is no reasonable likelihood of a target shareholder or group of shareholders who have yet to accept the offer preventing the offeror from ultimately reaching 90% and being able to implement the compulsory acquisition procedures or, should that not prove possible, blocking any special resolution necessary to re-register the target (and any other relevant company) as a private company.

Depending on its terms, any side agreement or arrangement with the lending banks in connection with their approach to the offeror's ability to declare its offer unconditional as to acceptances may have to be included in the documents required to be published on a website following the announcement of a firm offer[4], in which case the details would also have to be disclosed in the offer document[5]. This applies whether or not the agreement or arrangement has been reduced to writing and, if it has not, a written memorandum would need to be created for disclosure purposes. This can be a sensitive area, particularly in hostile and/or competitive takeover situations.

1 See *CA 2006, sections 974–991.*
2 See CHAPTER 2.
3 See *CA 2006, section 97.*
4 See Rule 2.7(c)(iv) and Rule 26.2(e) of the Code.
5 Rule 24.3(d)(ix) of the Code.

Debt syndication

11.13 An offeror seeking to raise debt finance for a cash offer (or an offer involving a cash component) would normally appoint one or more primary lenders to commit to provide the required facility to implement the offer, in advance of the announcement of a firm intention to make an offer, and if necessary to seek further lenders to participate in the facility and take a share of their financing commitment (ie sub-participations) following the firm offer announcement.

The Code places particular emphasis on the vital importance of maintaining absolute secrecy before an announcement is made, and one circumstance in which an announcement is normally required is when negotiations or discussions relating to a possible offer are about to be extended to include more than a very restricted number of people[1].

In this context, the Panel Executive requires prior consultation before more than a total of six parties are approached about an offer or possible offer (the so-called 'rule of six'), and this includes potential providers of finance, whether debt or equity[2]. Where a party has been approached about the possibility of it providing finance to an offeror, and has declined the opportunity to do so, the Panel Executive may be prepared to treat that party as no longer counting towards the six parties who may be approached, provided it is not interested in securities of the offeror or offeree and does not have any other ongoing interest in the offeree[3]. Given these limitations, wider syndication of any debt financing required usually has to be conducted after the firm offer announcement.

Where an offeror or any of its advisers or primary lenders intend to provide non-public information about the offeror or the target to a potential finance provider which also holds (or may hold) shares in the target, it will be

important to ensure that effective information barriers have been established between its debt and equity departments so that any such information does not have to be made equally available to all target company shareholders, with further possible implications under the Code[4].

1 See Rules 2.1 and 2.2(e) of the Code.
2 See Practice Statement No 20 (Rule 2 – secrecy, possible offer announcements and pre-announcement responsibilities), at paragraph 8.2.
3 See Practice Statement No 20, at paragraph 8.4. Where one department of a multi-service financial organisation has declined an opportunity to provide finance and a separate department is interested in securities of the offeror or offeree, the Panel Executive will not normally treat the organisation as counting towards the six parties by virtue if its having been approached to provide finance, provided that the department which is interested in securities of the offeror or offeree is not aware of the approach to the department invited to provide finance.
4 See Practice Statement No 25 (debt syndication during offer periods), which describes the application of the Code to the syndication of debt financing following the announcement of a firm intention to make an offer. See also Rule 20.1 of the Code (equality of information to shareholders and persons with information rights) and Rule 16.1 of the Code (special deals with favourable conditions).

Cash underwriting

11.14 Where there is a share for share offer, an offeror may arrange for a third party (usually its financial adviser) to underwrite its issue of new shares in order to provide a full or partial cash alternative (known as a 'cash underwritten alternative' or, sometimes, a 'cash underpinning'). Under such an arrangement, the third party agrees with the offeror that it will make a separate offer to the target's shareholders to acquire the consideration shares they receive from the offeror at a fixed cash price. The third party may in turn arrange for sub-underwriters to take up all or some of the shares it agrees to underwrite. The price at which new shares of the offeror are underwritten will be at a discount to the then market price of the shares of the offeror. The offeror may therefore choose to top up the amount of cash offered to the target's shareholders out of its existing cash resources or, possibly, out of debt financing. A cash underwritten alternative will usually only be conditional on the offer being declared wholly unconditional.

Cash underwritten alternatives have become very uncommon in recent years. One reason for this is that the underwriting costs can be high relative to the costs of debt financing. This will particularly be the case in the context of hostile and/or competing bids where the offer timetable (and hence the underwriting period) is likely to be longer and more uncertain than for a recommended offer which is not competitive. Additional underwriting costs may also be incurred if an offeror wishes to revise its offer, which is likely to require a new underwriting if cash is still to be provided by this method. Furthermore, any change in market conditions between the time of the original underwriting and the offeror's decision to revise its offer may affect the offeror's ability to enter into a new underwriting on satisfactory terms.

From the underwriter's perspective, it is also worth noting that the scope for building a book in advance of an offer announcement is severely constrained by the Code requirements concerning secrecy, particularly the restriction on the number of people that can be made aware of a possible offer whilst it has

yet to be announced[1].

[1] See Rule 2.2(e) of the Code and paragraph 11.13. The restriction includes potential providers of finance, whether equity or debt.

Shutting off a cash underwritten alternative

11.15 In order not to discourage the provision of cash, where it is to be provided by means of a cash underwritten alternative, the normal Code rules requiring alternative offers to be kept open for a minimum period are relaxed in certain cases so as to reduce the underwriting cost involved. Accordingly, where the value of a cash underwritten alternative provided by a third party is, at the time of announcement, more than half the value of the offer, the alternative may be 'shut off' early (ie closed prior to the usual minimum 14 days after the offer becomes unconditional as to acceptances)[1] provided that:

(a) the offeror has given written notice to offeree company shareholders and persons with information rights that it reserves the right to close the alternative on a certain specified date; and

(b) that date is not less than 14 days after the date on which the written notice is posted[2].

In practice, in appropriate cases, notice is usually given in the offer document to the effect that the cash underwritten alternative will be closed on the date on which the offer is declared unconditional as to acceptances. This can act as an incentive for shareholders to accept early (otherwise they may lose the opportunity to take cash – but see paragraph 11.16). It also reduces both the amount of underwriting commission payable by the offeror and the period of exposure for the underwriter(s).

The procedure for acceptance of a cash underwritten alternative that is capable of being shut off early must be prominently stated in relevant documents and acceptance forms[3].

The ability to shut off a cash underwritten alternative early does not apply if it is the only source of cash needed to satisfy the mandatory offer requirements of Rule 9[4].

[1] See Rules 31.4 and 33.1 of the Code.
[2] Rule 33.2 of the Code. Notice under this Rule may not, however, be given between the time when a competing offer has been announced and the end of the resulting competitive situation.
[3] Rule 24.14 of the Code.
[4] See Note 2 on Rule 33.2 of the Code.

Reintroduction of cash for compulsory acquisition

11.16 Where cash has been provided by a cash underwritten alternative which has been shut off early, the offeror will nonetheless need to reintroduce a cash alternative if it exercises its 'squeeze-out' rights (or outstanding minority shareholders are entitled to exercise their sell-out rights) under the compulsory acquisition procedures in *CA 2006*[1]. This could require the offeror to pay holders of up to a further 10% of the target's shares in cash. In practice, the

reintroduction of a cash alternative in these circumstances is likely to have to come from the offeror's own resources (or, possibly, from debt financing) rather than a renewed underwriting.

Where a cash underwritten alternative is shut off early, a potential impasse can arise if share prices subsequently suffer a significant decline whilst the basic securities exchange offer remains open for acceptance and the offeror has still to reach 90%[2]. In these circumstances, offeree shareholders may be reluctant to accept the continuing securities exchange offer and wish to hold out for the reintroduction of a cash alternative in the compulsory acquisition phase (by which time, the required cash alternative, which will be pegged to the previous underwritten price, may be significantly more attractive than the value of the offeror's shares). However, this may in turn make it more difficult for the offeror to reach 90% and for the squeeze-out or sell-out rights requiring the re-introduction of the cash alternative to apply[3].

[1] See *CA 2006, section 981(4)–(5)* in relation to 'squeeze-out' and *section 985(4)–(5)* in relation to sell-out.
[2] As happened, for example, following the stock market crash on 19 October 1987 (so-called 'Black Monday').
[3] See, generally, *CA 2006, section 979* in relation to squeeze-out and *section 983* in relation to sell-out.

Raising cash through an issue of new securities

11.17 An offeror may, alternatively, consider financing all or part of a cash offer (or a cash alternative to a securities exchange offer) through an issue of new securities. In these circumstances, the offer may be made subject to any condition which is required, whether as a matter of law or regulatory requirement, in order for the offeror to validly issue such securities and to have them listed or admitted to trading. Conditions which will normally be accepted as necessary for this purpose include the passing of any resolution required to create or allot the new securities and/or to issue the new securities on a non pre-emptive basis (if relevant), and any necessary listing or admission to trading condition (where the new securities are to be admitted to listing or to trading on any investment exchange or market)[1].

The Panel Executive does not, however, consider it appropriate for an offer to be made conditional upon any placing or underwriting agreement in relation to the issue of the new securities becoming unconditional and/or not being terminated, on the basis that any such condition is not necessary as a matter of law or regulatory requirement for the new securities to be issued[2].

The Panel Executive also considers that it is the responsibility of the party giving the required cash confirmation in these circumstances[3], and also the offeror and its financial adviser if it is not the cash confirmer, to take all reasonable steps before the offer is announced to satisfy themselves that the issue of the new securities will be successful and that the offeror will have the necessary cash available to finance full acceptance of the offer[4].

The limitations on the conditions to which an offer may be subject (as compared to the conditions which placees or underwriters are likely to require in connection with an issue of new securities) means that, in practice, an offeror wishing to raise cash through an issue of new securities may first need

Chapter 17

MERGER CONTROL AND THE CODE

Charles Bankes and Stephen Wilkinson

Overview

INTRODUCTION

17.1 Merger control is a vital consideration in executing the takeover of a public company. The procedural complexity of merger control is such that this is the case even if the transaction apparently gives rise to no substantive competition issues. In contested takeovers, merger control offers fertile ground to those seeking to delay or frustrate the takeover or gain tactical advantage, particularly given the provisions of the City Code on Takeovers and Mergers (the 'Code') which require an offer to lapse if it is to be subject to a prolonged investigation. It also presents significant issues in structuring transactions where the timetable for securing the required clearances cannot be guaranteed to be achieved within the standard Code timetable for an offer.

This chapter discusses the particular difficulties which arise under the Code in relation to takeovers where merger control issues arise. CHAPTER 18 and CHAPTER 19 discuss the details of the UK and EU merger control regimes. At least one of these regimes will apply to the takeover of all but the smallest UK public companies listed in London[1]. Whilst in many cases the substantive merger control issues raised by a takeover will be critical to its success, those issues are not peculiar to the takeover of public companies and will, in any event, require expert handling. This chapter and CHAPTER 18 and CHAPTER 19 focus in particular on the procedural aspects of merger control and highlight those features of the UK and EU merger control regimes which can generate the most pressure on the successful execution of a public takeover.

[1] UK merger control will apply to the takeover of any company with a UK turnover of £70 million or more or which satisfies the share of supply test (see CHAPTER 19); EU merger control has higher turnover thresholds but, because its thresholds are based on worldwide and Community-wide turnover, it can apply even to a takeover of a company the UK turnover of which falls below the UK turnover threshold (see CHAPTER 18).

EU and UK regimes – mutual exclusivity

17.2 It is generally the case that the jurisdictions of the European Commission and the competition authorities of EU Member States are mutually exclusive[1]; that is to say a merger that falls within the jurisdiction of one falls outside the

jurisdiction of the other. A merger that falls within the jurisdiction of the European Commission will generally fall outside the jurisdiction of the UK authorities. The national competition authorities (the Competition and Markets Authority (CMA) in the case of the UK) will, however, have a role in the jurisdictional and substantive analysis of mergers by the European Commission as well as in cases falling under the domestic regime and should, therefore always be considered. A merger which does not fall within the jurisdiction of the European Commission may nevertheless require notification in a number of EU Member States other than the UK.

The starting point for considering the application of merger control to a takeover is to establish where jurisdiction lies by applying the rules and procedures for determining which regime applies. These are dealt with in CHAPTER 18 (in relation to the EU merger control regime) and CHAPTER 19 (in relation to the UK merger control regime).

[1] European Merger Regulation ('EUMR'), Article 21 provides that the European Commission shall have sole jurisdiction to take decisions under that Regulation and prohibits the application by Member States of national legislation on competition to transactions falling under the European Commission's jurisdiction. There is a similar prohibition, under EUMR, Article 4(5) in respect of concentrations which do not have a Community dimension but which are transferred to the European Commission's jurisdiction by virtue of a request by the bidder.

Other applicable regimes

17.3 An analysis of the potential application of merger control regimes outside the EU is beyond the scope of this book. However, it should be emphasised that a public takeover may well give rise to merger control issues in regimes other than those discussed in this chapter[1]. It should be noted that the influence of merger control and other relevant regulatory authorities in those other jurisdictions has become a significant factor in cross border mergers and acquisitions. There has been a substantial increase in the number of merger control regimes worldwide in the last decade and there are now at least 70 merger control regimes operating worldwide. Many of these regimes provide for mandatory filing when the relevant thresholds are met and prohibit closing before clearance is given. The filing and timetable requirements of these regimes vary enormously. A transaction with a US dimension may well require a filing under the Hart-Scott-Rodino regime. Takeovers of significant UK public companies with international operations may well fall for scrutiny by a number of authorities where the need to obtain clearances, etc may have implications under the Code in terms of the conditions and/or the timetable. It is therefore important that a jurisdictional analysis is carried out at an early stage and the procedural consequences are taken into account in planning a takeover as the filing and timetable requirements of these regimes vary enormously. Where a transaction may give rise to competition issues, or where it is unlikely to be recommended, the merger control preparation before launching a bid should go further and consider how best to overcome merger control concerns, wherever they might arise. The further discussion in this book is, however, limited to the EU and UK regimes.

[1] For example, merger clearance in the EU, Brazil, China and Australia were pre-conditions to Shell's offer for BG plc in April 2015.

MERGER CONTROL AND TIMETABLE ISSUES

17.4 A number of particular issues arise in relation to merger control as a result of the interaction between the Code timetable and the regulatory timetable. The European Commission and the CMA are both subject to statutory timetables for making merger control decisions. Those timetables must be taken into account when considering how to manage the merger control process in the context of a public offer. Both authorities have made it clear that they will not allow their scrutiny of a merger to be truncated by the requirements of the Code timetable. The timetables for merger control procedures are described in detail in CHAPTER 18 and CHAPTER 19 and are summarised in paragraphs 17.5 and 17.6.

EU merger control timetable

17.5 The key time limits for Phase 1 clearance under EU merger control are summarised in the following table:

Event	Timetable
Pre-notification discussions	Depending on the complexity of the issues raised, at least two to four weeks prior to the intended date of notification. In complex cases this period can be considerably longer
Notification	Form CO can be filed following a publicly announced intention to make an offer
Consideration of Form CO (Phase 1)	25 working days, extended to 35 working days if commitments offered or if request for referral made under EUMR, Article 9
Time limit to apply for review of a clearance decision or referral decision under EUMR, Article 9	Two months from date of publication/ notification to the interested party of the decision

UK merger control timetable

17.6 The key time limits and administrative time scales for Phase 1 clearance under UK merger control, excluding public interest cases, are summarised in the following table.

Event	Timetable
Pre-notification discussions	Depending on the complexity of the issues raised, at least two to four weeks prior to the intended date of notification. In complex cases this period can be considerably longer[1]

Event	Timetable
Consideration of a Merger Notice	Merger Notice cannot be filed until after announcement. The CMA can start its formal processes as soon as it is satisfied that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation. Statutory period for consideration is 40 working days, which can be extended by a further ten working days
Time limit to apply for review of a decision relating to a merger reference	Within four weeks of the date on which the applicant was notified, or the date of publication of the decision if earlier
Decision following a referral under ECMR, Article 4(4) or Article 9	45 working days from working day following the date of referral

[1] The CMA's notes on its timetable provide:

'For mergers governed by the City Code, the CMA does not envisage that the pre-notification timetable will raise significant difficulties in relation to the timing of public offers. Merger parties should however bear in mind the need to reconcile timing of submission of the Notice with the requirements of the City Code. If merger parties are seeking a decision by the first closing date of an offer (as defined in the City Code), the CMA will need to receive the Notice (following pre-notification) before the posting of the Offer Document. This will increase the likelihood of obtaining a Phase 1 decision by the first closing date. The CMA will take account of timing constraints relating to the City Code, or merger control regulation in other jurisdictions, when conducting its investigation and may, where the demands of the particular case and its existing caseload allow, seek to make its decision more quickly than the standard statutory timetable. The CMA cannot be bound by the first closing date however, and where it is not in a position to reach a decision by the first closing date, the consideration period under the City Code will need to be extended.'

Options available to the bidder

17.7 Where an offer falls within the jurisdiction of the European Commission, the CMA or some other overseas regulator it will be necessary for the bidder to consider how to structure the offer so as to accommodate the anticipated regulatory timetable. The principal options available to the bidder, which are considered further in paragraphs 17.8–17.13, are:

(a) to announce a possible offer which may allow the bidder to commence regulatory processes;
(b) to make an announcement of a firm intention to make an offer but with the posting of the offer document being subject to regulatory pre-conditions;
(c) to make an announcement of a firm intention to make an offer subject only to the mandatory non-waivable term required by Rule 12.1 of the Code that the offer is not referred to a Phase 2 CMA investigation or subjected to a Phase 2 investigation by the European Commission; or
(d) to make an announcement of a firm intention to make an offer subject to the term required by Rule 12.1 of the Code and to additional regulatory conditions.

The most appropriate option will depend on the circumstances of any particular offer and the options may be used in combination. A key consideration is whether the offer is to be recommended by the target board. In friendly situations, the parties have far greater flexibility to manoeuvre, even within the Code timetable. It is also more practical to implement a friendly takeover by way of a scheme of arrangement which in general provides far greater flexibility over the timetable than a contractual offer (see CHAPTER 12). In hostile situations, this flexibility is significantly reduced.

Possible offer announcement

17.8 Under Rule 2.4 of the Code, a bidder may make an announcement which raises or confirms the possibility that an offer might be made but which does not amount to the announcement of a firm intention to make an offer. The announcement of a firm intention to make an offer can only be made when the bidder has every reason to believe that it can and will continue to be able to implement the offer[1]. One advantage of making a possible offer announcement is that it may allow formal merger control procedures to be commenced. In particular, the CMA will treat an announcement by the offeror that it might make an offer as grounds for having jurisdiction to examine the offer (or refer it to Phase 2) as an offer that is in contemplation. Under the EUMR it is possible to notify a merger 'where they have publicly announced an intention to make a bid'. The European Commission is likely to consider carefully whether or not a Rule 2.4 possible offer announcement is sufficient to allow it to accept notification of an intended concentration. This may depend on the amount of detail about the proposed bid which is included in the possible offer announcement and the extent to which sufficient information is available to enable it to analyse the transaction thoroughly. The European Commission is more likely to accept notification if it is satisfied that the offer is likely to proceed and is not merely speculative.

[1] Rule 2.7 of the Code.

17.9 As noted above, the advantage of making a possible offer announcement is that it may allow merger control procedures to be started without committing a bidder to make a bid (or to do so on particular terms). However, this will be of limited benefit in practice. Once the announcement of the possible offer has been made, the potential bidder must within 28 days announce either a firm intention to make an offer (in which case it is committed to proceed with the offer subject to its terms and conditions), or that it does not intend to make an offer (in which case it is precluded from making an offer subject to certain exceptions)[1]. So in hostile situations, a deliberate announcement of a possible offer will only gain a maximum of a further 28 days in which to address the regulatory timetable. As discussed in CHAPTER 3, the Panel may allow the 28 day 'put up or shut up' period to be extended on application by the potential target company. It is possible therefore for the target which is supportive of the proposed deal to gain extra time by seeking 'put up or shut up' extensions[2]. In practice a target board will be unwilling to extend this period to address regulatory issues if the bidder has not actually committed at least to the principal terms of a possible offer as any specified price in a possible offer announcement will generally act as a floor to

the price at which an offer can subsequently be made[3].

[1] See CHAPTER 3.
[2] Harvard International plc first announced an approach from Chinese company Chengdu Geeya in September 2011 triggering a 'put up or shut up' period which was extended on application to the Panel by Harvard on eight separate occasions before a firm offer was announced in April 2012.
[3] Rule 2.5(a)(i) of the Code.

Pre-conditional offer announcements

17.10 As an alternative to making a possible offer announcement, a bidder can announce a firm intention to make an offer the posting of which is subject to pre-conditions. Pre-conditions are, except with consent of the Panel, confined to CMA or European Commission clearances or other official authorisations or regulatory clearances[1]. Thus, a pre-conditional offer announcement can be used to allow regulatory processes to be commenced without starting the Code timetable for an offer (as described in CHAPTER 4) which begins on the date on which the offer document is posted. It is clear that both the CMA and the European Commission will accept a pre-conditional announcement of a firm intention to make an offer as a basis upon which they can examine a bid. There are three important differences between a pre-conditional offer announcement under Rule 2.7 of the Code and a possible offer announcement under Rule 2.4 of the Code (whether or not the possible offer is subject to pre-conditions):

(a) first, in accordance with Rule 2.7, the pre-conditional offer announcement must set out in detail the terms on which the offer will be made;
(b) secondly, when a pre-conditional offer announcement is made, the offeror will be required to make the offer once the pre-conditions are satisfied; and
(c) thirdly, as the bidder is required to proceed with the offer once the conditions are satisfied, it must be in a position to do so and therefore, in practice, it must have financing in place at the date of the pre-conditional offer announcement.

A pre-conditional offer announcement is likely to represent an attractive alternative to a firm offer announcement (without pre-conditions) where it is necessary in order to trigger EU (or other overseas) merger control processes which would otherwise be unlikely to be completed within a normal offer timetable as any extension of this timetable would then rely on the offeree's consent (see paragraph 17.13) which might not be forthcoming if the offer is not recommended or subsequently ceases to be recommended because of a competing bid. The Panel must be consulted before any firm intention announcement which includes a pre-condition and will want to be convinced that the regulatory process cannot be completed within the standard Code timetable. As noted in paragraph 17.13 the Panel will adopt the same approach to materiality of pre-conditions as it does for conditions to the offer more generally. Whilst the need to complete the relevant regulatory processes within the Code timetable will drive the structuring of the offer, the cost of having finance in place from the point of announcement and for what may be

a significant period may deter certain bidders unless the Panel can be persuaded to allow a financing pre-condition which it has been reluctant to accept, at least historically.

[1] See Rule 13.3 of the Code.

Offers subject to mandatory term

17.11 Rule 12.1 of the Code requires that:

(a) Where an offer comes within the statutory provisions for possible reference by the CMA to Phase 2, it must be a term of the offer that it will lapse[1] if there is a reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later.
(b) Where an offer would give rise to a concentration with a Community dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that it will lapse if either:
    (i) the European Commission initiates Phase 2 proceedings; or
    (ii) following a referral by the European Commission under Article 9.1 to a competent authority in the United Kingdom, there is a subsequent reference by the CMA to Phase 2,

in either case before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later.

This mandatory term cannot be waived. Although it applies only up to the later of first closing or the offer going unconditional as to acceptances, in practice it makes it almost impossible for an offeror either to accept merger control risk or to keep the offer open whilst second stage merger control procedures are completed. The precise wording of the Rule 12.1 term will depend upon the outcome of the jurisdictional analysis. For example, if the bidder is confident that the transaction will not fall within the jurisdiction of the European Commission, there is no requirement to include requirements relating to Phase 2 European Commission proceedings. If, however, the jurisdictional analysis is not complete at the time of publication of a Rule 2.7 announcement, it will be necessary to include the Rule 12.1 term in the alternative. There is, however, a risk that a bid could be referred to Phase 2 by the CMA or that the European Commission could initiate proceedings after the offeror had both declared its offer unconditional as to acceptances and the first closing date had passed. For this reason it is standard practice, as described in paragraph 17.13, for the offeror to include merger control conditions covering competition clearances at all times up to the time when the offer is declared unconditional in all respects.

[1] Note to Rule 12.1 of the Code emphasises that lapsing means not only that the Offer will cease to be capable of further acceptances but also that shareholders and the Offeror will thereafter cease to be bound by prior acceptances.

17.12 Where an offer lapses, the bidder and persons acting in concert with the bidder will normally be restricted from making a further offer for 12 months from the date of lapse[1]. However, where a previous offer period has ended

because the offer has been referred to Phase 2 by the CMA or the European Commission has initiated proceedings but the bid is subsequently cleared, the Panel will normally grant consent for a new offer being made within 21 days of the clearance[2]. Paragraphs **5.42–5.50** discuss the lapse of an offer in these circumstances and the restrictions on making a new offer.

1 Rule 35.1 of the Code.
2 Paragraph (b) of the Note on Rule 35.2 of the Code.

Offer subject to regulatory conditions

17.13 As noted in paragraph **17.11**, when an offer is announced which is not subject to pre-conditions, it is usual for the offer to be subject to regulatory conditions as well as the mandatory terms in relation to UK and EU merger control which need to be included pursuant to Rule 12.1 of the Code. The inclusion of these additional regulatory conditions is expressly permitted by Rule 12.1(c) of the Code. Paragraphs **5.42–5.50** discuss merger control terms, conditions and pre-conditions. In particular, it should be noted that:

(a) Unlike other conditions, merger control conditions can be expressed in subjective terms and a regulatory issue in the UK or EU need not be of 'material significance' to justify regulatory conditions being invoked to lapse an offer.
(b) Additional regulatory conditions may not be included in a mandatory bid (see also CHAPTER 6).
(c) Where regulatory decisions are delayed so that it is not likely to be known, as at Day 39 after the offer document is posted, whether there is to be a reference to Phase 2 by the CMA or the European Commission is to initiate proceedings, then the offer timetable will normally be extended provided that the offeree consents to do this. This means that Day 39 (the last date for target announcements of material new information), Day 46 (the last date for the bidder to revise the terms of its offer) and Day 60 (the last date for the offer to be declared unconditional as to acceptances) will be extended. Effectively, the timetable is frozen at Day 37 and commences on the second day following the relevant regulatory announcement[1].
(d) Waiver of the usual rule that 12 months must elapse before a new offer is made may be given where it is likely to prove or has proved impossible to obtain material regulatory clearances within the offer timetable. This provision is in addition to the provision referred to in paragraph **17.12** which applies where the offer has lapsed pursuant to the mandatory term included pursuant to Rule 12.1 of the Code.

1 See paragraph **4.13**.

17.14 In relation to offers where it is foreseeable that the relevant competition authorities will have concerns regarding the effect on competition of the merger, and that conditions are likely to be attached to any clearance decision, the parties may wish to specify the nature or extent of any conditions that they would be willing to accept as being clearance on satisfactory terms. Such matters are often dealt with in a side letter between the offeror and the board of the target. A willingness to agree to conditional clearance may be significant

in terms of persuading the board of the target to recommend the offer. Any such undertaking between the target board and the offeror may have to be disclosed to the Panel if the bidder seeks to rely on a condition to the offer which it is permitted to include under Rule 12.1(c) of the Code. Moreover, as a general principle, the Code requires that an offeror should include in its offer announcement or offer document, details of all conditions to which the offer is subject[1] and details of any agreements or arrangements to which the offeror is party, which relate to the circumstances in which it may seek to invoke a pre-condition, or a condition to its offer and the consequences of doing so[2]. The type of side letter described above falls within this disclosure obligation. However, the Panel has indicated[3] that it may be willing to grant a dispensation from this disclosure obligation in relation to side letters setting out the position of the parties on merger control conditioned clearance to address concerns that disclosure of any concessions that the offeror was willing to make would prejudice its negotiating position with the relevant regulator. In such cases, the Panel may be willing to grant a dispensation if the target and its advisers confirm to the Panel in writing that they believe that disclosure would be likely to prejudice negotiations with a relevant regulatory authority to an extent which is material in the context of the offer.

1 Rule 2.7(c)(iii) of the Code.
2 Rule 2.7(c)(iv) of the Code.
3 RS 2004/4.

Code issues in the context of an appeal to the Competition Appeal Tribunal

17.15 Where an offer appears to raise real competition issues but has nevertheless been cleared by the CMA at Phase 1 there may remain an element of merger control risk until the expiry of the period during which appeals may be brought under *EA 2002, section 120*[1] by interested third parties. That risk will need to be taken into account when considering declaring an offer unconditional as to acceptances or wholly unconditional. It is likely that, in most cases where these circumstances arise, the Panel will be willing either to grant an extension to the Code requirement that an offer must be declared unconditional as to acceptances within 60 days of the posting of the offer document[2] or to freeze the Code timetable, perhaps so as to treat the second day after the expiry of the period for making appeals as Day 39[3].

1 This period is four weeks from the publication of the decision.
2 Rule 31.6 of the Code; it is expected that such an extension would be sufficient for the period within which an appeal must be made to expire before an obligation under the Code to declare the offer unconditional as to acceptances arises.
3 See paragraphs **4.13**, **5.46** and **17.13**.

STRATEGIC DOCUMENTS AND PUBLIC STATEMENTS

17.16 Those responsible for conceiving and planning the acquisitions of public companies should assume, from the outset, that any strategy documents relating to the transaction may be seen by the competition authorities. Those authorities have a general interest in understanding the motives of the parties to a merger and are becoming increasingly persistent in their demands to see

all commercial documents which inform their decisions. Under both the EU and UK merger control regimes there is a general requirement that strategic documents prepared for the board or senior management relating to a merger should be provided as part of a merger filing. As a general proposition great care is needed in relation to any suggestion that, following the acquisition, there will be scope to raise prices or lessen efforts to innovate. Furthermore, there can be no certainty that disclosure will be limited to merger-related documents; other documents relating to market definition and market shares or dealings with customers may subsequently be required as part of the investigation.

There can be a tension between those who wish to advocate strongly the commercial benefits of a merger, and therefore want to place emphasis on any element of market power that might arise as a result of the merger, and those tasked with obtaining merger control clearances. Infelicitous wording in either public or private documents can give rise to real difficulties in front of the merger control authorities. It is strongly recommended that, from the conception of a takeover plan to the completion of the public explanation of the transaction and receipt of clearance, care is taken to ensure that all explanations are consistent with the explanation given to the merger control authorities. It is advisable for competition advisers to see all public statements describing the markets in which the bidder and target operate or stating the rationale for the transaction before they are published or promulgated and all papers to be put before the board in relation to the transaction before they are finalised.

BUYING SHARES IN THE MARKET

17.17 It is sometimes the case that before receipt of merger clearance, a bidder may wish to buy shares of the target in the market. Stakebuilding is discussed in detail in CHAPTER 7. This does raise certain merger control issues. If the transaction is one to which the EUMR applies, then it is important that nothing is done which may amount to a breach of the prohibition on implementing the transaction before clearance[1]. Care needs to be taken even below the level at which an offeror would be required to make a mandatory offer pursuant to Rule 9 of the Code. The acquisition of a sizeable minority shareholding can amount to an acquisition of decisive influence for EUMR purposes, depending on the dispersion of the remaining shares and on past attendance and voting patterns at previous shareholders meetings (see paragraph 18.3). As a rule of thumb, in the absence of other factors (such as the acquisition of shares by concert parties) it is unlikely that a shareholding below 10% of issued share capital would give rise to decisive influence. The situation is less clear in relation to shareholdings of between 10% and 20% of issued share capital and if remaining shareholdings are known to be widely dispersed, more careful consideration may be required of the question of whether a filing is necessary. For any shareholding above 20% of issued share capital it would be prudent to consider the dispersion of remaining shares and historic attendance and voting at shareholders' meetings in order to rule out the requirement for a merger filing. In any event, if such stakebuilding is a prelude to making an offer, it would be unwise to exercise shareholder rights in such

a way that, when the offer is notified to the European Commission, the question is raised whether the prohibition on implementing a concentration has been breached.

By way of an example of gun-jumping in this context, in July 2014, the EU Commission imposed a fine of €20 million on Marine Harvest for acquiring a 48.5% stake in its competitor Morpol (in advance of the acquisition of the remaining shares via a public bid) prior to notifying the transaction and receiving clearance from the Commission.

[1] See paragraphs 18.55–18.56.

17.18 There is no prohibition under UK law from implementing the transaction without a merger control clearance[1]. It should be noted that the threshold for a relevant merger situation is likely to arise at 25% or below, which in most cases is below that for control under the EUMR. Therefore, an offeror who acquires 25% or more but subsequently does not proceed with a bid, may find itself with a residual UK merger control problem. This will be the case whether or not the offer is a concentration with a Community dimension. The most high profile example of this is part of the long-running attempt by Ryanair to acquire control of Aer Lingus. It launched its initial bid in 2006. By 2008 it had built a stake of just over 29% in Aer Lingus. Its 2007 offer for the outstanding share capital was referred to Phase 2 by the European Commission and blocked in late 2007. Ryanair appealed but was not successful in the General Court. In 2010, after the deadline for appeal to the Court of Justice had expired, the OFT started to investigate the acquisition of the 29% stake under UK merger control. That acquisition was referred to the Competition Commission in 2012 and in March 2014 the Competition Commission ordered Ryanair to reduce its stake to 5%. Finally, in the context of a merger which falls within the jurisdiction of the UK merger control authorities, and in particular such a merger which does give rise to real competition issues, the acquisition of a significant stake in the market may be seen by the CMA as a provocative act and one which may increase the chances of a reference being made.

[1] For example, the offer by iSoft for Torex, which was the subject of the IBA Health litigation (*IBA Health Ltd v Office of Fair Trading* [2003] CAT 27, [2003] All ER (D) 77 (Dec)), was completed after the initial OFT decision had been set aside and before a further determinative decision was available. In that case the OFT required undertakings under *EA 2002, section 71*. See CHAPTER 19.

INFLUENCING THE MERGER CONTROL PROCESS

Conduct of a regulatory investigation

17.19 In a recommended bid, the target company will wish to co-operate with the offeror in order to facilitate the merger clearance process. A target company is generally precluded from entering into any 'offer-related arrangements' save for those expressly permitted by Rule 21.2(b). The permitted exceptions include a commitment to provide information or assistance for the purposes of obtaining any official authorisation or regulatory clearance. It is therefore not unusual for the offeror and the board of the target to agree that

the parties will co-operate in seeking clearances and responding to requests for information from any relevant competition authority. However, in hostile bids, such co-operation cannot be expected. The European Commission and the CMA will in such cases contact the target to obtain any information that is required for the purposes of the assessment of the merger. Whilst the target may have no wish to facilitate the merger clearance process, it may not (without shareholder consent) take any action which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on the offer on its merits[1]. However, in the context of a merger investigation, the Panel will not treat action by the target as being frustrating if it puts forward a position on market definition or on the conditions for competition in a market that is affected by the offeror, provided that the arguments put forward by the target are substantiated[2]. This is not entirely straightforward as the target in such cases may need to ensure that the arguments it put forward do not also weaken the position of other more welcome suitors. Moreover, the directors of the Target must be mindful of their duty to obtain the best price in the case of a contested bid process if they have concluded that a takeover is in the best interest of the target.

1 Rule 21.1 of the Code.

2 See paragraphs 10.107–10.109 and Panel Statement 1989/20 (B.A.T. Industries Plc). In this case, B.A.T. and Farmers (an indirect subsidiary) participated in a US regulatory process, intervened in constitutional proceedings and also engaged in extensive lobbying. Hoylake argued that B.A.T. had sought to frustrate its offer through lobbying, encouraging the various US commissioners to block Hoylake's offer and by intervening in Hoylake's legal actions against the US insurance commissioners. The Panel disagreed. In relation to administrative proceedings, the Panel took the view that it would be 'very slow to characterise conduct in regulatory proceedings which are controlled by the regulator as being frustrating action'.

Lobbying and indirect influence

17.20 Given the potential importance of the outcome of the merger control process to an offer it is not surprising that the parties will seek any method of influencing the outcome. Historically there has been perceived to be an element of political influence in the decision-making process, certainly for the most high-profile mergers. More recently both the European Commission and the CMA have sought to emphasise their unwillingness either to take extraneous factors into account or to be susceptible to political pressure. The task of exercising indirect influence has therefore never been harder. For example, a telephone call from an ambassador or government minister to the Commissioner with responsibilities for competition, or to the chairman of the CMA's board is likely to be counterproductive. It is generally true that there are rather more people, including those in public life, who think that they can influence the outcome of a merger control process than is actually the case.

17.21 Given the current attitude of regulators to outside pressure, any lobbying campaign in support of a merger control process must satisfy two objectives. First, it must not operate so as to indicate to the authorities that the applicants for clearance are seeking to influence the process or concerned about clearance, other than through the presentation of relevant data and argument. Secondly, the messages that it seeks to promote must be focused on the consequences of the proposed transaction for competition, or at least upon the customer benefits likely to be generated. Those messages must be complementary to the key arguments being promoted by those seeking merger clearance. If those two objectives can be met in a timely manner then, and only then, will a lobbying campaign be worthwhile.

17.22 The views of third parties are given a degree of importance by the merger control authorities and can influence their thinking. As discussed in CHAPTER 18 and CHAPTER 19, the authorities will generally be interested in the views of both customers and competitors of the parties to a merger and will place particular emphasis on the views of customers. Therefore an important objective for any lobbying campaign will be to educate customers and suppliers about the benefits (or lack of anti-competitive effects) of a merger and then persuade them to make representations. This can include both individual customers and their trade bodies or representatives. Such a campaign will be of most value if representations are perceived to be spontaneous, rather than orchestrated. Furthermore, given the practice of both the European Commission and the CMA of contacting important customers, it can be important to contact customers as early in the process as confidentiality constraints permit. A secondary objective of a lobbying campaign may be to generate informed third-party comment, particularly in the press, of a type likely to inform and influence the merger control authorities. This can, however, be a difficult objective, given the uncontrollable nature of the media. Where there are likely to be effects of a merger, such as redundancies, which are likely to give rise to a hostile reaction from important stakeholders, it is important to seek to limit such reaction, particularly in relation to those stakeholders whose natural forum is the press. Trade unions and, to a lesser extent, constituency Members of Parliament, understand sufficiently the merger control process to be able to tailor their public comment so as to influence the merger control process. Lobbying in the context of a public offer is, inevitably, a risky practice, particularly where the arguments being presented to the competition authorities are complex or carefully nuanced. In those circumstances any lobbying process must be carefully controlled; if control is not possible, careful consideration is needed as to the value of such a campaign.

Merger control as a defensive tactic

17.23 Given the complexities of the merger control process, both in the EU and UK jurisdictions, as well as in other jurisdictions, it inevitably offers fertile grounds for those seeking to frustrate an offer. This is further enhanced by the terms of Rule 12 of the Code, which mean that an offer needs only to fail the Phase 1 scrutiny to be required to lapse. The competition authorities are generally willing to consider relevant arguments put to them by any third party. The target is in a good position to talk authoritatively about the conditions of competition in the relevant market. Thus it is well placed to sow seeds of doubt about the arguments advanced by those seeking early clearance. However, there is no doubt that the authorities do take into account the commercial position of those presenting arguments to them[1]. Prior to the commencement of the *EA 2002*, a number of cases under UK merger control were referred to the Competition Commission for reasons other than the effect on competition. Examples include concerns about the acquisition of potentially important companies by foreign investors or highly geared vehicles. The

immediate potential for use of such arguments appears to be less; but it remains to be seen how willing Secretaries of State are to exercise their powers to add to the list of public interest criteria.

[1] As discussed in paragraph 17.19, a target company which considers an offer to its shareholders unwelcome will always need to ensure that it complies with the prohibition on frustrating action. This is discussed further in CHAPTER 10. The Panel has historically taken the view that the lobbying of the competition authorities by the target company with a view to encouraging a reference to the Competition Commission or the opening of a Phase 2 procedure by the European Commission does not fall within this prohibition. See, for example, the comments of the Panel in Panel Statement 1989/20 (B.A.T. Industries Plc) in relation to the offer by Hoylake Investments Limited for the entire issued share capital of B.A.T. Industries plc.

17.24 Lobbying is as much an issue for a reluctant offeree, or potential competitive bidder, as it is for an offeror. As explained above, such lobbying is likely to be most effective if focused on bringing before the competition authorities factors which may result in them looking less favourably on the transaction. Finally, the IBA Health case[1] is an illustration of the potential for appealing clearance decisions in the context of takeovers. In its judgment the Competition Appeal Tribunal places no emphasis on the fact that IBA had a strong incentive for wanting the takeover to fail[2].

[1] *IBA Health Ltd v Office of Fair Trading* [2003] CAT 27, [2003] All ER (D) 77 (Dec).

[2] The question may arise as to whether the initiation of proceedings by a target company without shareholder approval before the Competition Appeal Tribunal in respect of a decision by the CMA not to refer an unwanted offer would amount to frustrating action. See CHAPTER 10 for a discussion of frustrating action. It is not clear what position the Panel might take were such an action to be initiated. The Panel has generally declared itself to be reluctant to interfere with the taking of legal action. The nature of the judicial review process and the speed with which the Competition Appeal Tribunal is able to deal with merger related actions may also influence the Panel's approach. However, the Panel's decision in relation to Minorco's offer for Consolidated Gold Fields (Consgold) (see Panel Statement 1989/7(Consolidated Gold Fields Plc)) illustrates the potential limits to this position. The facts behind this decision are complex. Minorco's first offer for Consgold was referred to the Monopolies and Mergers Commission (now the reporting panel of the CMA), but ultimately cleared. Following that clearance, it posted a second offer. In the USA, Newmont (a company in which Consgold held 49% but which the Panel considered to be acting independently of Consgold) obtained a preliminary injunction preventing Minorco taking control of Consgold. An action by Newmont and Consgold in the US seeking a similar injunction on anti-trust grounds was refused and Consgold appealed. Minorco complained to the Panel that, by starting and continuing the US procedures without shareholder consent, Consgold was in breach of what was then General Principle 7 of the Code (frustrating action). The Panel upheld Minorco's complaint. In reaching its decision the Panel noted its general reluctance to interfere in any party's right to take action before the Court; but that the conduct of proceedings could have the effect of being potentially gravely damaging to the orderly conduct of bids. They noted that Minorco's offer had been the subject of extensive scrutiny by both the US Justice Department and the Committee on Foreign Investment in the United States, neither of which had decided to commence proceedings. They concluded that shareholders should be entitled, in those circumstances, to decide whether proceedings should take place.

Chapter 18

EU MERGER CONTROL REGIME

Morven Hadden

Overview

INTRODUCTION

18.1 This chapter describes the application of the EU merger control regime to public takeovers focusing in particular on procedural aspects of the regime, which may have an impact on the planning and timetable of a public takeover. It considers the jurisdictional and substantive tests applied under the EU merger control regime that are most relevant to public takeovers, before describing the notification and investigation procedure and the appeals process.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[1] (the 'EU Merger Regulation') came into force in May 2004. In essence, the EU Merger Regulation applies to mergers, acquisitions and the formation of certain types of joint venture. In order to establish whether these transactions are subject to the requirements of the EU Merger Regulation, regard is had to the level of turnover generated by the relevant businesses worldwide and within the EU. Where the relevant turnover thresholds are satisfied, the European Commission has exclusive jurisdiction to review the transaction (subject to certain limited exceptions) and the competition authorities of Member States are precluded from applying their domestic competition legislation to the transaction. The EU Merger Regulation also applies to mergers under the cross-border merger regulations[2].

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24 29.01.2004 p1.

[2] *Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974)*, which implement the Directive on Cross-Border Mergers of Limited Liability Companies (2005/56/EC). In *Re International Game Technology plc; Re GTECH S.P.A.* [2015] EWHC 717 (Ch), [2015] Bus LR 844, [2015] 2 BCLC 45, the High Court confirmed that it could exercise its discretion to make a conditional order approving completion of a cross-border merger under these regulations subject to it being agreed that all conditions in the merger agreement had been satisfied or waived and the merger agreement not having been terminated. The conditions in that case included conditions relating to competition and regulatory clearances.

JURISDICTION

Definition of a concentration

18.2 The EU Merger Regulation applies to 'concentrations' which have a 'community dimension'. The definition of a concentration is set out in EU Merger Regulation, Article 3, and covers mergers[1], acquisitions of control (either on a sole or joint basis)[2] and the creation of joint ventures performing on a lasting basis all the functions of an autonomous economic entity[3]. Control for these purposes is determined by the ability to exercise 'decisive influence' over an undertaking[4] and the persons exercising control for these purposes may be the direct holders of the rights in question or those persons having the power to exercise the rights[5]. In 2008, the European Commission published a notice providing guidance on the various elements of the jurisdictional tests that apply under the EU Merger Regulation and which clarifies the concepts of merger and of acquisition of control either on a sole or joint basis (the 'Jurisdictional Notice')[6].

1 EU Merger Regulation, Article 3(1)(a).
2 EU Merger Regulation, Article 3(1)(b).
3 EU Merger Regulation, Article 3(4). Whilst this concept is unlikely to be relevant in the context of a public takeover, the concept encompasses joint ventures which operate on a self-standing basis in the market without being wholly reliant on their parents for either supply of raw materials or sales of products or services.
4 EU Merger Regulation, Article 3(2).
5 EU Merger Regulation, Article 3(3).
6 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C95 16.04.2008 p1. The Jurisdictional Notice replaced previous European Commission notices on the concept of concentration, the concept of full-function joint ventures, the concept of undertakings concerned and the calculation of turnover.

18.3 Almost all UK public takeovers will take the form of an acquisition of control. This will include transactions which are described as 'mergers' as these transactions will usually involve both entities involved in the merger continuing to exist with one acquiring control of the other or a new holding company acquiring control of both[1]. For the purposes of the EU Merger Regulation, control is defined as the possibility of exercising decisive influence on an undertaking on the basis of rights, contracts or any other means. Decisive influence in this context means influence over the strategic commercial behaviour of an undertaking and goes beyond shareholder rights relating to protection of financial investments. Where a public bid is made by a single offeror for the whole of the issued share capital of a public listed company, this will clearly constitute a concentration with one undertaking acquiring sole control over the previously listed entity.

In the context of stakebuilding it is also important to note that control can be acquired for the purposes of the EU Merger Regulation at levels of stakebuilding below the 30% threshold, at which the City Code on Takeovers and Mergers (the 'Code') would require a public offer to be made. For example, a concentration will exist where the acquisition of a minority shareholding is accompanied by the acquisition of specific legal rights allowing the minority shareholder to determine strategic commercial behaviour (such as a right to appoint more than half of the board)[2]. The Jurisdictional Notice highlights the possibility of stakebuilding leading to an acquisition of control. Recital 20 of

the EU Merger Regulation indicates that a single concentration can arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration covers all such acquisitions[3]. In addition, a stakebuilder could be treated as having acquired control on a *de facto* basis where the stake acquired is such that it is highly likely to allow the holder to achieve a majority at the shareholder's meeting given that the remaining shares are widely held. The European Commission in such cases has considered whether the small shareholders would be sufficiently likely to be present or represented at the shareholders' meeting and will consider the attendance of such shareholders and patterns of voting at shareholders' meetings in previous years. In cases in which the number of shareholders attending the shareholders' meeting means that the minority shareholder has a stable majority of the votes cast at the meeting, the minority shareholder would be considered to have sole control[4].

In July 2014, the European Commission launched a consultation on improvements to the EU merger control regime, including proposals to extend the merger control regime to non-controlling minority shareholdings[5]. The proposals are intended to enable the European Commission to review structural links that fall short of control. The consultation document cites the minority shareholding held by Ryanair in its competitor Aer Lingus as an example of a structural link that could be subject to review under these proposals. In that case, Ryanair had acquired a significant but non-controlling stake in Aer Lingus. It then launched a bid for the remaining shares. Ryanair notified its proposed acquisition of control of Aer Lingus to the European Commission in 2006, and in June the European Commission prohibited the acquisition of control of Aer Lingus by Ryanair. However, Ryanair retained a minority stake of 29.4% in Aer Lingus and the European Commission took the view (which was subsequently upheld by the General Court[6]) that it could not require the divestiture of that stake[7], notwithstanding the view of Aer Lingus that Ryanair's minority stake would have significant negative effects between the two carriers.

The consultation notes that Austria, Germany and the UK have national merger control rules that also give them competence to review structural links falling short of outright control, as do a number of countries outside of the EU. Whilst there is some scope for the European Commission to use its anti-trust powers under Articles 101 or 102 of the Treaty on the Functioning of the European Union ('TFEU') to intervene against anti-competitive structural links, this is in practice limited and the European Commission considers that it is not clear whether this would apply to links built up by the acquisition of a series of shares via the stock exchange. Extending the scope of the EU Merger Regulation to cover non-controlling structural links would address this, but the consultation also recognises that the number of cases creating problematic structural links is likely to be limited, and that as a result, applying all of the procedural rules of the current EU merger control regime (in particular, mandatory prior-notification) may not be appropriate.

The European Commission's White Paper proposes what it describes as a 'targeted transparency system' for transactions that create a 'competitively significant link'. This would be the case where there is a *prima facie* competitive relationship between the acquirer's and the target's activities,

either because they are active in the same markets or sectors or they are active in vertically related markets. The system would be triggered only where the minority shareholding and the rights attaching to it enable the acquirer to influence materially the commercial policy of the target and therefore of its commercial behaviour or grant it access to commercially sensitive information. Above a certain level, the shareholding itself might result in a change in the acquirer's financial incentives in a way that would lead it to adjust its own behaviour in the market place. The European Commission proposes that in order to provide legal certainty, only a transaction meeting the following criteria would fall within the definition of a competitively significant link: acquisitions of a minority shareholding in a competitive or vertically related company; the competitive link would be considered significant if the shareholding is (i) around 20% or (ii) between 5% and around 20% but is accompanied by additional factors such as rights which give the acquirer a *de facto* blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target. Where these criteria are met, the parties would be required to self-assess whether the transaction creates a competitively significant link and, if so, submit an information notice. The European Commission would then consider whether to investigate the transaction, and the Member States would decide whether to make a referral request. The White Paper suggests that in such circumstances, a waiting period may be imposed (of 15 working days) during which the parties would not be able to close the transaction. The White Paper also proposes that the European Commission be free to investigate a transaction, whether or not it has been implemented, within a limited period of time following the information notice (four to six months). These proposals could, if adopted, have potentially significant implications for investors acquiring significant stakes in listed companies that fall short of the thresholds that would be regarded as giving rise to decisive influence, and which would not trigger a mandatory bid under Rule 9 of the Code. Control for the purposes of the EU Merger Regulation includes the acquisition of joint control by two or more persons. Situations of joint control may arise in the context of an offer where the offeror proposes to enter into a shareholders' agreement with a significant minority shareholder following completion of the offer or where the offer is made by a consortium. Joint control for the purposes of the EU Merger Regulation is characterised by deadlock, where each of the shareholders has equality of voting rights or has veto rights over matters relating to the strategic commercial behaviour of the target company. In the absence of equality of voting rights, veto rights over matters such as the budget, business plan, appointment of management, and investments (going beyond normal financial protection) are likely to give rise to joint control. Depending on the markets in which the target company operates, there may be other factors over which a veto right would be sufficiently important to influence the strategic commercial behaviour of the target company (eg, in industries in which technology is highly important, a veto right over decisions relating to the technologies to be used by the joint venture or its subsidiaries may be a factor indicating joint control)[8].

Joint control may also be demonstrated in the absence of specific veto rights where minority shareholders jointly exercise their voting rights in such a way as to control the target company. This can result from a legally binding agreement relating to the exercise of voting rights, or it may be established on

a *de facto* basis, such as where the shareholders have a strong common interest which will lead them to agree on the manner in which their shareholder rights will be exercised[9].

Consortium bids need careful analysis to determine whether the transaction involves an acquisition of joint control of the target by the consortium members, an acquisition of sole control of the target by the vehicle used for the acquisition, or, in cases in which the assets of the target are to be divided between the consortium members, a number of separate concentrations in which each consortium member acquires sole control of the part of the target's business that it will own following division of the business[10].

Looking at the issue of acquisition of control from the perspective of the acquirer, control held by commercial companies can be attributed to their exclusive shareholder, their majority shareholder or to those jointly controlling the companies since these companies comply in any event with the decisions of those shareholders. A controlling shareholding which is held by different entities in a group is normally attributed to the undertaking exercising control over the different formal holders of the rights[11]. The Jurisdictional Notice clarifies how the European Commission will approach the application of these principles to acquisitions of control by investment funds[12]. Although each case must be examined on its individual facts, control is normally exercised by the investment company which has set up the fund as the fund itself is typically a mere investment vehicle. The investment company usually exercises control by means of the organisational structure (by controlling the general partner of fund partnerships, or by contractual arrangements, such as advisory agreements or a combination of both). This may be the case even if the investment company itself does not own the company acting as a general partner, but their shares are held by natural persons or by a trust. If the general partner does not have its own resources and personnel for the management of the portfolio companies, but only constitutes a vehicle whose acts are in fact performed by persons linked to the investment company pursuant to contractual arrangements, such as advisory agreements, with the investment company, then the investment company is likely to have indirect control within the meaning of the EU Merger Regulation.

Not all acquisitions of shares will be deemed to give rise to concentrations. EU Merger Regulation, Article 3(5) provides that a concentration shall not be deemed to arise where securities are acquired by credit institutions, other financial institutions or insurance companies as financial investments in the normal course of their activities. Provided that these securities are held on a temporary basis with a view to reselling them within a period of one year, and that the financial institutions in question do not exercise the voting rights acquired in respect of those securities in such a way as to determine the competitive behaviour of the target company, acquisitions of this nature will not be caught by the EU Merger Regulation. This provision, which is intended to protect market makers, underwriters and others, is also important in relation to investments in public companies made by investment funds[13].

The Jurisdictional Notice also clarifies that the merger of a dual listed company into a single entity is not a concentration[14] although the creation of a dual

listed entity may be a concentration[15].

1 Examples of 'mergers' involving an acquisition of control include *Case Comp/M.1846 Glaxo Wellcome/SmithKline Beecham, 08.05.2000* and *Case Comp/M.1972 Granada/Compass, 29.06.2000*.

2 For example, in *Case IV/M.258, CCIE/GTE, 25.09.1992*, CCIE's shareholding gave it no more than 19% of the voting rights in EDIL with the balance being held by other investors and management. CCIE had a permanent seat on EDIL's board and could appoint the chairman and CEO. The CCIE director's prior written consent was required for all significant decisions. The other investors together had only one seat on the board. CCIE was considered to have control of EDIL.

3 Jurisdictional Notice, paragraph 48.

4 Jurisdictional Notice, paragraph 59. In *Case IV/M.754 Anglo American Corporation/Lonrho, 16.12.1996*, the European Commission investigated the acquisition by Anglo American of a 24.13% interest in Lonrho. Taken together with shares held by associated companies of Anglo American, the shareholding in Lonrho attributed to Anglo American was 27.47% and this was considered sufficient for Anglo American to control Lonrho for the purposes of the original EC Merger Regulation as this would have been sufficient to command consistently more than 50% of the votes cast at shareholders' meetings over the previous three years. The shareholding held by Anglo American would have amounted to a majority of votes cast in each shareholder's meeting, with the exception of one annual general meeting. The analysis of voting patterns showed that the number of votes cast at the general meetings represented less than 55% of the share capital, except at one meeting where a contentious vote on the appointment of Mr R W Rowland as President on Lonrho had attracted 63% of the share capital. Anglo American argued that the test of influence of a shareholder should be measured against its ability to carry resolutions on contentious matters and that the voting on the resolution to appoint Mr Rowland should be used as the appropriate benchmark. However, the European Commission decided that this was an exceptional resolution, and could not be taken as a guide for future voting patterns. The European Commission noted that the resolution was not relevant to the issue of control as it did not concern a commercial issue or the appointment of a director (the role of President being an honorary post). Also voting on the resolution had followed the recommendation of the board. Similarly in *Case IV/M.343 Société Générale de Belgique/Générale de Banque, 03.08.1993*, the European Commission decided that an increase in shareholding from 20.94% to 25.96% in the stake in Générale de Banque held by Société Générale de Belgique was sufficient to give it decisive influence as the remaining shares were widely dispersed amongst small investors and the public and an analysis of past shareholders' meetings showed that these were not well attended. The 20.94% shareholding meant that Société Générale accounted for between 43.02% and 47.68% of votes cast at the previous three annual general meetings of Générale de Banque, which would not have been sufficient for Société Générale to have had decisive influence over Générale de Banque. However, a projection of future voting patterns showed that the increased shareholding would give Société Générale 56.62% of votes cast. The projection assumed that all shareholders with a shareholding of at least 0.06% cast their votes and then considered the number of shareholders with a shareholding of less than 0.06% that would be required to vote in order for Société Générale's shareholding to amount to less than 50% of votes cast. For this to happen, shareholders each having less than 0.06% of issued shares but together having more than 900,000 shares would need to cast their votes. At the annual general meetings of Générale de Banque in 1990 to 1993, the number of shares represented by such small shareholders that had been voted had never exceeded 200,000 shares. In Case Comp/M.5932 News Corp/BSkyB. the European Commission reviewed the acquisition by News Corp of the shares in BSkyB that it did not already own and considered whether News Corp's existing 39.14% stake had already given it control over BSkyB. The European Commission noted that the voting rights attached to the shareholding had been restricted to 37.19%. These voting rights did not confer sole control over BSkyB as it would not have the majority of votes as shareholders' meetings (based on an analysis of attendance rates at Annual General Meetings of BSkyB for the past four years). In addition, News Corp did hold any special rights attached to its shareholding. Of the 14 directors on the BSkyB board of directors (which took its decisions by simple majority) only four were affiliated with News Corp and those directors did not have executive positions.

5 See European Commission press release IP/14/801 of 9 July 2014 and White Paper 'Towards more effective EU merger control', COM(2014) 449 final.

6 *AER Lingus Group plc v EC Commission (Ryanair Holdings plc, intervening): T-411/07* [2012] ECR II-3691, [2011] 4 CMLR 358.

7 The minority stake was reviewed by the UK competition authorities and on 28 August 2013, the Competition Commission announced its finding that the minority stake gave rise to a substantial lessening of competition and that is intended to require Ryanair to sell down its stake to 5%. On 23 September 2013, Ryanair made an application to the Competition Appeal Tribunal challenging the Competition Commission's findings. That challenge was rejected by the Competition Appeal Tribunal (see *Ryanair Holdings Plc v Competition Commission* [2014] CAT 3, [2014] All ER (D) 306 (Mar)) and also by the Court of Appeal (see *Ryanair Holdings Plc v Competition and Markets Authority* [2015] EWCA Civ 83, [2015] All ER (D) 138 (Feb)). Following the bid by IAG for Aer Lingus in 2015, Ryanair alleged that there had been a material change of circumstance that meant that the remedy proposed by the Competition Commission was no longer appropriate. The Competition and Markets Authority (which took over the functions of the Competition Commission in April 2014) found that there had not been a material change of circumstance in June 2015 and issued an order requiring Ryanair to sell down its stake. Ryanair unsuccessfully challenged that finding (see *Case No 1239/4/12/15 Ryanair Holdings Plc v Competition and Markets Authority*).

8 Jurisdictional Notice, paragraphs 65–73.

9 Jurisdictional Notice, paragraphs 74–80.

10 See, for example, the acquisition of Scottish & Newcastle plc by Carlsberg and Heineken (*Cases Comp/M.4999 Heineken/Scottish & Newcastle Assets* and *Comp/M.4952 Carlsberg/Scottish & Newcastle Assets*).

11 Jurisdictional Notice, paragraph 13.

12 Jurisdictional Notice, paragraphs 14–15.

13 Jurisdictional Notice, paragraphs 111–114.

14 Jurisdictional Notice, paragraph 51.

15 Jurisdictional Notice, paragraph 10.

Identifying the 'undertakings concerned'

18.4 In order to determine whether a concentration has a Community dimension and falls within the ambit of the EU Merger Regulation, it is necessary to determine the turnover of the 'undertakings concerned'. Whilst in many cases, identifying the undertakings concerned – namely, the parties to the transaction – is a straightforward exercise the use of increasingly complex acquisition structures means that in some instances it is necessary to look behind the acquisition vehicle to identify the undertakings concerned.

The Jurisdictional Notice provides guidance in identifying the undertakings concerned in different types of acquisition structure. Thus, in the case of a merger, where previously independent companies come together to create a new legal entity, the undertakings concerned are each of the merging entities[1]. Where one entity acquires sole control of another (which would be the usual situation in the context of a takeover), the undertakings concerned will generally be the acquirer and the target[2]. In the context of an offer, the offeror and the target would generally be the undertakings concerned.

In many instances an offer will be made through a group subsidiary. In such cases, the undertakings concerned are the target company and the acquiring subsidiary. However, as explained in paragraphs 18.7–18.8, when calculating the turnover of the acquiring subsidiary, regard is had to the turnover of the whole of the group to which it belongs[3].

The situation becomes slightly more complex when acquisitions are made by a number of parties. Where two or more parties acquire joint control of a pre-existing public company, the undertakings concerned are each of the companies acquiring joint control and the target[4]. However, where the acquisition is made through an acquisition vehicle of some sort (as is the case

in consortium bids), identifying the undertakings concerned is less straightforward. The essential question is whether the acquisition vehicle is itself an undertaking concerned, or whether the companies controlling the acquisition vehicle should each be regarded as separate undertakings concerned and the acquisition vehicle ignored[5]. The European Commission's starting point is to consider the company making the bid to be the undertaking concerned. However, it will lift the corporate veil and look directly to the companies controlling the acquisition vehicle where that vehicle is essentially a shell company set up for the purposes of holding the shares in acquired entities but without any other business activity of its own. In such cases, the undertakings concerned are each of the companies that control the shell company and the target[6]. By contrast where the acquisition is made by a joint venture that has sufficient financial and other resources to be considered a business in its own right, the European Commission will generally consider the joint venture to be an undertaking concerned (rather than its parent companies) along with the target[7].

Consortium bids may create additional complications where the consortium members intend to divide the business or assets of the target between themselves. In such cases, the European Commission will consider whether the transaction involves the acquisition of joint control of the target by the consortium members, or whether it is more appropriate to consider the transaction as a series of separate concentrations in relation to which each consortium member acquires sole control over the assets that it will acquire on the division of the target business. The key issue is the duration of the period prior to the division of the business. The European Commission takes the view that consortium bids leading to a temporary acquisition of joint control of the target by the consortium members with a view solely to 'immediate' partition of the assets of the target between them should be regarded as a series of separate concentrations. In such cases the undertakings concerned will be the consortium member and the business that it will acquire on division of the target[8]. For these purposes, there must be a pre-existing plan providing for the division of the assets and the division must take place with a limited period following completion of the bid[9].

1 Jurisdictional Notice, paragraph 132.
2 Jurisdictional Notice, paragraph 134. However, the vendor is not an undertaking concerned and its turnover is irrelevant in determining whether or not a concentration has a Community dimension (Jurisdictional Notice, paragraph 136).
3 Jurisdictional Notice, paragraph 135.
4 Jurisdictional Notice, paragraph 140.
5 This question may be determinative when considering whether the turnover thresholds outlined at paragraph 18.5 are satisfied, since in order to have a Community dimension, each of at least two undertakings concerned must have turnover of above a specified amount derived within the EU.
6 In *Case IV/M.102 TNT/Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post, 02.12.1991*, the European Commission investigated the acquisition of joint control of a joint venture ('JVC') by TNT and a separate joint venture (GD NET BV) owned by five postal administrations. The European Commission looked through GD NET BV and treated each of the five postal administrations as being undertakings concerned along with TNT. The European Commission considered that GD NET BV was a vehicle set up for the purposes of the acquisition to enable the postal administrations to act as one and to facilitate decision-making among the parent companies. In addition, the structure ensured that TNT would not be able to exercise sole control over JVC if the postal authorities were unable to reach a unified position on any decision. Jurisdictional Notice, paragraphs 145–147.
7 Jurisdictional Notice, paragraph 146.

8 Jurisdictional Notice, paragraphs 148–150. This reflects the intention that a concentration should result in a lasting change of control. In consortium bids the joint control is for a temporary period.
9 Although the European Commission may be prepared to accept that the actual division takes place some months after the completion of the consortium bid, if, for example, some internal restructuring of the acquired business were required, it would be necessary to show that steps were to be taken immediately following completion to give effect to such division within a short timeframe (Jurisdictional Notice, paragraph 32).

Community dimension: the thresholds

18.5 There are two sets of thresholds for determining whether the European Commission has jurisdiction over a merger. First, under the EU Merger Regulation, a concentration has a 'Community dimension'[1] (and therefore falls within the European Commission's jurisdiction) where:

(a) the combined aggregate worldwide turnover of all of the undertakings concerned is more than EUR 5,000 million; and
(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million; unless
(c) each of the undertakings concerned achieves at least two-thirds of its aggregate Community-wide turnover in one and the same Member State[2].

A concentration that does not satisfy these criteria will nevertheless have a 'Community dimension' if the second set of thresholds is exceeded, where:

(a) the combined aggregate world-wide turnover of all the undertakings concerned is more than EUR 2,500 million;
(b) in each of at least three Member States the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million; unless
(e) each of the undertakings concerned achieves at least two thirds of its aggregate Community-wide turnover in one and the same Member State[3].

In order to apply these jurisdictional thresholds it is necessary to identify the turnover of the relevant entities (which may differ from amounts listed as revenue in the accounts of the entities in question) and identify the geographic area to which this turnover should be attributed (ie whether the turnover is generated within the EU or in a particular Member State). Each of these issues is discussed in more detail in paragraphs 18.7–18.14.

1 Following the entry into force of TFEU, references in EU legislation to the 'Community' should be read as references to the EU.
2 EU Merger Regulation, Article 1(2).
3 EU Merger Regulation, Article 1(3).