



Burgess Salmon
Guide to public
takeovers in
the UK



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1. Introduction

This guide provides a general overview of how public takeovers are conducted and regulated in the UK. It is essential reading for anyone who is contemplating a public takeover in the UK.

2. The regulatory framework

An overview of the regulatory regime

The conduct of takeovers and mergers of UK public companies (and, in certain cases, private companies) is regulated by the City Code on Takeovers and Mergers (the "**City Code**"). The City Code is issued and administered by the Panel on Takeovers and Mergers (the "**Panel**").

The City Code consists of six general principles and 38 detailed rules. The general principles underpin the Panel's approach to all issues. One of the most fundamental principles is that all shareholders must be treated equally.

Which companies are subject to the City Code?

The City Code applies to all offers for companies which have their registered offices in the UK, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market (e.g. the Main Market of the London Stock Exchange) or a multilateral trading facility (e.g. AIM) in the UK or on any stock exchange in the Channel Islands or the Isle of Man.

It also applies to offers for unquoted public companies which have their registered offices in the UK, the Channel Islands or the Isle of Man and which are considered by the Panel to have their place of central management and control in one of those jurisdictions.

The City Code does not apply to private companies which have their registered offices in the UK, the Channel Islands or the Isle of Man unless (i) there has been some public trading or marketing of their shares in the previous ten years and (ii) the Panel considers that their place of central management and control is in the UK, the Channel Islands or the Isle of Man. The City Code does not apply to offers for open-ended investment companies.

General principles under the City Code

The six general principles are as follows:

- All holders of the securities of a target company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.

- The holders of the securities of a target company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the target company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.
- The board of a target company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.
- False markets must not be created in the securities of the target company, of the bidder or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.
- A bidder must announce a bid only after ensuring that it can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.
- A target company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

3. What are the key differences between public takeovers and private sales?

There are fundamental differences between a public takeover and a private sale of a company in the UK. Some of the key differences include:

Approach to representations, warranties and indemnities: In short, bidders should not expect any general contractual representations, warranties or indemnities on public takeovers.

Level of due diligence: There are no set rules regarding the approach to be taken to due diligence on public takeovers and practice varies considerably. However, as a general rule, due diligence is often conducted at a more high-level compared to private sales. On public takeovers, target companies will, unsurprisingly, prefer a quick due diligence process and make arguments to support this. In particular, target companies will typically point to the fact that, under the City Code, they will be required to provide any bona fide bidder or potential bidder with the same due diligence information that it has given to any other bidder. As this rule applies even if the other potential bidder is unwelcome, target companies are often very wary of engaging in detailed due diligence. Whatever level of due diligence is undertaken, it is essential that the due diligence is complete before the bidder formally announces its bid, since the opportunities to withdraw after having announced are extremely limited.

Exclusivity arrangements and break fees: The City Code prohibits "offer-related arrangements". This includes exclusivity arrangements and break fees payable by the target. There are limited exceptions to this general prohibition. Section 7 contains further details.

Conditionality: While the City Code permits bidders to include conditions or pre-conditions, an offer must not normally be subject to conditions or pre-conditions which depend solely on subjective judgements by the directors of the bidder or the target company, or the fulfilment of which is in their control. Importantly, the City Code contains constraints on the ability of bidders to invoke conditions and pre-conditions. In particular, a bidder may only do so if the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the bidder in the context of the offer. While no "material adverse change" conditions are often included in announcements and offer documents, the Panel has confirmed that, for a bidder to invoke a material adverse change condition, the bidder must demonstrate to the Panel that circumstances have arisen affecting the target which could not have reasonably been foreseen at the time of the announcement of the offer and which are of an entirely exceptional nature – something of the kind which would frustrate a legal contract. This is a very high test. Bidders should be very cautious about their ability to invoke conditions and pre-conditions. For reasons explained below in relation to the Panel's approach to cash confirmed bids, financing conditions are not a feature of public takeovers in the UK.

Cash needs to be fully committed: Where an offer is for cash, or includes cash, the financial adviser to the bidder will have to confirm in the formal offer announcement and the offer document that the bidder has sufficient funds to satisfy in full the acceptance of the offer. This is typically referred to as the "cash confirmation" exercise. As such, the bidder will need to have appropriate arrangements in place to finance the offer before it formally announces it. Where bidders do not intend to finance an offer exclusively from existing cash resources, a facility providing certain funds will need to be available before the formal offer announcement is made.

Equality of treatment: An essential requirement of the City Code is that all holders of securities of a target company of the same class must be afforded equivalent treatment. This principle manifests itself in a number of different ways, including a requirement for (i) all information to be made equally available to all shareholders; (ii) comparable offers to be made for each class of equity share capital; and (iii) no special arrangements to be made with any particular target shareholders.

Once formally announced, bidders are committed: The announcement of a firm intention to make an offer (commonly referred to as a "Rule 2.7 announcement") is a significant event and will commit the bidder to proceed with the offer and to post its offer documentation within 28 days. The City Code provides that such an

announcement should only be made when the bidder has every reason to believe that it can and will continue to be able to implement the offer. In some situations, a "possible offer" announcement may need to be made prior to an announcement of a firm intention to make an announcement - for instance, in response to market rumour or speculation. Where possible offer announcements are made, they are usually very brief. Please also see section 4 below for further details regarding announcement obligations in connection with public takeovers.

4. Announcement obligations

Requirement for secrecy

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

When is an announcement required?

An announcement will be required:

- when a firm intention to make an offer has been communicated to the target board by or on behalf of a bidder;
- when an acquisition of an interest in shares gives rise to an obligation to make a mandatory bid under Rule 9 of the City Code (see section 6);
- when, following an approach by or on behalf of a potential bidder to the target board, the target company is the subject of rumour and speculation or there is an untoward movement in its share price;
- when, after a potential bidder first actively considers an offer but before an approach has been made to the target board, the target company is the subject of rumour and speculation or there is an untoward movement in the target company's share price and there are reasonable grounds for concluding that it is the potential bidder's actions (whether through inadequate security or otherwise) which have led to the situation; or
- if negotiations or discussions in connection with a possible offer are about to be extended to include more than a very restricted number of people (other than those who need to know in the parties concerned and their immediate advisers). The Panel has advised that it should be consulted prior to more than a total of six external parties being approached about an offer or possible offer including, for example, potential providers of finance.

See *City Code: When is an announcement required?* for further details.

Who is responsible for making the announcement?

Before it has approached the target board, the potential bidder is responsible for making any announcement required under the City Code. Once an approach has been made to the target board, the target is responsible for making any announcement. However, if an approach is rejected by the target board, the announcement obligation will typically revert back to the potential bidder.

Can we seek a dispensation?

Yes. In certain cases, the Panel may grant a dispensation from the requirement for an announcement to be made where it is satisfied that the potential bidder has ceased actively to consider making an offer for the target company. If such a dispensation is granted, the potential bidder will be subject to a number of restrictions for six months. For instance, it may not announce a firm intention to make an offer or possible offer for the target company for six months. In addition, the potential bidder must not within three months of the dispensation having been granted, actively consider making an offer for the target company, make an approach to the board of the target company or acquire an interest in shares in the target company.

However, if such a dispensation is not granted, there is nothing a bidder can do to prevent a target company from making an announcement if required by the City Code. If a target company is required to announce that it has received an approach from a potential bidder, it will also need to name each other potential bidder with which it is in talks or from which an approach has been received (and not unequivocally rejected).

Consequences of an announcement

Firm intention to make an offer (Rule 2.7 announcement): As noted above, the announcement of a firm intention to make an offer is a significant event and will commit the bidder to proceed with the offer and to post its offer documentation within 28 days.

Possible offer announcement: Although a possible offer announcement does not commit a bidder to make an offer, it will trigger an automatic 28 day period in which the potential bidder must either announce a firm intention to make an offer in accordance with Rule 2.7 or publicly withdraw its interest (known as the "put up or shut up" deadline). This deadline can be extended, but only at the request of the target company and with the consent of the Panel.

The "put up or shut put" deadline will not apply, or will cease to apply, to a potential bidder if another bidder has already announced, or subsequently announces, a firm intention to make an offer for the target company.

If, at or before the expiry of the "put up or shut up" period, the bidder withdraws its interest, it will normally be prevented from making an offer for the target company for six months.

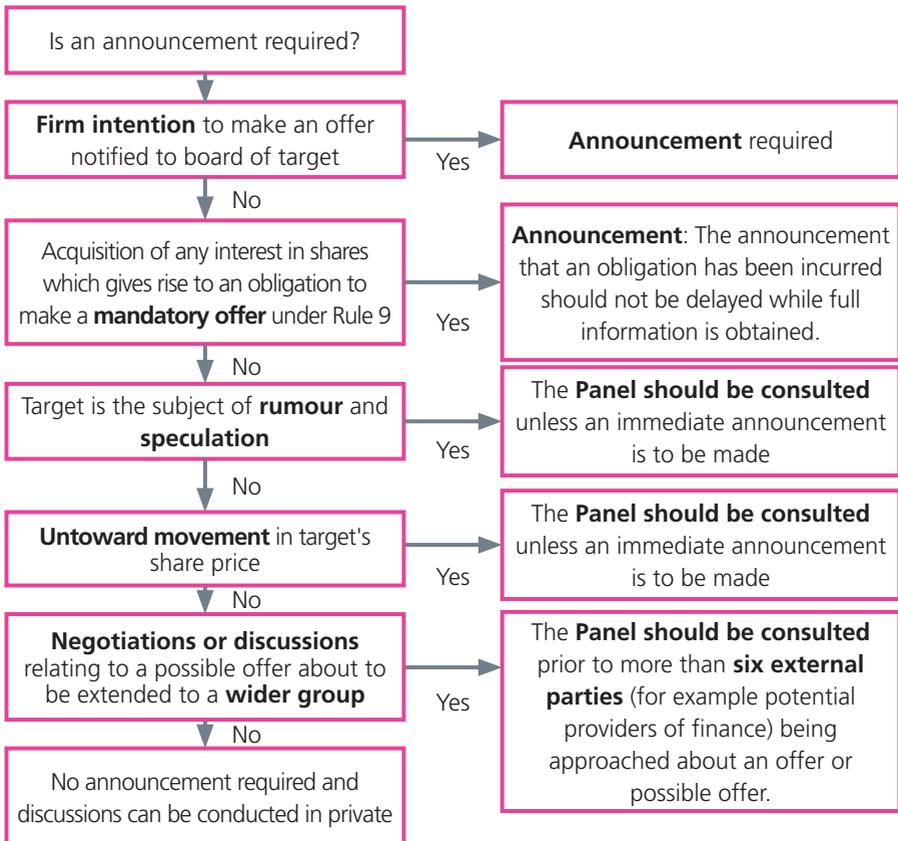
See *City Code: "Put up or shut up"* flowchart for further information.

Bidders should also be aware that if they include within a possible offer announcement specific terms on which an offer may be made (e.g. by stating that, if an offer is made, it would be for a price in excess of a certain level or be all cash), then the bidder is likely to be held to those terms if it does proceed to make an offer.

No intention to bid: An announcement that a person does not intend to make an offer for a company will trigger certain restrictions under the City Code for a period of six months. These include a restriction on announcing an offer or possible offer for the target company. The restrictions apply to the person making the no intention to bid statement and any person who acted in concert with them.

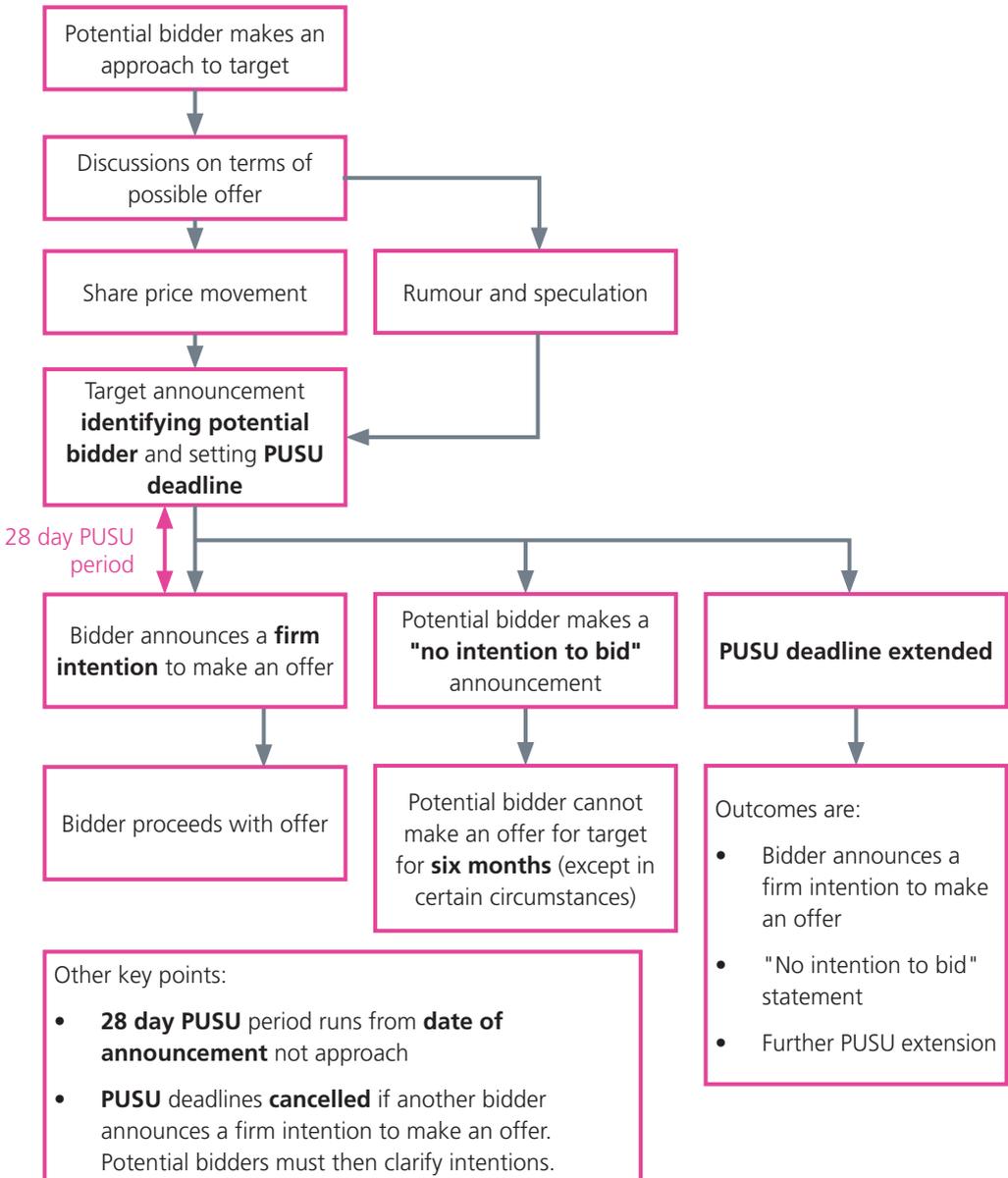
City Code: When is an announcement required?

This flowchart will help companies and their advisers to determine whether an announcement is required under the City Code:



City Code: "Put up or shut up" flowchart

This flowchart will help companies and their advisers work with the "put up or shut up" (PUSU) regime



5. Offer structures and timetables

Contractual takeover offers and schemes of arrangement

Public takeovers in the UK are implemented by either a contractual takeover offer or a scheme of arrangement.

Under a contractual takeover offer, the bidder makes a general offer to all target shareholders. Shareholders are sent an offer document containing information on the bid and the bidder. The bidder must secure acceptances over shares representing more than 50% of the target's voting share capital to declare the offer unconditional. Acceptances over shares representing 90% of the target's voting share capital are required to squeeze out the minority (and thereby enable the bidder to acquire all of the target's voting share capital). Given that bidders typically aspire to acquire 100% of the voting rights in a target company, it is therefore usual for the acceptance condition to be set at 90% (rather than 50%), but for the bidder to have the option to reduce this threshold to shares carrying over 50% of the voting rights. Please see below for further details regarding the minority squeeze-out mechanism.

A scheme of arrangement is a statutory mechanism which is an alternative to a contractual offer. It is a formal arrangement between the target company and its shareholders, which is governed by the Companies Act 2006. A scheme of arrangement must be approved both by the shareholders of the target company and the High Court. In particular, a scheme of arrangement requires approval from shareholders who constitute a majority in number of each class of shareholders who are subject to the scheme of arrangement and who are voting at the meeting. This majority must also represent at least 75% in number of those shares which are voted.

The main advantage of a scheme of arrangement is that, if successful, it will bind all shareholders (regardless of whether, or in what way, they voted). However, due to the High Court's involvement, schemes of arrangement are less flexible structures than contractual takeover offers.

Timetables

The timetable for a public takeover will depend on whether it is structured as a contractual takeover offer or a scheme of arrangement. See page 11 for an indicative timetable for a contractual takeover offer and page 12 for an indicative timetable for a scheme of arrangement.

Minority squeeze-out mechanism

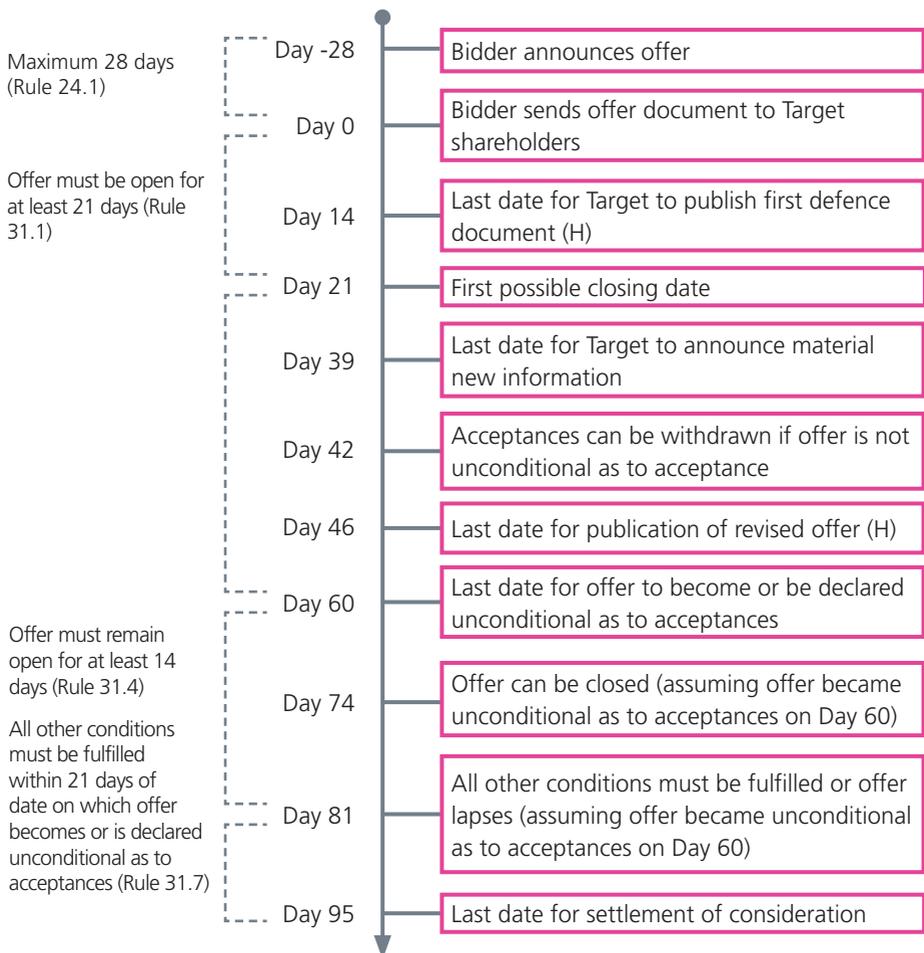
Under the Companies Act 2006, bidders making a contractual takeover offer have the right to acquire compulsorily the shares of minority shareholders if they have acquired, or unconditionally contracted to acquire, both 90% of "the shares to which the offer relates" (i.e. the shares which were not held by the bidder at the time the offer was

made) and 90% of the voting rights in the company to which the offer relates. This therefore means that any shares held by the bidder before it formally makes an offer for the target company will not count towards the 90% thresholds. The minority squeeze-out mechanism is not relevant to a scheme as the scheme will bind all shareholders when it becomes effective.

Consequences of a failed takeover offer

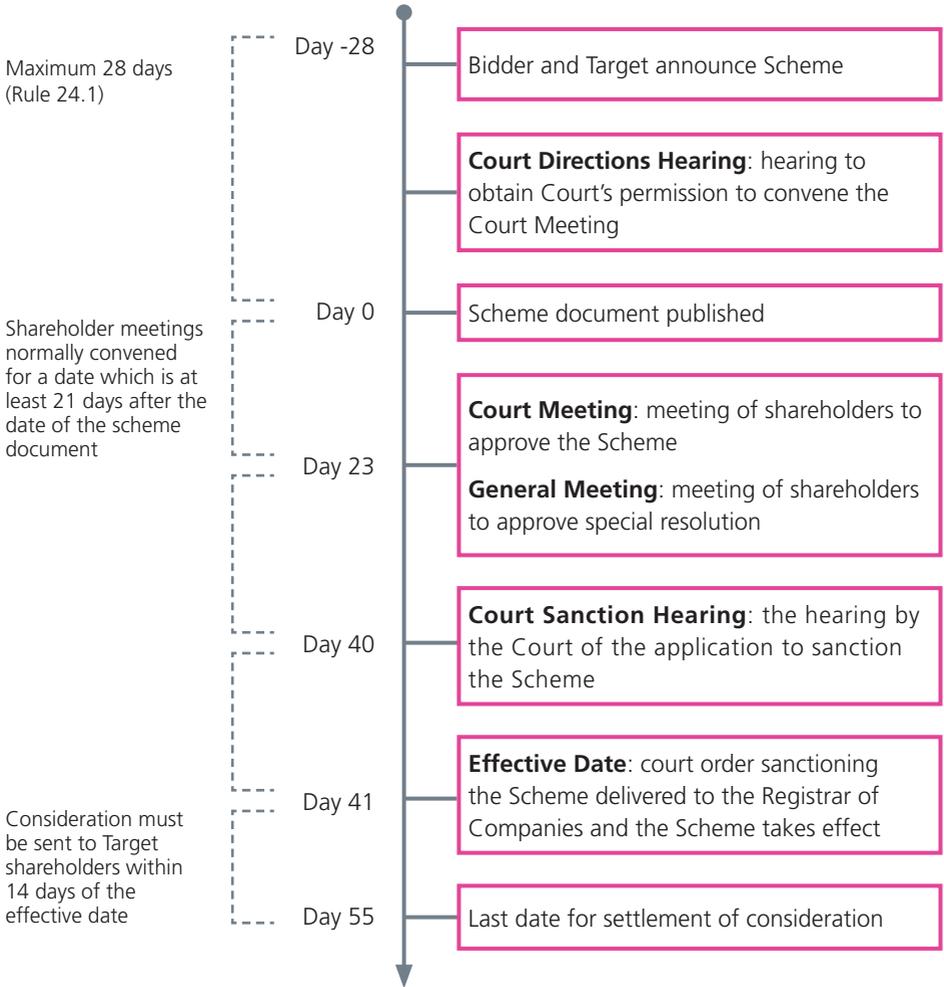
The City Code provides that, if a takeover offer fails or lapses (e.g. because the required acceptances or approvals are not obtained), the bidder will not be able to make another takeover offer for the same company for at least 12 months (subject to certain exceptions).

City Code: Timetable for Takeover Offer



1. This indicative timetable assumes that (i) no competitive situation arises and (ii) no regulatory clearances are required.
2. References to days are to calendar days rather than business days.
3. H = hostile bid.

City Code: Timetable for Scheme of Arrangement



1. This indicative timetable assumes that (i) no competitive situation arises and (ii) no regulatory clearances are required.
2. References to days are to calendar days rather than business days.
3. The Final Day Rule (Rule 31.6) does not apply to a takeover implemented using a Scheme. The City Code does not set a long stop date for the holding of Shareholder meetings.

6. Stakebuilding and mandatory offers

Purpose of stakebuilding

Stakebuilding is the process by which bidders seek to build up a stake in a target company through purchases of shares before or during a takeover offer, with the objective of increasing the likelihood of success of a takeover offer. Stake acquisitions may be made either by off-market purchases or on-market purchases. Any purchases will count towards achieving the minimum 50% acceptance condition required by the City Code.

Key legal and regulatory considerations

There are a number of important legal and regulatory issues which need to be considered carefully before bidders acquire shares in a target company. This can be a complicated area and bidders should therefore always seek appropriate legal advice before undertaking stakebuilding.

Insider dealing

If a bidder possesses inside information in relation to a target, the insider dealing rules mean that the bidder will not be able to acquire any shares in the target company until the information ceases to be inside information. The fact that the bidder is considering making an offer for the target company can, of itself, constitute inside information. However, if the bidder does not possess any inside information other than the knowledge that it expects to make an offer for the target, it should still be possible for the bidder to acquire shares before the announcement of the offer without breaching the relevant insider dealing legislation.

Acquiring 30% or more of total voting rights

The City Code prevents bidders acquiring an interest in shares which results in the bidder holding 30% or more of the total voting rights in the target. However, there are exceptions to this rule which permit acquisitions in the following situations:

- from a single shareholder before an offer is announced when it is the only acquisition within a seven-day period;
- immediately prior to (and conditional on) the announcement of an offer, provided that the offer is recommended by, or the acquisition is made with the agreement of, the board of the target company;
- after an offer has been announced and where either:
 - the acquisition is made with the agreement of the target board; or
 - the offer, or any competing offer, has been publically recommended by the target board (even if such recommendation is subsequently withdrawn); or
 - the first closing date of the offer, or any competing offer, has passed;

- the offer is unconditional in all respects;
- by way of acceptance of the offer; and
- in certain other limited circumstances.

Impact on terms of offer and rules relating to mandatory offers

Market purchases should never be considered as independent from the terms of the eventual offer, since they can have a significant impact on both the minimum level of consideration and the form of consideration.

- ***Minimum level of consideration:*** If a bidder acquires an interest in shares in the target company (i) within a three month period before the commencement of the offer period or (ii) between the commencement of the offer period and the announcement by the bidder of a firm intention to make an offer, then except with the consent of the Panel, any offer by that bidder to shareholders of the same class must not be on less favourable terms.
- Further, if, after the announcement of a firm intention to make an offer by the bidder but before the offer closes for acceptance, the bidder acquires any interest in shares above the offer price, the bidder is required to increase its offer to not less than the highest price paid for the interest in shares acquired in this way.
- ***Requirement for particular forms of consideration:*** If any shares are acquired during the offer period for cash, or 10% or more were acquired for cash during the preceding 12 months, the offer must be in cash (or include a cash alternative) at not less than the highest price paid during the offer period and the preceding 12 months.
- ***Requirement for a mandatory offer:*** Where a bidder is interested in shares carrying 30% or more of the target's voting share rights, the bidder must make a mandatory offer in cash at no less than the highest price paid during the preceding 12 months (often referred to as a "Rule 9 offer"). Mandatory offers can only be conditional on the bidder receiving acceptances that, together with any shares already held or acquired during the offer, would give the bidder and its concert parties more than 50% of the voting rights. As such, bidders cannot rely on other conditions to protect themselves.

Under the City Code, share dealings by concert parties are treated effectively as dealings by the bidder itself. As such, concert parties' holdings will be aggregated with those of the bidder.

Persons acting in concert are defined as persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company. Certain persons are presumed to be acting in concert (e.g. directors of the bidder, companies in the same group or a party's financial adviser), unless the contrary

is established. The existence or not of a concert party is especially important in determining whether or not the 30% mandatory offer threshold has been breached.

Disclosure obligations

Acquisitions of shares in a potential takeover target may give rise to an obligation to disclose details of voting rights held under DTR 5 and the City Code.

Under DTR 5, anyone who gains control of 3% or more of a UK quoted company's total voting rights must notify the target within two trading days. The target then has to notify a regulatory information service before the end of the trading day following receipt of the notification, which will then publish the information. Each further 1% increase or decrease in the stake must then be disclosed.

Rule 8 of the City Code also imposes an enhanced disclosure regime during public takeovers:

- ***Opening position disclosures:*** Bidders, targets and persons with an interest in 1% or more of the target and, if the offer includes securities of the bidder, persons with an interest in 1% or more of the bidder, must make an opening position disclosure within 10 business days of the start of an offer period.
- ***Dealing disclosures:*** Bidders, targets, their respective concert parties and persons with an interest in 1% or more of the target and, if the offer includes securities in the bidder, persons with an interest in 1% or more of the bidder, must disclose any dealings in target shares and, if the offer includes securities of the bidder, any dealings in bidder shares. Dealing disclosures by the bidder, the target and their concert parties must be made by noon the next business day; dealing disclosures by 1% holders must be made by 3.30 p.m. on the next business day.

7. Deal protection

Prohibition on offer-related arrangements

A general prohibition on "offer-related arrangements" between bidders and target companies was included in the City Code in September 2011. This followed concerns that it had become standard practice in the context of recommended offers for bidders to insist on various deal protection measures which could have had a detrimental effect on target shareholders by, for example, deterring competing bidders from making an offer.

Except with the consent of the Panel, neither the target company nor any person acting in concert with it may enter into any "offer-related arrangement" with either the bidder or any person acting in concert with the bidder during an offer period or when an offer is reasonably in contemplation.

An "offer-related arrangement" is defined widely as any agreement, arrangement or commitment in connection with an offer, including any inducement fee arrangement

or other arrangement having a similar or comparable financial or economic effect. The prohibition on "offer-related arrangements" does not cover:

- commitments to maintain the confidentiality of information;
- commitments not to solicit employees, customers or suppliers;
- commitments to provide information or assistance for the purposes of obtaining any official authorisation or regulatory clearance;
- irrevocable commitments and letters of intent;
- agreements, arrangements or commitments which impose obligations only on the bidder or any person acting in concert with it, other than in the context of a reverse takeover;
- agreements relating to any existing employee incentive arrangement; and
- agreements between bidders and the trustees of any of the target's pension schemes in relation to the future funding of the pension scheme.

If there is any doubt as to whether any proposed agreement, arrangement or commitment is subject to this prohibition, the Panel should be consulted.

Break fees

The general prohibition on "offer-related arrangements" extends to break fees (also known as inducement fees). The only exceptions to this prohibition are:

- when the target company has announced that it is seeking one or more potential bidders by means of a formal sale process;
- where a hostile firm offer has been announced, the target company can agree to pay a break fee to a recommended "white knight" (i.e. a possible counter bidder); or
- if the target company is in serious financial difficulties.

In each case, the break fee must be entered into only at the time of a firm offer announcement, must be limited to no more than 1% of the aggregate offer value on a fully diluted basis and must be payable only if another offer becomes wholly unconditional.

There is no prohibition under the City Code, however, on a bidder agreeing to pay a reverse break fee – for example, if it does not receive the necessary regulatory clearances to complete the takeover.

Irrevocable undertakings

Bidders are still permitted to, and frequently do, seek irrevocable undertakings from target shareholders to accept the takeover offer. It is also normal for target directors to give irrevocable undertakings to accept the takeover offer and for these to remain binding even if a higher offer emerges. Any person proposing to contact a private individual or small corporate shareholder with a view to seeking an irrevocable commitment must consult the Panel in advance.

8. Post-offer restrictions

The City Code was amended in 2015 to introduce the concept of "post-offer undertakings" and "post-offer intention statements". These changes were prompted by two high-profile takeovers (namely, Kraft's takeover of Cadbury and Pfizer's aborted offer for AstraZeneca) which focused attention on how statements made during the course of a takeover offer could be enforced.

Post-offer undertaking: A party to an offer who proposes to make a statement relating to any course of action that it commits to take (or not take) after the end of the offer period (being, a "post-offer undertaking") must consult the Panel in advance of making that statement. The bidder must include any "post-offer undertaking" in its offer document and the "post-offer undertaking" must specify any period for which the undertaking is made or the date by which the course of action will be completed (including any qualifications or conditions to which it is subject).

Where a party makes a "post-offer undertaking", it must comply with its terms for the period of time specified in the undertaking and complete any course of action committed to by the date specified in the undertaking (unless, of course, a qualification or condition can be relied upon). The relevant party is also required to submit written reports to the Panel after the end of the offer period at such intervals and in such form as the Panel may require. The Panel may require a party to an offer which has made a post-offer undertaking to appoint a supervisor to monitor compliance by that party with that undertaking.

Post-offer intention statement: A post-offer intention statement is any public statement made by a bidder or target about what it intends to do (or not do) after the end of the offer period. These statements must be an accurate statement of the party's intention at the time that it is made and be made on reasonable grounds. If a party makes a post-offer intention statement and, during the 12 month period from the date on which the offer period ends, or such other period of time as was specified in the statement, that party decides to take a different course of action, the Panel must be consulted.

When the relevant period has ended, the party which made the post-offer intention statement must confirm in writing to the Panel whether it has taken, or not taken, the course of action it stated in the post-offer intention statement that it intended to take or not to take and publish that confirmation via a regulatory information service.

9. Do we need a financial adviser?

The bidder is not formally required to have a financial adviser in order to make a takeover offer, but will generally have one. As mentioned above, the formal offer announcement and offer document on a cash offer both need to contain a

confirmation by the bidder's financial adviser (or other appropriate person) that the bidder has sufficient resources available to satisfy full acceptance of the offer. There are often other good reasons why a bidder will require a financial adviser.

The target company must, however, always have a financial adviser. This is because the City Code requires the target board to obtain competent independent advice on the financial terms of any offer and make the substance of that advice known to shareholders.

10. Who to contact

If you would like any further information on any of the matters addressed within this guide, please speak to your usual contact at Burges Salmon or:

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