



GENERAL GUIDE TO THE
UK TAKEOVER
REGIME

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Foreword

The Takeover Panel (the Panel) is the principal regulator of the mergers and acquisitions process in the UK for companies that have their registered office in the United Kingdom, Channel Islands and the Isle of Man if any of their securities are admitted to trading on a regulated market in any of those jurisdictions. Historically, the Panel was only concerned with protecting shareholders in offeree companies from these jurisdictions, but its obligations were extended in line with the requirements of the European Takeover Directive in 2006. The Panel also regulates the acquisition of some private and unlisted companies which meet relevant criteria.

The Panel was established in 1968 following a number of high-profile offers during which what would now be considered dubious practices were used by the offeror or offeree to gain an advantage over the other party. Shareholders were often left ignorant of what exactly was happening. Prompted by the UK government, the City of London, through the auspices of the Bank of England, determined that a regulator with the sole purpose of overseeing takeovers should be established. The Panel was thus created.

Participants in transactions governed by the Takeover Code (the Code) should always bear in mind the following fundamental points:

- 1.** The overriding approach of the Panel is that shareholders are the owners of the company and they should decide its future, particularly at the crucial time of a takeover. The Panel therefore makes no decision on the merits of an offer, this being a matter for shareholders, but the Panel does try to ensure that shareholders are given sufficient time and information to make an informed decision.
- 2.** From the outset, the Panel has been practitioner-based. In that regard it is a prime example of self-regulation, which means that, even today, the two major committees of the Panel (the Code Committee, responsible for proposing and implementing the Rules of the Code (the Rules) and the Hearings Committee, responsible principally for determining, following a complaint, whether the Panel Executive has acted in accordance with the objectives of the Rules) are comprised almost exclusively of senior practitioners of those bodies interested in the offer process, namely shareholders and hedge funds, as well as market practitioners such as lawyers, bankers and brokers and, of course, the companies themselves.
- 3.** Perhaps most significantly, the Panel's approach is principle-based. The original, very slim, Code contained a number of statements about the Panel's approach which in time were codified as the General Principles: in essence the Rules of the Code flow from the General Principles as more explicit statements of those General Principles. However, the great advantage of principle-based regulation is that it enables the Panel to deal with unexpected events in offers, as it has done in the past with, for example, dual-listed company transactions, so-called "virtual bids" and derivatives.

The Panel's day-to-day business is conducted through the Panel Executive (the Executive) which responds as rapidly as possible to queries about interpretations of the Code. Guidance is provided primarily over the telephone, typically in real time or within a matter of hours. The Executive continues the theme of self-regulation as, in addition to a number of permanent staff, the case officers interfacing with the market are nearly all secondees from investment banks, law firms and accounting firms.



There are two key words in understanding how the Executive considers questions it receives about the application of the Rules.

The first is “flexibility,” which flows from the principle-based approach and also reflects the Panel’s recognition that takeovers are complex and dynamic processes driven by innovative practitioners such that it is impossible in a series of Rules to cover every conceivable eventuality that may occur or, just as importantly, that a precise application of a Rule may not always be appropriate. The Executive is therefore able to apply discretion, provided that it can be justified. When discussing the application of a Rule with the Panel, it is critical that the context in which the Rule is written should be considered as well as its precise wording. In addition, the legal and political environment in which the Panel now operates needs to be recognised.

The second key word, which runs in parallel with the first, is “consultation.” The Code states that if there is any doubt about a course of action, the Panel (*i.e.*, the Executive) must be consulted. But, in addition, there are many occasions when, as stated above, the precise application of a Rule could be in point and it is vital that the views of the Panel be obtained to ensure that the best course of action is followed. This places advisers to any party in an offer in a crucial position: it is important to contact the Panel at the right time but, generally, the sooner the better, since the Executive will need some time to consider the issues. If a matter is straightforward, the response will be rapid but, as is more often the case, difficult issues take longer as the Executive considers the ramifications of various possible courses of action.

Consultation by parties ensures that the Panel is aware of the significant issues of any offer. While there can be no absolute guarantee that a decision of the Executive is final (other parties having the right to take an Executive decision to the Hearings Committee), there are very few occasions when an Executive decision has been overturned, so normally such a decision can be relied upon.

Advisers and companies from jurisdictions that take a black-letter approach to regulation need to adjust to this approach and understand that the Code is designed to encourage, and in many cases expressly requires, companies and their advisers to consult prior to engaging in a particular course of conduct. They sometimes find it difficult to accept that the answer is not always written down on paper. Such persons naturally are unaccustomed to consulting with their regulator in the same way as advisers consult the Panel.

To conclude, the Panel aims to be a user-friendly body. It appreciates that its Rules are complex — part of the reason it strongly encourages consultation — but ultimately parties involved in an offer should always remember that shareholders’ interests are paramount in the Panel’s mind.

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A. Introduction

This guide summarises certain key provisions of the Code with a focus on issues that are likely to be of particular concern to a bidder. Although reference is made to other statutory and regulatory instruments and regimes, this guide does not consider in any detail instruments or regimes other than the Code. In particular, the Companies Acts 1985 and 2006, the Financial Services and Markets Act 2000, the UK Listing Rules, the UK Prospectus Rules, the Criminal Justice Act 1993 and the relevant competition legislation in the UK and the European Union (EU), all of which may be relevant in the context of a UK takeover, are not addressed in detail.

This guide is a summary of what are often complex provisions, which are applied in a flexible and purposive way by the Panel. It is intended to provide a general understanding of certain key provisions of the Code, and should not be relied upon as being definitive or exhaustive. It will be important to obtain specific advice before taking any action in relation to a particular situation and not to rely on the general description in this guide.

The definitions of certain key terms used in the Code (and which are used in this memorandum), including, “acting in concert,” “interests in securities” and “offer period” are set out in the Appendix to this guide.

B. Executive Summary

Transactions involving UK public and certain private companies are regulated by the Panel in accordance with the Code. The Code comprises six General Principles and 38 Rules supplemented by notes, appendices and a very extensive series of Panel statements, consultation papers and other forms of guidance. This regime imposes procedures for the conduct of change-of-control transactions and ensuring the integrity of the equity markets during the period in which a bid is in contemplation. In that context, from the point at which a bid is first “actively considered,” the Code requires secrecy to be maintained prior to announcement and, upon commencement of an offer period, regulates offer terms, timetable and dealings in the securities of the target and (when the offer consideration includes bidder securities) the bidder (whatever its jurisdiction) as well as documentation, public statements and associated disclosures.

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C. The Panel and the Code

The Panel

The Panel is an independent, self-funding body which regulates takeovers of companies that are subject to the Code. The Panel (whose membership is drawn from the three main constituents in the market: investors, companies and advisers) is designated as the supervisory authority to carry out certain regulatory functions pursuant to the EU's Directive on Takeover Bids (2004/25/EC). The Panel's members are divided between a Hearings Committee, the Panel's judicial branch, which hears appeals against rulings of the Executive; and a Code Committee, the Panel's legislative branch, which sets the Rules.

The Panel Executive administers the Code on a day-to-day basis. It provides guidance on how the Code should be interpreted and applied to particular transaction. Decisions are made quickly (normally immediately or within a matter of hours) and are binding, absent an appeal to the Hearings Committee. Communications are primarily over the telephone, and decisions are not normally communicated in writing.

Finally, there is the Takeover Appeal Board, which is independent of the Panel, whose function is to hear appeals against decisions of the Hearings Committee. The membership of the Takeover Appeals Board reflects the same three constituencies as the Panel and is chaired by a senior English judge.

Code Jurisdiction

Broadly, the Code applies to all companies which have their registered offices in the UK, the Channel Islands or the Isle of Man if any of their equity securities (including depositary receipts) are admitted to trading on a regulated market in the UK or any stock exchange in the Channel Islands or the Isle of Man. It also applies to other public companies which are considered by the Panel to have their place of central management and control in the UK, the Channel Islands or the Isle of Man. The Code also may apply to private companies in certain circumstances.

The Code also operates under shared jurisdiction arrangements in the European Economic Area (the EEA). Certain companies with a registered office in the UK, though admitted to trading on a regulated market in another EEA member state, or with a registered office in another EEA member state but solely admitted to trading on a regulated market in the UK, will be subject to the Code. Further, a company with a registered office in another EEA member state, but whose stock is admitted to trading in the UK and other EEA member states (but not in its home state), may be subject to the Code, or may be required to elect a jurisdiction by which it is regulated. The jurisdiction or corporate status of the bidder is irrelevant for the purposes of determining whether the Code is applicable.

The Code is designed to ensure high business standards and fairness to shareholders — it is not the responsibility of the Panel to assess the commercial merits of an offer or to consider issues such as antitrust.

Powers

If a person breaches the Code, he may be criticised privately or publicly by the Panel. The Panel also may report a person's conduct to other regulators (for example, in the UK, the Financial Services Authority which regulates financial advisers) or, exceptionally, "cold-shoulder" a person. Cold-shouldering means that regulated entities and other professionals are no longer able to act for the person concerned. Effectively such persons are excluded from takeover activity in the UK and denied access to the UK securities and financial markets. Such actions have been necessary only three times in the Panel's history, in 1980, 1992 and 2010.

These powers have been sufficient to maintain a high level of compliance by market participants over more than 40 years. The Panel did consider its sanctions when the EU Takeovers Directive was implemented in 2006, when it was designated under the UK Companies Act as the supervisory authority for takeover regulation, but decided against extending its range of disciplinary powers (such as the ability to levy fines).

However, since 2006, the Panel has had the ability to seek court enforcement of its rulings, to make compensation rulings (requiring a person to make payments to investors where Code Rules are breached) and to require the production of documents and other information. Therefore, although strictly speaking the Panel remains a non-statutory body, it has certain statutory powers at its disposal. It is understood that the Panel has not, as yet, found it necessary to make use of these statutory powers.

Acquisition Structures: Takeover Offers, Schemes of Arrangement and Mergers

The Code is drafted in a manner applicable to offers (that is, tender or contractual offers) to acquire shares in a target. However, the acquisition of a UK company may be implemented by means of a court-approved scheme of arrangement, and Appendix 7 of the Code sets out the manner in which the Code will apply to such schemes. A more recent phenomenon is the use of mergers under the Companies (Cross-Border Mergers) Regulations 2007, implementing EC Directive 2005/56/EC, as a means of effecting a takeover. Again, demonstrating the flexibility of the Code, the Panel has published guidance to explain in what circumstances and manner the Code will apply to such mergers. Except where a mandatory bid is required, or where a bidder wishes to "switch" from one mode of acquisition to another, the Code does not specify the mode by which a takeover should be carried out.

A scheme of arrangement is typically undertaken only in a recommended transaction. Although the Code does consider the possibility of implementing a hostile offer by way of a scheme, the Panel must be consulted before any attempt is made to do so. As a scheme of arrangement requires the target to convene meetings of its shareholders and to make application to the court to sanction the scheme, it is likely to be used to implement a hostile offer only in exceptional cases.

Section 8 of Appendix 7 provides that, with the consent of the Panel, a bidder may switch from a scheme of arrangement to a contractual offer or vice versa. One of the key benefits of a scheme of arrangement is that, if it is approved by a majority in number of the shareholders who hold 75 percent or more of the voting securities subject to the proposal, it will apply to all shareholders. In a takeover offer, a bidder must acquire 90 percent of the securities to which the offer applies before it can exercise compulsory acquisition rights in respect of the remaining shares (assuming the target is a UK company). Accordingly, a bidder that has made a contractual offer — and considers that it will reach the 75 percent threshold but may not reach the 90 percent level

— may consider switching to a scheme of arrangement in order to ensure that it acquires the whole of the target.

The opposite scenario may occur where a bidder has commenced an offer by way of a scheme of arrangement, but considers that it may not reach the required 75 percent threshold for the approval of the scheme (noting that a scheme will either succeed entirely, that is the bidder will acquire the entire company or class of shares, or fail entirely, and no shares will be acquired). If the bidder is willing to conclude the transaction with only a majority shareholding in the target, rather than 100 percent of the target's share capital, it may consider switching to a contractual offer with an acceptance condition of less than 75 percent but no less than 50 percent (plus 1 share), the minimum level allowed under the Code.

Throughout this guide, where reference is made to an "offer" or "bid," it should be taken to include an acquisition by way of a scheme of arrangement or a merger (unless the context requires otherwise). With regard to certain key provisions summarised in this guide, we have highlighted some differences between implementing an acquisition by way of a contractual offer and doing so by way of a scheme of arrangement.

D. Key Provisions of the Code

Since the Panel was established in 1968, the UK market has maintained the view that shareholders, as the owners of a company, should be entitled to receive bids and determine whether or not they ultimately succeed. The first objective of the Code continues to be to ensure that investors are protected and a level playing field for corporate control is maintained in the UK. Changes to the Code in 2011 were designed to shift the balance of power away from bidders and toward targets, precisely in order to re-establish what the Panel views as a level playing field.

The Code consists of six General Principles (statements of good commercial practice) and 38 Rules, as well as notes to those Rules, which act as guides to interpretation. The Rules govern specific aspects of takeovers, and are best understood as specific articulations of the General Principles.

A key aspect of the Code is its flexibility of interpretation. The General Principles provide a purposive framework in which the Rules are applied and interpreted by the Panel. It may be possible to seek dispensation from the Panel from the strict application of the Code's Rules in appropriate circumstances. The Panel encourages, and in some cases the Code specifically requires, consultation. To quote from the Introduction to the Code:

When a person or its advisers are in any doubt whatsoever as to whether a proposed course of conduct is in accordance with the General Principles or the rules, or whenever a waiver or derogation from the application of the provisions of the Code is sought, that person or its advisers must consult the Executive in advance. In this way, they can obtain a conditional ruling (on an ex parte basis) or an unconditional ruling as to the basis on which they can properly proceed and thus minimise the risk of taking action which might, in the event, be a breach of the Code. To take legal or other professional advice on the interpretation, application or effect of the Code is not an appropriate alternative to obtaining a ruling from the Executive.

1. General Principles

The six General Principles are as follows:

1. All holders of the securities of an offeree 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.

As mentioned at the beginning of this guide, unequal treatment of shareholders was one of the practices in the 1960s that led to the Panel being established. The concept of shareholder equality is reflected throughout the Code and presents most clearly in rules relating to the consideration to be made available to target shareholders, the terms on which an offer is made and the information to be provided.

The Code requires that shareholders of the same class receive the same bid and that holders of different classes of equity security receive “comparable” offers. Improved offers must be extended to shareholders who accepted the lower offer and target shareholders are entitled to withdraw their acceptances and accept a higher offer from a competing bidder.

The equality principle underpins the mandatory offer Rule, which requires any person who acquires interests in shares carrying 30 percent or more of the voting rights in a target to make a general offer to all shareholders at the highest price it has paid in the previous 12 months. Equality is achieved between target shareholders and those former shareholders who delivered the controlling position to the bidder by sharing any control premium paid amongst all shareholders and affording them the same opportunity to exit the controlled company. In voluntary offers, the equality principle equalises the position of shareholders who accept an offer and those who sell to the bidder outside the bid (whether during an offer period or for certain periods preceding bids) by stipulating that such acquisitions may set a minimum bid price or oblige a bidder to offer a particular form of consideration in the offer.

2. The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree 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 Code sets a bid timetable, which is designed to allow sufficient time for all arguments and information to be presented to and considered by shareholders whilst at the same time preventing target companies from being subjected to unduly long periods of siege.

The Code sets out a number of information requirements that need to be complied with in respect of offer documentation prepared by bidders and target companies. In September 2011, as a result of changes to the Code in response to Kraft’s bid for Cadbury, these disclosure requirements were extended in relation to bid financing and the bidder’s intentions with respect to the target business. The Code requires this information to be prepared with the highest standards of care and accuracy. In addition, certain types of financial information, such as profit forecasts, asset valuations and merger benefit statements, must be reported on.

“ [O]nce a potential bidder is publicly identified, it has 28 days to either announce a (fully financed) bid, obtain the agreement of the target and the Panel to an extension of that deadline, or walk away. ”

3. The board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.

The most powerful articulation of this principle is the Rule against frustrating action, commonly referred to in Europe as the “board neutrality rule”. The Code addresses the concern that directors may oppose takeovers that are beneficial for shareholders in order to preserve their own management positions by preventing target boards from taking any form of action which may frustrate a bid, without first obtaining shareholder approval.

Because the implementation of a poison pill without shareholder consent would be prohibited under the Code, and because UK shareholders generally are not willing to give target management discretion to threaten to implement a pill in the face of a bid, poison pills are not a feature of the UK market for corporate control. It has been argued that the mandatory bid Rule provides a level of protection that renders pills unnecessary to protect the interests of minority shareholders.

4. False markets must not be created in the securities of the offeree company, of the offeror company 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.

The Financial Services Authority (the FSA) is the principal regulator responsible for ensuring the integrity of the securities markets in the UK. However, from the point at which a bidder starts actively considering a bid until the bid becomes wholly unconditional, the Panel coordinates with the FSA to avoid false markets arising in the securities of the bidder and the target.

Two Rules in particular are designed to avoid false markets. The first of these is Rule 2, which deals with the secrecy before announcement and the timing and contents of announcements. The second is Rule 8, which requires disclosures to be made during the offer period of dealings in the stock of the target and, where a bidder offers its own stock to target shareholders as consideration, the bidder.

5. An offeror must announce a bid only after ensuring that he/she 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.

Takeovers are disruptive events for targets (and bidders) as well as their boards and employees. They also impact market activity in the securities of the bidder and the target. The Code therefore seeks to ensure that bidders are committed to their offers, have sufficient resources to carry them through and complete bids once announced. It does this, for example, by requiring the financial adviser to a cash bidder to confirm publicly that the bidder has the necessary resources to pay all target shareholders accepting the offer and by stipulating that offer conditions can only be invoked if a very high materiality threshold is satisfied.

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

As takeovers can be disruptive and destabilising, the Code establishes a fairly rigid timetable, which starts when a firm intention to bid is announced. Generally speaking, a bidder has 109 days from that point to have posted and satisfied all of the conditions to its offer.

“A target announcement is required to name all possible bidders from whom approaches have been received (and not unequivocally rejected), although there may be scope for a derogation from this requirement in certain circumstances.”

The Rules dealing with the period after announcement that a bid may be made but prior to a firm offer announcement were significantly revised in September 2011. Under the new Rules, in order to prevent unduly long “virtual bid” periods, once a potential bidder is publicly identified, it has 28 days to either announce a (fully financed) bid, obtain the agreement of the target and the Panel to an extension of that deadline, or walk away, in which case it is precluded from making a bid for six months (except in limited circumstances). This default 28-day deadline does not apply where the bidder is participating in a formal sales process sponsored by the target.

2. The Approach and Associated Requirements¹

A. Secrecy and Pre-Bid Announcements

One of the objectives of the Code is to prevent the creation of false markets. The keystone of the Code structure in this regard is the obligation of parties to maintain secrecy in the early phases of bid consideration and release a public announcement where the Panel determines there has been a leak, as is typically evidenced by an untoward movement in the target stock price, or rumour and speculation.

The importance the Code places on absolute secrecy prior to a formal announcement cannot be overstated. Before the announcement of the transaction, code names and other information security measures should be used and persons informed of the offer only on a need to know basis.

If the Panel believes there has been a leak, it may require a clarificatory announcement. An “untoward movement” in the target’s share price, or rumour and speculation in respect of the target, can be sufficient indication of a leak for the Panel to require an announcement. As a rule of thumb, an untoward movement is either a movement of 10 percent or more above the lowest share price since the beginning of the process (or any re-fixing of the base price in discussions with the Panel) or 5 percent on an intra-day basis. Various factors such as general market and sector movements, publicly available information, general trading activity, speculation unrelated to the transaction and the period over which a rise has occurred are taken into account by the Panel when considering whether a price movement is “untoward.” The Panel will reset the base price if satisfied that price rises are attributable to causes other than a leak.

If a party engages in discussions with more than a limited number of external people (generally up to six (including lenders) is acceptable without Panel consent) a preemptive announcement may be required by the Panel unless there is reason to believe that confidentiality can in the particular circumstances be maintained.

B. Duty to Monitor for Speculation

Prior to approaching the target about a transaction, the bidder is obliged to monitor for untoward price movements and speculation, and to take the lead in consulting the Panel and making an announcement if one is required. Once the target has been approached, the obligation to monitor price and speculation, consult the Panel and make any announcement moves to the target (although a secondary obligation remains with the bidder). The target continues to bear

¹ See Section 5 below for a discussion on preconditions and the restrictions on both including them and invoking them.

these obligations until the approach is unequivocally rejected, whereupon the responsibilities revert to the bidder.

“Approach” is interpreted extremely broadly by the Panel. The Panel has published guidance stating that the parties should agree who has the responsibility for making an announcement at any particular time following approach.

C. Leaks Announcements

The Panel will expect a draft “leaks announcement” to be prepared and ready (*i.e.*, with appropriate board authority) for release at short notice, if required. If talks with the target have commenced, a brief announcement along the lines that talks are taking place or that an approach has been received is generally sufficient. A target announcement is required to name all possible bidders from whom approaches have been received (and not unequivocally rejected), although there may be scope for a derogation from this requirement in certain circumstances. The announcement serves to put shareholders and the market generally on notice that a change of control transaction is possible — it is required to state that no bid may be forthcoming and may state that discussions are at a highly preliminary stage. At this point, an “offer period” commences with, for example, enhanced dealing disclosure requirements and restrictions on target conduct coming into play. A raft of other Rules also come into play with implications for the bidder as well as the target.

A listed target has to observe a parallel and largely complementary set of disclosure rules as a result of its listing requirements and under the UK market abuse regime. If the transaction is sufficiently large, the bidder will need to consider any notification obligations it should observe.

D. 28-Day Deadline to Bid or Walk Away

Except where an offer period has already been initiated by the target announcing that it is inviting bidders to participate in a formal sales process, an announcement identifying a potential bidder triggers an obligation for that bidder to either make a fully-funded bid or walk away within 28 days unless the target and the Panel agree to extend that deadline. In the absence of a bid or an extension, a bidder will be precluded from making an offer (except in limited circumstances) for six months.

Prior to any announcement, therefore, the fundamental obligation is that all persons privy to confidential information, and particularly price-sensitive information, concerning an offer or contemplated offer, should treat the information as secret and 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. This applies to all persons involved and not only to the directors of the bidder.

E. Statements of Intention

The Code requires strict observance of statements that lead the public to understand that an offer will be made (or not), made on particular terms or conducted in a particular manner. Any comment on the offer process or terms, however informal, that is attributable to the bidder may therefore become binding unless immediately retracted.

Since the market is presumed to act in reliance on offer-related statements or comment by the bidder, the Rules are strictly enforced in order to underpin market certainty and avoid false

markets. Another supporting pillar is the equality principle, which in this context means that information about companies involved in an offer must be made equally available to all shareholders, so far as possible, at the same time and in the same manner. The Rules seek to avoid the situation where a limited portion of the target's investors has access to information which could influence investment decisions.

Rule 2.8 of the Code provides that a person who makes a statement that he does not intend to make a bid for a company (a Rule 2.8 statement) will be bound by that statement and precluded from bidding for six months, except in the limited circumstances provided for in the notes on the Rule. Statements of a similar nature, such as "*not currently looking at the target*" and "*don't currently have any plans to consider bidding for the target*" will normally be interpreted by the Panel as a Rule 2.8 statement. A Rule 2.8 statement made during the course of an interview binds the maker of the statement in the same way that a formal press release would.

The Panel monitors the press for statements made in relation to bid intentions. Upon becoming aware of such statements, enquiries are made by calls to financial advisers (or direct to the company to which the comment is attributed if there is no record of an adviser). To the extent that statements are made in media outlets, market participants are likely to contact the Panel to ask whether the statement has Code consequences (*i.e.*, because it amounts to a Rule 2.8 statement or a statement that a bidder is considering making an offer).

When considering media reports, the Panel will take into account the statement itself and the way in which it is reported. In appropriate circumstances, the Panel may require a statement of retraction or clarification. Any retraction must be issued very quickly in order to avoid the statement being binding. Directors, officers and other representatives of companies must therefore bear in mind the implications of the Code when giving interviews to or taking part in discussions that may attract media coverage.

The Code stipulates a set of default circumstances in which a Rule 2.8 statement may be set aside, which apply whether or not they are stated expressly in the Rule 2.8 statement. This is a significant change introduced in September 2011. Previously it was generally necessary, following an inadvertent Rule 2.8 statement, to issue a press release reiterating the statement and formally reserving the ability to set the statement aside in specified circumstances. The new defaults are:

- the agreement or recommendation of the board of the target;
- the announcement of an offer for the target by a third party;
- the announcement by the target of a "whitewash" proposal or a reverse takeover; and
- a material change of circumstances. (as determined by the Panel).

In addition, if a 2.8 statement is made outside an offer period the bidder may be entitled to set out additional, specific circumstances in which it reserves the right to set the statement aside.

F. Target Approach and Offer Announcement

The Code provides that the offer must be put forward in the first instance to the target board or its advisers. If the offer, or an approach with a view to an offer being made, is not submitted by the ultimate bidder or potential bidder, the identity of that person must be disclosed at the outset. The target board is entitled to be satisfied that the bidder is, or will be, in a position to implement the offer in full. In the case of a hostile offer, the approach to the target board need

only take place a few minutes before the public announcement whereas, in the case of a recommended offer, the announcement will follow a period of negotiation with the target board. That negotiation may take place without publicity until the point of agreement unless there is a leak that forces an announcement.

A concept of central importance to the Code is that a bidder should only announce its intention to make an offer after the most careful and responsible consideration. Such an announcement (a Rule 2.7 Announcement) only should be made when a bidder has every reason to believe that it can and will continue to be able to implement the offer.

General Principle 5 of the Code provides that a bidder must announce a bid only after ensuring that it can fulfil any cash consideration and after taking all reasonable measures to secure the implementation of any other type of consideration. Where the offer is for cash or includes an element of cash, a Rule 2.7 Announcement must include confirmation by an appropriate third party (normally the bidder's financial adviser) that resources are available to the bidder sufficient to satisfy full acceptance of the offer. This usually means that committed facilities must be in place; letters of intent are unlikely to be sufficient unless the funding requirement is modest relative to the financial standing of the bidder. This obligation is replicated in Rule 24.7, which requires the same statement to appear in the offer document. In addition to carrying out its own due diligence, a financial adviser providing this "cash confirmation" will engage legal counsel to investigate the funding structure to demonstrate that it acted reasonably and avoid any obligation under the Code to make up any funding shortfall.

Where there has been an announcement of a firm intention to make an offer, the bidder must, except with the consent of the Panel, proceed with the offer unless the posting of the offer is subject to the fulfilment of a precondition, and that precondition has not been met. A change in general economic, industrial or political circumstances will not justify failure to proceed with an announced offer and an offer cannot be conditioned upon a lack of material change in those circumstances.

The Panel will usually allow a bidder not to proceed with its offer if a competing higher offer is announced prior to the posting of an offer document; however, the original bidder's obligations to proceed may be reinstated if the competing offer were in some way to be aborted (for instance, if it were to be referred to the UK Competition Commission or the European Commission).

G. 'No Increase' and 'No Extension' Statements

If statements in relation to the value or type of consideration — such as "*the offer will not be further increased*" or "*our offer remains at 'x' per share and it will not be raised*" — are included in documents sent to target shareholders (or are made by or on behalf of a bidder, its directors, officers or representatives), and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the bidder be allowed subsequently to amend the terms of its offer in any way even if the amendment would result in an increase of the value of the offer, except where the right to do so has been specifically reserved.

If statements in relation to the duration of an offer such as "*the offer will not be extended beyond a specified date unless it is unconditional as to acceptances*" are included in documents sent to target shareholders (or are made by or on behalf of a bidder, its directors, officers or representatives), and not withdrawn immediately if incorrect, only in wholly exceptional circumstances will the bidder be allowed subsequently to extend its offer beyond the stated date except where the right to do so has been specifically reserved.

H. Independent Advice

Rule 3.1 of the Code requires the target board to obtain competent independent advice on the bid from a financial adviser and to make the substance of that advice known to its shareholders at the same time as it circulates its own opinion on the offer. The Panel has stressed the importance of the adviser's role in ensuring that full information and reasoned arguments are presented to target shareholders. The target board's opinion must include their views on the effects of the offer on all the target's interests, including their views on the bidder's strategic plans for the target and their likely repercussions on employment and the locations of the target's places of business.

The target board's recommendation to shareholders normally consists of simple advice to accept or reject the offer. Where the target board decides to recommend the offer, its advice to shareholders usually will be contained in the offer document. On occasion, if the context in which an offer is made is sufficiently complex, the target board's opinion may address the pros and cons of acceptance without firmly stating that the offer should be accepted or rejected.

I. Inducement Fees and Other Deal Protections

In 2011, the Panel concluded that inducement fees rarely induce a bidder to make an offer and that deal protection measures can have the effect of deterring competing bidders, or at least result in competing bids being made on less favourable terms. As a result, the Code was amended to prohibit "*any agreement, arrangement or commitment proposed to be entered into ... in connection with an offer, either during the offer period or when an offer is reasonably in contemplation.*" This includes inducement fees, as well as a number of other contractual protections familiar to bidders, such as information and matching rights. Limited exceptions are available for undertakings given in relation to confidentiality, employee retention, provision of information for regulatory purposes, as well as irrevocable commitments and letters of intent to accept an offer given by target directors in their capacity as shareholders. Derogations may be granted following a formal sale process, where the target is in serious financial difficulty or where the target is bringing in a "white knight" to compete with a hostile bidder. The rules do not restrict the bidder from undertaking any obligations to the target, such as a reverse break fee or standstill agreement. This is discussed further in Section 8(b).

3. Equality, Share Dealings and Mandatory Offers²

A. Equal Treatment

It is a fundamental principle of the Code that all shareholders of the same class of the target must be afforded equivalent treatment by a bidder. In other words, holders of the same class of shares must be given the same consideration under the offer. In addition to requiring equality of treatment among target shareholders participating in the offer itself, the Code contains Rules

²References in this Section 3 and in Section 4 to a bidder should be read as references to the bidder and all persons acting in concert with it (see the definition of this term in the Appendix to this guide). Where reference is made to a person owning or acquiring an "interest" in shares or securities, it is a reference not only to a person owning shares or securities, but also includes a person owning or acquiring the right to exercise or direct the exercise of voting rights attaching to, or having an economic exposure to, the shares or securities, as more fully set out in the definition in the Appendix to this guide.

“ [T]he Code contains Rules designed to ensure that target shareholders are afforded equal treatment with shareholders who sell their shares in the run up to, or outside, a bid. ”

designed to ensure that target shareholders are afforded equal treatment with shareholders who sell their shares in the run up to, or outside, a bid.

B. Offers for Other Classes of Shares

General Principle 1 mandates equivalent treatment for target shareholders and protections for other holders of target equity or equity-linked securities where a person acquires control of a company. This concept is the basis for Rules 14 and 15, which provide that where an offer is made for equity share capital and the target has other classes of share capital, or outstanding rights to subscribe for or convert into share capital (*e.g.*, under an employee share option scheme or under the terms of any outstanding convertible securities), a comparable offer must be made for those other classes of equity share capital and an “appropriate offer or proposal” must be made to safeguard the interests of holders of conversion or subscription rights.

C. Dealings and Price Floors

Rule 6.1 of the Code provides that if a bidder acquires an interest in shares in a target company:

- within a three-month period prior to the commencement of the offer period; or
- during the period (if any) between the commencement of the offer period and the announcement of a firm intention to make an offer (a Rule 2.7 Announcement); or
- prior to the three-month period referred to above if the Panel is of the view that there are circumstances which render it necessary to ensure that all shareholders in the target are afforded equivalent treatment in accordance with General Principle 1,

then, except with the consent of the Panel, any subsequent offer by the bidder for target shares must be on no less favourable terms.

Further, under Rule 11.1, where a bidder has purchased for cash, either during the offer period or in the 12 months prior to the commencement of the offer period, an interest in shares which carry 10 percent or more of the voting rights in the target, then except with the consent of the Panel, any offer for target shares must be in cash or with a full cash alternative and at not less than the highest price paid by the bidder for any interest in target shares acquired during the offer period and within 12 months prior to its commencement.

The same obligation exists where a bidder acquires an interest in securities of the target for cash during the offer period. Rule 6.2 contains a similar requirement; it provides that where, after a Rule 2.7 Announcement has been made, a bidder acquires an interest in securities at a price above the offer price, the offer price must be increased to not less than the highest price paid for those securities. If this obligation to increase an offer is triggered, an immediate announcement that a revised offer will be made at the higher price must be issued by the bidder.

The Panel also may exercise its discretion to require such a cash offer, even where the above requirements are not met, if it deems it necessary to ensure that all target shareholders are afforded equal treatment (this only will be invoked where the directors or other connected persons of the bidder or the target have sold shares to the bidder).

Further, where a bidder has, either during the offer period or in the three months prior to the commencement of the offer period, acquired an interest in shares which carry 10 percent or

more of the voting rights in the target, in exchange for securities, then except with the consent of the Panel, in any offer for shares in the target, like securities will be required to be offered to all other holders of target shares.

Each of Rules 6 and 11 allow for dispensations or adjustments to be made by the Panel when appropriate. Such adjustments and dispensations are applicable in exceptional circumstances, and the Panel may make adjustments to make the Rules more stringent rather than relaxed. However, adjustments have very rarely been made following representations from bidders (although there were a few examples during the recent financial crisis). When considering such representations, the Executive will typically look carefully at the size of the price-setting acquisitions and the movements of the stock price in the market (although the mere fact that a stock price has crashed will not necessarily in itself be sufficient justification). In addition, the attitude of the target board and its advisers will be important to the Executive's decision as to whether any dispensation or adjustment should be granted.

D. Restriction on Dealings by the Bidder During the Offer Period

On the basis that doing so may confuse the market, a bidder must not, during the offer period, sell any securities in a target without having obtained the prior consent of the Panel (and following 24 hours public notice). The Panel should be consulted whenever the bidder proposes to enter into or close out any type of transaction (such as a contract for difference) which may result in the shares of the target being sold during the offer period, either by the bidder or a counterparty to the transaction.

E. Prohibited Dealings by Persons Other Than the Bidder, Insider Dealing and Market Abuse

Rule 4 prohibits any person (not being the bidder), who is privy to confidential price-sensitive information concerning an offer or contemplated offer, from dealing in securities of any kind in the target between the time when there is reason to suppose that an approach or an offer is contemplated and the announcement of the approach or offer or of the termination of discussions. Such dealings in securities of the bidder are also prohibited if the proposed offer is price-sensitive to the bidder's securities.

Dealings in securities in the target and the bidder are also likely be restricted or prohibited by the insider dealing provisions of the UK Criminal Justice Act and the market abuse provisions of the UK Financial Services and Markets Act (although it should be noted that Rule 4 may apply to companies that are not subject to those regimes). These restrictions apply to any person who at any time, not just during an offer period, has or obtains inside information. For those purposes, and for the purposes of Rule 4, mere knowledge that it may bid for the target normally does not, of itself, amount to inside information that precludes dealing by the bidder.

F. Mandatory Offers

The Code deems a party to have obtained or consolidated control of a target when that party has acquired an interest in shares carrying 30 percent or more of the voting rights of the target or, if it already is interested in between 30 percent and 50 percent of the target's shares, it acquires any further interests. This reflects the belief that the point at which effective control passes varies, primarily depending upon the degree to which the target's shareholder base is

dispersed. The Code imposes a series of Rules designed to regulate such accumulations and, should they occur, to force an offer for the whole company on equivalent terms.

Rule 9 provides that if a bidder either:

- a. acquires (whether or not pursuant to a series of transactions or over a period of time) an interest in shares which, together with shares in which the bidder is already interested, carry 30 percent or more of the voting rights in the target; or
- b. where the bidder is already interested in shares which carry 30 percent or more but less than 50 percent of the voting rights in a target, and acquires an interest in shares in that company which increases the percentage of shares carrying voting rights in which it is interested,

then, except with the consent of the Panel, that bidder will be required to make a mandatory offer for all of the securities in the target not already owned by it.

The terms of a mandatory offer are dictated more strictly by the Code than those of a voluntary offer in order to reduce the likelihood that a mandatory bid lapses. Except with Panel consent, the offer is permitted to be conditional only upon a 50 percent acceptance condition. If the offer may be reviewed by the UK and the EU antitrust authorities, it must contain a term that it will lapse if there is a reference to the UK Competition Commission or if phase-two proceedings are initiated by the European Commission; however, if the offer is subsequently cleared, it must be reinstated on the same terms and at not less than the same price as soon as possible. Further, the offer must be in cash or accompanied by a cash alternative at not less than the highest price paid by the bidder, or any person acting in concert with it, for target shares within the preceding 12 months. A mandatory offer cannot be implemented by way of a scheme of arrangement without the consent of the Panel.

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

In a similar vein, Rule 5.1 of the Code provides that if a person is interested in shares carrying less than 30 percent of the voting rights in a company, it may not acquire an interest in any other shares which results in it being interested in shares which carry, in aggregate, 30 percent or more of the voting rights. Furthermore, where a person is interested in shares carrying 30 percent or more but less than 50 percent of the voting rights in a company, Rule 5 restricts the acquisition of further interests in shares carrying voting rights in that company.³

Unlike Rule 9, the restrictions in Rule 5.1 do not apply to acquisitions by a person:

- at any time from a single shareholder if it is the only such acquisition within any period of seven days (this will not apply if a Rule 2.7 Announcement has been made and the posting of the offer is not subject to a precondition);
- immediately before the person announces a firm intention to make an offer, provided that the offer will be publicly recommended by, or is made with the agreement of, the board of the target and the acquisition is conditional upon the announcement of the offer;
- after the person has made a Rule 2.7 Announcement, provided that the posting of the offer is not, at the time of the acquisition, subject to a precondition; and

³For the purpose of Rule 5, an "interest in securities" include obtaining irrevocable commitments from target shareholders.

- i) the acquisition is made with the agreement of the board of the target; or
- ii) the offer (or any competing offer) has been recommended publicly by the board of the target, even if such recommendation is subsequently withdrawn; or
- iii) the first closing date of that offer has passed; or
- iv) the offer is unconditional in all respects; or
- v) if the acquisition is by way of acceptance of the offer; or
- vi) in certain other circumstances where a reduction in holdings has occurred prior to the acquisition.

G. Special Deals

In general, neither the bidder nor persons acting in concert with it may make any arrangements with target shareholders, deal in the target company's shares or enter into arrangements to deal in such shares, or enter into arrangements which involve acceptance of an offer, either during an offer or when one is reasonably in contemplation, if there are favourable conditions attached which are not being extended to all target shareholders. This will include a promise to make good on any difference between the sale price and the price of any subsequent successful offer or an irrevocable commitment to accept an offer coupled with the granting to target shareholders of an option to sell the target shares should the offer fail. Any proposed special arrangements with target shareholders or, particularly, any proposed financial arrangements with members of management who are interested in target shares, should be considered with great care and be entered into only after discussion with the Panel. In certain circumstances the Panel may require such arrangements to be approved by target shareholders.

Members of the target management team will normally enter into new service agreements conditional upon the offer becoming wholly unconditional. If the new service agreements represent an improvement in the terms and conditions on which the management team member is employed, that improvement potentially constitutes a special deal contrary to Rule 16, where the team member is a shareholder in the target company. The terms of the new service agreements will be disclosable in the offer document in accordance with Rule 24.5. Other incentives offered in order to ensure the person's continued involvement in the management of the business also may fall within the scope of Rule 16.

The target's financial adviser and the Executive will need to be satisfied that:

- a. the incentivisation is not being offered to management in their capacity as shareholders, but rather as managers; and
- b. the arrangements are not "significant" in size or "unusual" in their nature in the context of the relevant industry or good practice.

"Significant" in this context means significant to the manager, as opposed to significant in relation to the overall size of the transaction. Arrangements will be "unusual" where they are not consistent with market comparators or are not appropriate in the context of existing remuneration/incentivisation structures and/or the offeror's remuneration structures. In considering these questions, overall quantum, targets and structure of the package should be considered as well as the individual's particular experience and skills.

If the incentivisation arrangements are significant or unusual, Panel consultation and consent to the arrangements are required. A shareholder vote (passed by independent shareholders on a poll) also may be required as condition to the Panel consent.

The target's financial adviser is required to state that in his opinion the arrangements with management are "fair and reasonable." The fairness opinion should cover the whole of the management package (including any equity participation).

In 2010, the disclosure requirements for incentivisation arrangements were extended. As a result:

- a. "relevant details" of all arrangements - whether entered into or proposed and discussed - must be disclosed;
- b. if incentivisation arrangements are intended following completion of the offer but there have been limited or no discussions, that fact must be disclosed along with any relevant details of discussions;
- c. if no incentivisation arrangements are proposed, this must be stated; and
- d. if arrangements are changed or discussions advanced after posting of the offer document, the Executive must be consulted and disclosure may be required along with a further fair and reasonable opinion from the target's financial adviser. A separate vote of shareholders also may be required.

4. Disclosure of Interests

A. Key Objectives of the Code's Disclosure Regime

The Code's so-called "extended composite" disclosure regime is designed to provide the market with transparency by providing a detailed snapshot of the dealings and positions (including long and short, "physical" and "synthetic" positions) in relevant securities of the target and, if it is offering its own stock as consideration, the bidder. The Code's disclosure regime is designed to:

- identify the persons who control the voting of shares in the target company and, in the case of a securities exchange offer, the bidder;
- identify persons with significant interests who may be dealing in order to assist a party to an offer and who therefore may be acting in concert with the bidder or the target; and
- provide market transparency by requiring persons with significant interests in either the target or a paper bidder to disclose publicly information in relation to their positions at the start of, and dealings during the course of, an offer period, including the prices at which they have dealt.

B. Opening Position Disclosures

Rule 8 of the Code requires that any person who is interested in 1 percent or more of any class of relevant securities of the target or of any paper bidder must make an opening position

“It is a key principle of the Code that the ability of a bidder to invoke conditions and preconditions is severely constrained.”

disclosure following the commencement of the offer period and, if later, following the announcement in which any paper bidder is first identified.

An opening position disclosure must contain details of the person's interests and short positions in, and rights to subscribe for, any relevant securities of each of: (i) the target company; and (ii) any paper bidder(s). An opening position disclosure must be made by no later than 3:30 pm (London time) on the 10th business day following the commencement of the offer period and, if appropriate, by no later than 3:30 pm (London time) on the 10th business day following the announcement in which any paper bidder is first identified.

Relevant persons who deal in the relevant securities of the target company or of a paper bidder prior to the deadline for making an opening position disclosure must instead make a dealing disclosure.

Opening position disclosures also must be made by the target company and by any bidder and dealing disclosures must also be made by the target company, by any bidder and by any persons acting in concert with any of them.

C. Dealing Disclosures

The Code requires that any person who is or becomes interested in 1 percent or more of any class of relevant securities of the target company or of any paper bidder must make a dealing disclosure if the person deals in any relevant securities of the target company or of any paper bidder. A dealing disclosure must contain details of the dealing concerned and of the person's interests and short positions in, and rights to subscribe for, any relevant securities of each of: (i) the target company; and (ii) any paper bidder, save to the extent that these details previously have been disclosed under Rule 8. Dealing disclosures must be made by no later than 3:30 pm (London time) on the business day following the date of the relevant dealing. If two or more persons act together pursuant to an agreement or understanding, whether formal or informal, to acquire or control an interest in relevant securities of a target company or a paper bidder, they will be deemed to be a single person for the purposes of Rule 8.

D. Disclosure Obligations Outside Offer Periods

In addition to the Code requirements detailed above, there are general disclosure obligations which exist upon the acquisition of voting rights in companies listed on a regulated market in the UK which apply outside of an offer period. The Disclosure and Transparency Rules (DTRs) impose an obligation on any person who acquires in aggregate 3 percent or more of the voting rights in a UK issuer to give notice of such acquisition to the company within two trading days. The company must notify the London Stock Exchange as soon as possible after receipt of notification, and in any event by not later than the end of the trading day following receipt.

Like the Code, the DTRs now require disclosure of positions held in derivatives which provide only economic exposure to securities of UK issuers.

5. Conditions to an Offer

A. Conditions

It is normal for UK bids (other than mandatory bids) to be conditional upon the satisfaction of a number of conditions. The Panel views these conditions as falling into four categories: (i) minimum acceptances; (ii) antitrust; (iii) mandatory (e.g., where a bidder requires shareholder approval to issue consideration stock); and (iv) protective (which attempt to give the bidder (or the target) the right not to proceed in certain circumstances). Reflecting the principle that bids should be announced only when a bidder is highly confident it will be able to complete, the Code contains a number of provisions designed to limit the ability of a bidder to withdraw or lapse an offer. Key among those is Rule 13, which provides that a bid normally must not be subject to conditions or preconditions which depend solely on subjective judgments by the directors of the bidder or of the target, or the fulfilment of which is within their control. An element of subjectivity may be acceptable to the Panel where it is not practicable to specify all the factors on which satisfaction of a particular condition or precondition may depend, especially in cases involving official authorisations or regulatory clearances. This approach contrasts with private acquisitions and takeovers in a number of other jurisdictions.

B. Preconditions

A precondition is a condition which must be satisfied or waived before the offer is formally made by the posting of the offer document, whereas a condition to the offer itself applies after the offer has been formally made by the posting of the offer document. Except with the consent of the Panel, an offer must not be announced subject to a precondition unless the precondition relates to there being no reference, initiation of proceedings or referral to or by the UK Competition Commission or the European Commission, or it relates to another material official authorisation or regulatory clearance and the offer is publicly recommended by the target board or the Panel is satisfied that it is likely to prove impossible to obtain the relevant authorisation within the Code timetable.

The Panel must be consulted in advance if a bidder proposes to include in an announcement any preconditions to an offer.

C. Constraints on Invoking Conditions

It is a key principle of the Code that the ability of a bidder to invoke conditions and preconditions is severely constrained. The bidder may do so only if the circumstances which give rise to the right to invoke the condition or precondition are of material significance to the bidder in the context of the offer. Panel decisions applying this Rule have indicated that the materiality threshold applied by the Panel is extremely high.

The acceptance condition and any condition relating to the initiation of proceedings or referral to or by the UK Competition Commission or the European Commission are not subject to this standard.

Following the announcement of a firm intention to make an offer, a bidder is required to use all reasonable efforts to ensure satisfaction of any conditions or preconditions to which the offer is subject.

D. Key Conditions

Acceptance

As a general rule, no offer may be declared unconditional unless the bidder has acquired, or agreed to acquire, whether pursuant to the offer or otherwise, shares carrying more than 50 percent of the target company's voting rights. Once an offer has become or is declared unconditional as to the required level of acceptances, it must remain open for acceptance for not less than 14 days after the date on which it would otherwise have expired.

In practice, the acceptance condition is usually set by the bidder at 90 percent of the shares for which the offer is made (because this is the level at which the power to acquire shares which have not yet been assented to the offer may be exercised under the Companies Act 2006). This condition must be satisfied or waived, that is, the offer must become or be declared "unconditional as to acceptances," by no later than the 60th day after the formal offer document is posted to target shareholders. An acceptance condition is not required for a scheme of arrangement as the scheme will either succeed or fail based on whether a majority in number of shareholders representing 75 percent of the voting shares approve the scheme at a shareholder meeting. If approved, a scheme is binding on all shareholders.

The UK Competition Commission and the European Commission

Rule 12 provides that where an offer either (i) comes within the statutory provisions for possible reference to the UK Competition Commission, or (ii) would give rise to a concentration within the EU such that the applicable competition regulations may apply, it must be a term of the offer that it will lapse if there is a reference to the Competition Commission, or if the European Commission initiates phase-two proceedings or refers the matter to the UK Competition Commission.

Protective Conditions

When the Code was put on a statutory footing in 2006, the General Principles were amended to track the principles set out in the EU Takeover Directive (which were themselves founded upon the Code principles). At that time, some of the wording of the old General Principle 3 was amended and in the process, the express stipulation that a bid should not be announced unless the bidder "*has every reason to believe that it can and will continue to be able to implement the offer*" was lost and subsumed into other General Principles. Nonetheless, the spirit of that principle continues to underpin various Rules, which seek to balance the tension between protective conditions sought by bidders and the deal certainty that the market expects.

Conditions to UK bids are normally required to be cast in objective terms, and their satisfaction should not be solely within the bidders' control. Whilst offer documents typically contain a broad range of conditions, with the exception of the acceptance and any UK or EU antitrust conditions, conditions normally can be invoked only if "*the circumstances which give rise to the right to invoke the condition are of a material significance to the offeror in the context of the offer.*" This is a fundamental provision of the Code which "*is designed to override the legal and contractual effect of offer conditions and is the primary protection against widely drafted conditions being invoked contrary to the reasonable expectations of the offeree company and the market generally.*"

A "no material adverse change" condition is often included in offer documents (to the effect that there has been no material adverse change in the position of the target group since that

disclosed in the most recent published, audited accounts). The Panel has ruled that for a bidder to invoke a material adverse change condition (or any other protective condition), the bidder is required to demonstrate to the Panel that exceptional circumstances have arisen affecting the target which could not reasonably have been foreseen at the time of the announcement of the offer and which are of an entirely exceptional nature striking at the heart and purpose of the transaction. Failure to identify a specific liability of the target group in the course of due diligence before the offer is made normally would not provide grounds on which subsequently to withdraw an offer.

A condition as to sufficient financing becoming available to satisfy the consideration payable upon consummation of the offer normally will not be permitted by the Panel.

Sometimes conditions to the offer will be included for the benefit of shareholders in the target rather than the bidder. These target protection conditions generally are found only in recommended securities exchange offers (where the target board wishes to have some mechanism for ensuring that the offer does not go through in situations where the bidder's securities have a materially lower value than that contemplated by the target board at the time of the recommendation) and in particular in mergers of equals where the target and bidder are of a similar size and have agreed to reciprocal conditions.

6. The Offer Document and Disclosure Standards

A. The Offer Document

As the formal legal document making the offer, the offer document will contain the detailed terms and conditions of the offer (although the offer conditions will have been set out in the Rule 2.7 Announcement). It must normally be posted within 28 days of the Rule 2.7 Announcement. In a scheme of arrangement, a scheme circular, rather than an offer document, will be sent by the target to its shareholders, although the bidder and its advisers will normally provide significant input into this document.

The offer document will ordinarily contain a letter from the bidder setting out the offer and, where the offer is recommended, a letter from the chairman of the target company. In addition, the Code lays down detailed requirements as to the content of an offer document. The offer document is accompanied by a form of acceptance which will be used by shareholders of the target company to accept the offer unless they accept through the paperless trading system.

Rule 23, reflecting General Principle 2, provides that shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of an offer and the information must be available early enough to enable shareholders to make a decision in good time. The obligation of a bidder in these respects toward the target's shareholders is no less than its obligation towards its own shareholders. Information must be updated where there is a material change in information previously published during an offer period.

As stated above, the Code contains detailed provisions on the contents of an offer document. Some of the key required items of information include:

- the bidder's intentions regarding the future business of the target and its strategic plans for the target;

- the bidder's intentions regarding continued employment of the employees of the target;
- the bidder's long-term justifications for the offer;
- financial information on the bidder and the target;
- disclosures of the bidder's interests in the target's share capital; and
- where the offer is recommended, the target directors' interests in the target's share capital and disclosures on certain material contracts of the target.

Increased disclosure was a key factor behind the Panel changing the Code in September 2011, in an attempt to improve the ability of the target board, shareholders and employees to judge the merits of an offer.

Two important aspects of the disclosure regime were changed. First, all documents relating to the financing of the bid and refinancing of target working capital are required to be described and put on display at the time an offer is announced pursuant to Rule 2.7. Only "headroom" in a credit facility is regarded as sufficiently commercially sensitive to merit redaction. Second, statements about the bidder's intentions regarding the target business were extended to require confirmations where no such intentions exist, and the Code requires such statements (whether set out in the offer document or made elsewhere) to be adhered to in the absence of a material change in circumstances.

B. Responsibility

Rule 19.1 of the Code requires that *"each document or advertisement issued, or statement made, during the course of an offer must, as is the case with a prospectus, satisfy the highest standards of accuracy and the information given must be adequately and fairly presented."* Because all material new information released must be sent to all shareholders, the same high standards extend in practice to other releases of information. Severe criticism from the Panel will result if any information is inaccurate or misleading in any material respect and the publication of a correction may be required (there is also now potential criminal liability for failure to comply with the content requirements for offer documents or defence documents).

Furthermore, Rule 19.3 provides that care must be taken not to issue statements which, while not factually inaccurate, may mislead shareholders and the market or may create uncertainty.

It is the responsibility of the directors of the bidder and the target to ensure that these standards are met.

All documents issued to shareholders and advertisements must contain a responsibility statement given by the directors accepting responsibility and confirming that, to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case), the information contained in the document or advertisement is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the import of such information. Responsibility statements are regarded by the Panel as of great importance and any unusual issues need to be discussed with the Panel in advance.

C. Profit Forecasts and Earnings Enhancements Statements

During the course of an offer, the bidder or target may publish a profit forecast or asset valuation, or already may have a profit forecast “on the record” which needs to be repeated and reported on in accordance with the Code, or withdrawn.

Profit Forecasts

Any form of words which puts a floor under, or a ceiling on, the likely profits of a particular unaudited period or contains the data necessary to calculate an approximate figure for future profits will be treated as a profit forecast, *e.g.*, “*profits will be higher than last year.*” A profit estimate (*i.e.*, an estimate of profit for a period which has already expired) will be treated as a profit forecast.

The Code requires that a profit forecast must be compiled with due care and consideration by the directors, who are responsible for this statement. The financial advisers must satisfy themselves that this has been done and report on the forecast. The assumptions upon which the forecast has been based must be stated in any document published in connection with an offer, and the Code lays down specific requirements in relation to the selection and listing of assumptions.

Where a profit forecast relates to a bidder (other than for bidders offering solely cash), the accounting policies and calculations for the forecast must be examined and reported on by accountants. Financial advisers also must report on the forecast.

Earnings Enhancements Statements

A bidder who makes an earnings enhancement statement (a statement of the effect of the acquisition on future earnings, *e.g.*, “*the acquisition will be earnings enhancing by the end of the next financial year*”) which is not intended to be a profit forecast (because they make no statement regarding the absolute level of earnings, merely the effect of the acquisition), is required to include an explicit and prominent disclaimer (unless a profit forecast is intended) to the effect that the statement should not be interpreted to mean that earnings per share will necessarily be greater than those for the relevant preceding financial period.

Merger Benefits Statements

If a party makes quantified statements about the expected financial benefits of a proposed takeover or merger (for example, a statement by the bidder that it would expect the target to contribute an additional “x” of profit following the acquisition), it should consult the Panel in advance. It may be necessary to comply with certain additional requirements which seek to ensure that such statements are properly understood by the market.

Asset Valuations

Companies that are more likely to be valued on a net assets basis (such as property, oil and gas, or mineral companies) may consider having an asset valuation prepared. Asset valuations are required to comply with Rule 29 of the Code, irrespective of the type of asset. The principal requirement is that a valuation of assets given in connection with an offer should be supported by the opinion of a named independent valuer.

A valuation or assessment of another party’s assets (for example, the bidder commenting on the value of the target’s assets) normally will not be permitted unless supported by the

unqualified opinion of a named independent valuer that has had access to sufficient information to carry out the valuation (unlikely to be the case in a hostile bid).

D. Target Response

Typically, within 14 days of the publication of the offer document, the target board must circulate its views on the offer to its shareholders. As stated above, it must make known in the document the substance of the advice given to it by its independent advisers. Further, the target board must provide its shareholders in good time with all the facts necessary to enable them, taking into account the recommendation of the target board and the target company's financial advisers, to make an informed decision whether to accept the offer. Where an offer is recommended, this information will normally be included in the offer document.

Changes to the Code in 2011 enhanced the ability of target employee representatives to provide their views on bids. To the extent those views are received in good time to incorporate into the target board's response, this must be done. If received later, the target is required by the Code to publish them on its website.

7. Timing and Conduct

A. Timing

The Code contains detailed requirements relating to the timing of transactions subject to it. The following is a summary timetable for an acquisition implemented by way of a takeover offer:⁴

D -28	Date of Rule 2.7 Announcement (firm intention to make an offer)
"D" day	Offer document despatched (normally no later than 28 days after the Rule 2.7 Announcement)
D 14	Last date for despatch of first defence document of target. This will be incorporated into the offer document in a recommended bid
D 21	Earliest date to declare the bid unconditional ⁵
First business day after closing date (and all subsequent closing dates) (by 8:00 am)	Announcement of acceptance levels and (if appropriate) the extension of the offer
D 39	Last date for release of material new information by target
D 42 (assuming first closing date is D 21)	First date on which accepting shareholders can withdraw acceptances, if offer not yet unconditional as to acceptances
D 46	Last date for revision of the offer
D 60	Last date for offer to become unconditional as to acceptances
D 74	Earliest date on which offer can close (assuming the offer became unconditional as to acceptances on Day 60)
D 81 (assuming the offer became unconditional as to acceptances on D 60)	Last date for fulfilment of all other conditions
14 days after offer becomes unconditional in all respects	Last date for shareholders to receive consideration

⁴References to days or "D" in the table above are to calendar days, not business days unless otherwise stated.

⁵The offer must remain open for 14 days after the unconditional date.

The basic timetable rules apply whether the bid is recommended or contested. However, they may be altered by the emergence of a competing bid as the original bidder will have the option of resetting its timetable to run from the date of posting of the new bidder's offer document. Where a competing offer has been announced, the Panel will normally consent to the first bidder extending its offer beyond the 60th day where the offer has not become unconditional, provided consent is sought before the 46th day following the posting of the competing offer document. If a competitive bid situation continues to exist in the later stages of the offer period, the Panel will normally require bidders to follow an auction procedure unless an alternative procedure is agreed between the bidders and the board of the target.

8. Frustrating Action and Deal Protections

A. Frustrating Action

Rule 21 prohibits a target board, during an offer or prior to an offer if the target has reason to believe that a *bona fide* offer may be imminent, from taking any action which may result in an offer or possible offer being frustrated or in shareholders being denied the opportunity to decide on the merits of the offer without the approval of its shareholders at a general meeting.

Although the prohibition extends to any act that may frustrate a bid, the Code assumes that the target: (i) issuing or transferring any shares out of treasury; (ii) issuing options in respect of any unissued shares; (iii) creating or issuing any securities convertible into shares; (iv) selling, disposing or acquiring (or agreeing to do so) any assets of a material amount; or (v) entering into contracts other than in the ordinary course of business would be frustrating. The Panel must be consulted if there is any doubt about the acceptability of any such proposed actions.

B. Inducement / Break Fees and Other Deal Protections

In 2011, the Code was amended to prohibit "*any agreement, arrangement or commitment proposed to be entered into ... in connection with an offer, either during the offer period or when an offer is reasonably in contemplation.*" This includes inducement fees, as well as a number of other contractual protections familiar to bidders, such as information and matching rights. Limited exceptions are available for confidentiality, employee retention, and provision of information for regulatory purposes, as well as irrevocable commitments and letters of intent to accept an offer given by target directors in their capacity as shareholders. The Rules do not restrict the bidder from undertaking any obligations to the target, such as a reverse-break fee or standstill agreement.

With respect to schemes of arrangement, bidders and targets are required by the Code to implement a scheme in accordance with a timetable to be agreed upon with the Panel in advance and published in the circular to shareholders, subject to the withdrawal of the target board's recommendation.

The Code envisages three scenarios in which a dispensation from the general prohibition on such arrangements may be granted, including where a:

- non-recommended offer has been announced and the target wishes to bring in a white knight, in which case the target may be allowed to agree to an inducement fee, subject to

“Information about companies involved in an offer should be made equally available to all shareholders of a target in order to ensure they have equal opportunity to consider the merits of a bid.”

the proviso that it be no more than 1 percent of the competing bidder's offer when it is publicly announced;

- formal sale process is run by a target, in which case an inducement fee (and in exceptional circumstances, other offer-related arrangements) may be entered into at the conclusion of that process when the offer is announced; or
- target is in financial distress and seeking a bidder.

9. Publication of Information

A. Equality of Information — Shareholders

General Principle 1, which requires equal treatment of target shareholders, applies not only to the terms of an offer, but also to information. Information about companies involved in an offer should be made equally available to all shareholders of a target in order to ensure they have equal opportunity to consider the merits of a bid.

The supply of information during the course of a bid is subject to a number of legal restraints. Supply of information in this context encompasses everything from informal conversations with journalists or analysts to formal documents issued to target shareholders. Generally, all material information concerning an offer must be sent at the same time to all shareholders.

Meetings with anyone and, in particular, any shareholder, analyst or journalist prior to or during an offer may take place provided that no new material information is forthcoming and no significant new opinions are expressed and provided a representative of the party's financial adviser is present (who is required to confirm to the Panel in writing that no such information or opinions were presented). If, however, any material new information or significant new opinion does emerge at the meeting, a circular giving details must be sent to shareholders as soon as possible thereafter. In the later stages of an offer, it may be necessary to publish that circular in an appropriate newspaper.

Target shareholders should not be contacted by telephone except as part of an organised program of calls controlled and conducted by the financial adviser. Telephone campaigning should not be considered without careful consultation with appropriate advisers.

B. Equality of Information — Bidders

Any information which is given by the target (or its advisers) to one bidder or potential bidder (whether named or unnamed), must, on request, be given to another bidder or *bona fide* potential bidder, even if that bidder is less welcome. This requirement will usually apply only where there has been a public announcement of the existence of the bidder or of a potential offer, or if a bidder or potential bidder requesting the information has been informed of the existence of another potential bidder.

C. Misleading Statements and Practices

In addition to Code requirements, provisions of the criminal law back up the requirement for documents not to be false or misleading.

Section 397 of the UK Financial Services and Markets Act provides that it is a criminal offence where a person either makes a statement, promise or forecast which he knows to be misleading, false or deceptive or dishonestly conceals any material facts or recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive if he does so for the purpose of inducing, or is reckless as to whether it may induce, another person to enter or offer to enter into, or to refrain from entering or offering to enter into, an agreement, among other things, to acquire shares or to exercise, or refrain from exercising, any rights conferred by an investment.

D. Advertisements

The publication of all but a few categories of advertisement and general promotional and publicity material during an offer is prohibited. The excepted categories include corporate image or product advertising not bearing on the offer. However, other than in the case of product advertising, even these excepted categories must be cleared in advance with the Panel. Any new advertising campaigns of a general nature which are produced during an offer should not be designed to promote the success of the offer.

10. Restrictions Following an Offer

Except with the consent of the Panel, where an offer has been announced and has been withdrawn or lapsed, neither the bidder nor any person who is or was acting in concert with the bidder may within 12 months from the date on which such offer is withdrawn or lapses make an offer for the target company or put himself in a position whereby he would be obliged under Rule 9 of the Code (that is, the mandatory offer requirement referred to above) to make an offer.

There are circumstances in which the Panel has indicated that it normally will grant consent for a further offer to be made notwithstanding that the 12-month period has not elapsed. These include:

- where the previous offer lapsed due to UK Competition Commission or European Commission referral/action, and the new offer follows a clearance of the UK Competition Commission or the European Commission (in such circumstances, any offer normally must be announced within 21 days after the announcement of such clearance); and
- where the new offer follows the announcement of an offer by a third party for the target, or where the new offer is recommended by the board of the target.

Further, except with the consent of the Panel, neither the bidder nor any person acting in concert with it may, within six months of the closure of its offer (which became or was declared wholly unconditional), make a second offer to any shareholder in that company, or acquire any interest in shares in that company, on more favourable terms than those made available under the previous offer.

Appendix: Key Code Definitions

acting in concert

Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), cooperate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company. A person and each of its affiliated persons will be deemed to be acting in concert all with each other.

Without prejudice to the general application of this definition, the following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:

- a. a company, its parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies, all with each other (for this purpose ownership or control of 20 percent or more of the equity share capital of a company is regarded as the test of associated company status);
- b. a company with any of its directors (together with their close relatives and related trusts);
- c. a company with any of its pension funds and the pension funds of any company covered in (a);
- d. a fund manager (including an exempt fund manager) with any investment company, unit trust or other person whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;
- e. a connected adviser with its client and, if its client is acting in concert with a bidder or with the target, with that bidder or with that target respectively, in each case in respect of the interests in shares of that adviser and persons controlling, controlled by or under the same control as that adviser (except in the capacity of an exempt fund manager or an exempt principal trader); and
- f. directors of a company which is subject to an offer or where the directors have reason to believe a bona fide offer for their company may be imminent.

control

Control means an interest, or interests, in shares carrying in aggregate 30 percent or more of the voting rights of a company, irrespective of whether such interest or interests give *de facto* control.

interests in securities

This definition and its notes apply equally to references to interests in shares and interests in relevant securities.

A person who has long economic exposure, whether absolute or conditional, to changes in the price of securities will be treated as interested in those securities. A person who only has a short position in securities will not be treated as interested in those securities.

In particular, a person will be treated as having an interest in securities if:

- a. he owns them;
- b. he has the right (whether conditional or absolute) to exercise or direct the exercise of the

- voting rights attaching to them or has general control of them;
- c. by virtue of any agreement to purchase, option or derivative he:
- (i) has the right or option to acquire them or call for their delivery; or
 - (ii) is under an obligation to take delivery of them,
- whether the right, option or obligation is conditional or absolute and whether it is in the money or otherwise; or
- d. he is party to any derivative:
- (i) whose value is determined by reference to their price; and
 - (ii) which results, or may result, in his having a long position in them; and
- e. in the case of Rule 5 only (which restricts acquiring a position greater than 30 percent, or increasing a position between 30 percent and 50 percent), he has received an irrevocable commitment in respect of them.

offer period

Offer period means the period from the time when an announcement is made of a proposed or possible offer (with or without terms) until the first closing date or, if this is later, the date when the offer becomes or is declared unconditional as to acceptances or lapses. An announcement that an interest, or interests, in shares carrying in aggregate 30 percent or more of the voting rights of a company is for sale or that the board of a company is seeking potential bidders will be treated as the announcement of a possible offer.

In the case of a scheme of arrangement, the offer period will continue until it is announced in accordance with Section 5(c) of Appendix 7 that the scheme has become effective or that the scheme has lapsed or been withdrawn. Provisions of the Code that apply during the course of the offer, or before the offer closes for acceptance, will apply until the same time.

relevant securities

Relevant securities include:

- a. securities of the offeree company which are being offered for or which carry voting rights;
- b. equity share capital of the offeree company and an offeror;
- c. securities of an offeror which carry substantially the same rights as any to be issued as consideration for the offer; and
- d. securities of the offeree company and an offeror carrying conversion or subscription rights into any of the foregoing.

Beijing	Palo Alto
Boston	Paris
Brussels	São Paulo
Chicago	Shanghai
Frankfurt	Singapore
Hong Kong	Sydney
Houston	Tokyo
London	Toronto
Los Angeles	Vienna
Moscow	Washington, D.C.
Munich	Wilmington
New York	

Skadden