General Guide to the

UK Takeover Regime

Skadden

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Foreword

The Takeover Panel (the **Panel**) is the UK's primary regulator of takeovers and other transactions which involve a change of corporate control and for more than half a century it has overseen one of the most active M&A markets in the world. During this period of huge change for UK securities markets, corporate ownership and regulatory landscape, the Panel is regarded as having been consistently successful in protecting investors' interests and in maintaining high standards of corporate and market conduct. As a result, it has built an enviable international reputation and it has led the way in tackling new developments such as the widespread use of equity derivative products.

In its structure and regulatory approach, the Panel is different in a number of significant respects to other regulators in the UK and overseas. This guide sets out to explain these differences and the scope of the Panel's rulebook, the Takeover Code (the **Code**). It aims to assist directors, advisers and investors in understanding how the Panel operates in practice and how best to engage with it and to navigate through the Code's provisions without mishap.

The Panel is an independent and self-funding regulator whose members are drawn principally from three constituencies: investors, companies and advisers. Each Panel member is designated on appointment as a member of either the Panel's Hearings Committee, which reviews rulings of the Panel Executive (the **Executive**) and hears disciplinary proceedings in respect of breaches of the Code, or its Code Committee, which carries out the Panel's rule-making functions and is responsible for the Code.

The Code's rules apply to change of control transactions where the target company is incorporated in the UK, the Channel Islands or the Isle of Man and either its securities are quoted in, or its place of central management is located in, one of those jurisdictions.

The day-to-day work of the Panel is handled by the Executive which is staffed by a mixture of permanent employees and secondees from investment banks, law firms and corporate brokers. The Executive is available at all times for consultation and the giving of rulings on the interpretation, application or effect of the Code. Its approach is pragmatic rather than doctrinaire and its primary consideration will always be to find solutions and to devise remedies when problems or unusual circumstances arise.

The Panel's principal objectives are to ensure that investors in Code companies are treated fairly, that there is an orderly framework for the conduct of takeovers and that market integrity is promoted.

The Panel is entirely neutral about transaction outcomes and it has no role in judging the financial or commercial merits of a transaction, these being matters for the target company and its shareholders, or in addressing wider questions of public interest, which are the responsibility of government and other bodies.

The essential characteristics of the Panel system, which mark it out from many other regulatory bodies, are flexibility, a wide discretion to grant dispensations, the facility to obtain with ease both guidance and rulings, and therefore to establish regulatory certainty, and a notable speed of decision-making.

Flexibility is achieved by having a rulebook which is principles-based. As a result, new practices and developments can always be addressed and the Panel will never be left behind. The Panel's wide discretion to grant dispensations enables it to set standards at a high level without fear of creating overly rigid rules.

In large part, guidance and rulings are sought from the Executive before actions are taken and not after. Parties are required by the Code to consult the Executive in advance when they or their advisers are in any doubt whatsoever about how the Code should be interpreted. The Panel considers that prevention is preferable to cure and this enables parties to proceed with the comfort of knowing where they stand under the Code.

With the benefit of knowledgeable and experienced staff and an extensive library of precedents, Executive decisions can be, and are, made swiftly where the circumstances demand this. This speed of response, which is so important for the effective regulation of fast-moving transactions, extends to the Hearings Committee which can meet at short notice to hear appeals against Executive rulings and to resolve disputes.

The Panel's active hands-on approach to regulation has worked extremely well for investors, companies and advisers over many years and has delivered the investor protection which the Code is principally designed to ensure. There is no wish amongst participants to change this well-established feature of the UK M&A market.

A good understanding of this model of regulation and of the benefits of close interaction with the Panel during the course of planning and executing change of control transactions is the key to avoiding pitfalls and ensuring as far as possible the achievement of desired outcomes.

Tony Pullinger
Deputy Director General, Takeover Panel (1996-2021)

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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 UK Market Abuse Regime, the Financial Services and Markets Act 2000, the Financial Services Act 2012, the UK Listing Rules, the UK Prospectus Rules, the Criminal Justice Act 1993 and the relevant competition and national security and investment legislation in the UK or elsewhere, 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 is important to obtain specific advice before taking any action in relation to a particular situation rather than rely on the general description in this guide.

The definitions of certain key terms used in the Code (and which are used in this guide), including "acting in concert", "interests in securities", "offer period", "post-offer intention statement" and "post-offer undertaking" 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 and bulletins, consultation papers and other forms of guidance. This regime imposes procedures for the conduct of change of control transactions and ensures 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.

C. The Panel and the Code

The Panel

The Panel is an independent, self-funding body that regulates takeovers of companies subject to the Code. The Panel (whose membership is drawn from the three main constituents in the market: investors, companies and advisers) serves as the regulatory authority for takeovers under the Companies Act 2006.

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 a 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.

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.

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 Appeal Board reflects the same three constituencies as the Panel and is chaired by a senior judge of the courts of England and Wales.

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 or multilateral trading facility in the UK, or any stock exchange in the Channel Islands or the Isle of Man. It also applies to other public companies that 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 may also apply to private and unlisted companies in certain circumstances.

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 or national security.

"The Panel's principal objectives are to ensure that investors in Code companies are treated fairly, that there is an orderly framework for the conduct of takeovers and that market integrity is promoted."

Powers

If a person breaches the Code, they may be criticised privately or publicly by the Panel. The Panel may also report a person's conduct to other regulators (for example, in the UK, the Financial Conduct Authority (the **FCA**) 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. This is the Panel's most serious disciplinary sanction and has only been imposed a handful of times in the Panel's history. These powers have been sufficient to maintain a high level of compliance by market participants over more than 50 years.

Under the Companies Act 2006, the Panel has statutory powers including the ability to seek court enforcement of its rulings, to make compensation rulings (requiring a person to make payments to investors where prescribed Code Rules are breached) and to require the production of documents and other information. Therefore, although strictly speaking the Panel is not a statutory body, it has been placed on a statutory footing and therefore has certain statutory powers at its disposal. In 2017, the Panel found it necessary for the first time to make use of its statutory powers to seek enforcement by the court of the Panel's ruling that a mandatory offer should be made for Rangers Football Club.

Acquisition Structures: Takeover Offers and Schemes of Arrangement

The Code is drafted in a manner applicable to takeover offers (that is, tender or contractual offers) to acquire shares in a target company. 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. Except where a mandatory offer is required, or where a bidder wishes to "switch" from one acquisition structure to another, the Code does not specify the mode by which a takeover should be carried out.

A scheme of arrangement is the most popular acquisition structure but is typically undertaken only in a recommended transaction as a scheme of arrangement requires a high degree of target involvement, for example to convene meetings of its shareholders and to make an application to the court to sanction the scheme. Hostile transactions are generally undertaken by way of a takeover offer.

Section 8 of Appendix 7 provides that, with the consent of the Panel, a bidder may switch from a scheme of arrangement to a takeover 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 representing 75 per cent or more of the shareholders (or class of shareholders) voting on the proposal, it will bind all shareholders (or all shareholders in that class). In a takeover offer, a bidder must acquire 90 per cent of the shares to which the offer relates before it can exercise compulsory acquisition rights, contained in the Companies Act 2006, in respect of the remaining shares. Accordingly, a bidder will normally be advised to assess the target's share register and choose the structure most likely to increase deliverability.

If the bidder is willing to conclude the transaction with only a majority shareholding in the target, rather than 100 per cent of the target's share capital, it may consider switching to a takeover offer with an acceptance condition of less than 75 per cent but no less than 50 per cent (plus 1 share), the minimum level allowed under the Code. Unlike a takeover offer where a bidder can acquire less than 100 per cent, 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.

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 (unless the context requires otherwise). With regard to certain key provisions summarised in this guide, some differences between implementing an acquisition by way of a takeover offer and doing so by way of a scheme of arrangement are highlighted.

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.

The Code consists of six General Principles (statements of good commercial practice) and 38 Rules, as well as notes to those Rules that 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 dispensations 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 with the Panel Executive. 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 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.*

D. Key Provisions of the Code

1. General Principles

The six General Principles provide as follows:

1. **(1) All holders of the securities of a Code company of the same class must be afforded equivalent treatment. (2) If a person acquires control of a Code 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 equivalent treatment of shareholders 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 shareholders are entitled to withdraw their acceptances and accept a higher offer from a competing bidder.

   This principle underpins the mandatory offer Rule (contained in Rule 9 of the Code), which requires any person who acquires interests in shares carrying 30 per cent or more of the voting rights in a Code company to make a general offer to all shareholders at the highest price that person has paid for securities in the company in the previous 12 months. The Code ensures that existing shareholders and those former shareholders who delivered the controlling position to the mandatory bidder share any control premium paid whilst affording all shareholders the same opportunity to exit the controlled company. In a voluntary offer, this principle aligns the position of shareholders who accept an offer with those who sell to the bidder outside the bid (whether during an offer period or for certain periods preceding an offer period) by stipulating that such acquisitions may set a minimum bid price or oblige a bidder to offer a particular form of consideration.

2. **(1) The holders of the securities of a target company must have sufficient time and information to enable them to reach a properly informed decision on the takeover bid. (2) Where it advises the holders of securities, the board of the target company must give its views on the effects of implementation of the takeover bid on: (a) employment; (b) conditions of employment; and (c) the locations of the company's places of business.**

   The Code sets an offer 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, which include descriptions of 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 quantified financial benefits statements, must be supported by directors' confirmations or professional adviser reports.

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

   The most powerful articulation of this principle is the Rule against the target board taking frustrating action (contained in Rule 21 of the Code), also referred to 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 action which may frustrate a bid, without first obtaining shareholder approval.

   Actions which are considered to be frustrating include issuing shares, options or convertible securities, share buybacks, selling or acquiring material assets and entering into non-ordinary course contracts.

4. **False markets must not be created in the securities of: (a) the target company; (b) if the bidder is a company, that company; or (c) any other company concerned by the takeover 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 FCA 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 unconditional, the Panel coordinates with the FCA to avoid false markets arising in the securities of the target and the bidder.

   Two Rules in particular are designed to avoid false markets. The first of these is Rule 2, which deals with secrecy before announcement, monitoring of potential leaks of inside information 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 securities of the target and, where a bidder offers its own securities to target shareholders as consideration, the bidder.

5. **A bidder must announce a takeover bid only after: (a) ensuring that it can fulfil in full any cash consideration, if such is offered; and (b) 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 target and the bidder. 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 generally only be invoked if the Panel determines that a very high materiality threshold is satisfied.

6. **A target company must not be hindered in the conduct of its affairs for longer than is reasonable by a takeover 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 88 days (comprising 28 days from the announcement of the firm intention to bid to the posting of

the offer document plus 60 days following such posting) from that point to have made its offer and satisfied all of the conditions to it (with the potential to extend the deadline with Panel consent should any material regulatory approvals remain outstanding). However the strict deadlines are able to be extended by the mutual agreement of the parties.

In order to prevent unduly long "virtual bid" periods, once a potential bidder is publicly identified, it normally has 28 days to: (i) announce a (fully financed) bid; (ii) obtain the agreement of the target and the Panel to an extension of that deadline; or (iii) 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 initiated by the target or where the target has received a firm offer by a competing bidder.

2. The Approach and Associated Requirements[1]

A. Secrecy and Pre-Bid Announcements

As noted previously, 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 to release a public announcement where the Panel determines there has been a leak, as is typically evidenced by an untoward movement in the target share price, or rumour and speculation in the market. The importance the Code places on absolute secrecy prior to a formal announcement cannot be overstated. Before the announcement of the bid, code names and other information security measures should be used and persons informed of the transaction only on a need-to-know basis. If the Panel believes there has been a leak, it may require a clarification announcement to be made. An "untoward movement" in the target's share price, or rumour and speculation in the market 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 per cent 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 per cent 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 leak occurs but the Panel is convinced that the bidder has ceased active consideration and has "downed-tools", the Panel may grant a dispensation from making an announcement. If a party engages in discussions with more than a limited number of external parties (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.

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

"Once a potential bidder is publicly identified, it normally 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."

B. Duty to Monitor for Leaks

Prior to approaching the target about a transaction, the bidder is obliged to monitor for untoward price movements, rumour 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 for leaks, consult the Panel and make any announcement moves to the target (although a secondary obligation remains with the bidder). The target continues to bear 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 upon who has the responsibility for making an announcement at any particular time following approach.

C. Leak Announcements

The Panel will expect a draft "leak 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, the target enters an "offer period" imposing, among other things, enhanced dealing disclosure requirements and restrictions on target board conduct. A raft of other Rules also come into play with implications for the bidder as well as the target.

A listed target must 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 is required to observe (both under the UK regime and also under its domestic regime for an overseas bidder).

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 or where the target is already the subject of a firm offer by a competing bidder, 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.

"A target announcement that triggers an offer period is normally 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."

E. Public Statements

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 or clarified.

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 of information 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 in which a select few investors in the target have access to information that could influence investment decisions.

Rule 2.8 of the Code provides that a person who makes a statement that they do 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, unless certain permitted circumstances occur that the bidder has specified in the Rule 2.8 statement as being circumstances in which it may be set aside. 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 does not have to be formal, for example a 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 notes on Rule 2.8 make it clear that any person considering making a Rule 2.8 statement should consult the Panel in advance. However, the Panel also 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 directly 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 or taking part in discussions that may attract media coverage.

The Code stipulates a set of permitted circumstances in which the restrictions in Rule 2.8 may be set aside by the bidder if it has expressly included them in the Rule 2.8 statement. The permitted circumstances are:

- the agreement or recommendation of the board of the target (although if the Rule 2.8 statement was made after the announcement by a third party of its firm intention to make an offer, the restrictions will only cease to apply if:
  - that third party's offer has been withdrawn or lapsed; and
  - between the making of the Rule 2.8 statement and the lapse or withdrawal of the third party's offer, neither the person making the statement nor any of their concert parties has acquired an interest in any target shares);
- the announcement of a firm intention to make an offer for the target by a third party;

- the announcement by the target of a Rule 9 waiver proposal[2] or a reverse takeover; and
- a material change of circumstances (as determined by the Panel).

In addition, if a Rule 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, although the Panel should be consulted before such a statement is made.

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 generally 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 firm intention to make an offer after the most careful and responsible consideration. Such an announcement (a **Rule 2.7 Announcement**) should be made only 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 debt facilities are in place or the bidder has existing cash resources, which will usually be required to be placed in escrow (or a combination of these); bank commitment letters 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 24.8, which requires the same statement to appear in the offer document (which fully sets out the terms of the bid) as well as the Rule 2.7 Announcement. 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; this should avoid any obligation under the Code to make up any funding shortfall.

Where there has been a Rule 2.7 Announcement, the bidder must, except with the consent of the Panel, proceed with making the offer unless the publication of the offer or scheme document 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 publication of an offer or scheme document; however, the original bidder's obligations to proceed may be reinstated if the competing offer were in some way to lapse, terminate or otherwise be withdrawn.

[2] A Rule 9 waiver refers to a dispensation granted by the Panel from the requirement that would otherwise be imposed on a controller to make a mandatory offer which arises out of a corporate action or transaction put forward by a Code company in circumstances where the proposal has been approved by the company's independent shareholders.

G. No Increase and Acceleration 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 public statements, announcements or documents published in connection with an offer (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 in the value of the offer. Although a bidder may include a reservation allowing it to set aside such a no-increase statement, such reservations cannot be subjective and must be discussed with the Panel in advance.

If statements in relation to the duration of an offer such as bringing forward the unconditional date of an offer (being the latest date by which all of the conditions to the offer must be satisfied), such statements being "acceleration statements", are included in public statements, announcements or documents (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 set aside the acceleration statement 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 from a financial adviser as to whether the financial terms of any offer are fair and reasonable 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 its views on the effects of the offer on all the target's interests, including its 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.

Where the target board decides to recommend the offer, its advice to shareholders will usually be contained in the offer document and consist of simple advice to accept or reject the offer. On occasion, if the context in which an offer is made is sufficiently complex or the interests of shareholders may differ, 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 prohibits the target and any other person acting in concert with it from entering into "*any offer-related arrangement with either the offeror or any person acting in concert with it during an 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 a significant shareholder from providing a break fee (provided it is not acting in concert with the target) or the bidder from undertaking any obligations to the target, such as a reverse break fee or standstill agreement. The latter is discussed further in Section 8(b).

3. Share Dealings and Mandatory Offers[3]

A. Treatment of Target Shareholders

It is a fundamental principle of the Code that all target shareholders of the same class 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 equivalent treatment of target shareholders participating in the offer itself, the Code contains Rules designed to ensure that target shareholders are afforded equivalent treatment with shareholders who sell their shares in the run up to, or outside, a bid.

B. Offers for Other Classes of Shares

The equivalent treatment principle extends to 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 the target:

- 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 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 target shareholders 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 the target must be on no less favourable terms.

Further, under Rule 11.1, where a bidder and any person acting in concert with it 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 carries 10 per cent or more of the voting rights in the target, then, except with the consent of the Panel, any offer for the target must be in cash or with a full cash alternative and at not less than the highest price paid.

The same obligation exists where a bidder acquires an interest in shares of the target for cash during the offer period. Rule 6.2 contains a similar requirement; it provides that where, after a

[3] References 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.

Rule 2.7 Announcement has been made, a bidder acquires an interest in shares at a price above the offer price, the offer price must be increased to not less than the highest price paid for those interests. 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 made 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 equivalent treatment (this will generally only 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 carries 10 per cent or more of the voting rights in the target, in exchange for bidder securities, then, except with the consent of the Panel, in any offer for the target, the same bidder 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 global financial crisis). When considering such representations, the Panel will typically look carefully at the size of the price-setting acquisitions and the movements of the share price in the market (although the mere fact that a share 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 Panel'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 the 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 complete any type of transaction (such as a contract for difference) which may result in securities 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 (other than the bidder), who is privy to confidential price-sensitive information concerning an offer or a 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 of the target are also likely to be restricted or prohibited by the insider dealing provisions of the UK Criminal Justice Act 1993 and the UK Market Abuse Regulation (although it should be noted that Rule 4 may apply to companies 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 these 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.

"The Code contains Rules designed to ensure that target shareholders are afforded equivalent treatment with shareholders who sell their shares in the run up to, or outside, a bid."

F. Mandatory Offers

The Code deems a person to have obtained or consolidated control of a target when it, together with members of its concert party, has acquired an interest in shares carrying 30 per cent or more of the voting rights of the target or, if interests between 30 and 50 per cent of the target's shares are already held, any further interests are acquired. 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, together with its concert parties, either:

i) acquires an interest in shares that carries 30 per cent or more of the voting rights in the target; or
ii) is already interested in shares that carry 30 per cent or more but less than 50 per cent of the voting rights in a target, and any one of them 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 offer lapses. Except with Panel consent, the offer must be conditional only upon a 50 per cent (plus 1 share) acceptance condition. 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 12 months prior to the mandatory offer being triggered. 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 (unless the Panel has granted a dispensation e.g. a Rule 9 waiver).

In a similar vein, Rule 5.1 of the Code provides that if a person is interested in shares carrying less than 30 per cent 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 per cent or more of the voting rights. Furthermore, where a person is interested in shares carrying 30 per cent or more but less than 50 per cent of the voting rights in a company, Rule 5 restricts the acquisition of further interests in shares carrying voting rights in that company.[4]

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 the person has made a Rule 2.7 Announcement);
- immediately before the person makes a Rule 2.7 Announcement, provided that the offer will be publicly recommended by, or the acquisition 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:

[4] For the purpose of Rule 5, an "interest in shares" includes obtaining irrevocable commitments from target shareholders.

i) the acquisition is made with the agreement of the target board; or

ii) the offer (or any competing offer) has been recommended publicly by the target board, even if such recommendation is subsequently withdrawn; or

iii) Day 21 of that offer (or of any competing offer) has passed; or

iv) the offer is unconditional; or

- if the acquisition is by way of acceptance of the offer; or
- 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 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 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 if the team member is a shareholder in the target. The terms of the new service agreements will be disclosable in the offer document in accordance with Rule 25.5. Other incentives offered in order to ensure the person's continued involvement in the management of the business may also fall within the scope of Rule 16.

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

i) the incentivisation is not being offered to management in their capacity as shareholders, but rather as managers; and

ii) 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 bidder'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 target shareholders on a poll) may also be required as a condition to Panel consent.

The target's financial adviser is required to state that in its 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 addition:

i) "relevant details" of all arrangements whether entered into or proposed and discussed must be disclosed;

ii) 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;

iii) if no incentivisation arrangements are proposed, this must be stated; and

iv) if arrangements are changed or discussions advanced after the publication of the offer or scheme document, the Panel 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 target shareholders may also be required.

4. Disclosure of Interests

A. Key Objectives of the Code's Disclosure Regime

The Code's 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 securities as consideration, the bidder. The Code's disclosure regime is designed to:

- identify the persons who control the voting rights attached to shares in the target company and, in the case of a securities exchange offer where the bidder issues securities as consideration for target shares, the bidder (referred to as a **paper bidder**);
- identify persons with significant interests who may be dealing in order to assist a party with an offer and who may therefore 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 publicly disclose 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 per cent or more of any class of relevant securities of the target or of any paper bidder must make an opening position 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; and (ii) any paper bidder. An opening position disclosure must be made by no later than 3:30 p.m. (London time) on the 10th business day following the commencement of the offer period and, if appropriate, by no later than 3:30 p.m. (London time) on the 10th business day following the announcement in which any paper bidder is first identified.

Persons interested in 1 per cent or more who deal in the relevant securities of the target 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 and by any bidder, and dealing disclosures must also be made by the target, by any bidder and by any persons acting in concert with any of them. These disclosures are required irrespective of the percentage of interests held by the relevant bid party and must be made by no later than 12 noon (London time) on the day falling 10 business days after the commencement of the offer period or the announcement that first identifies a bidder (as the case may be). Where a bid party deals in relevant securities prior to the deadline for making an opening position disclosure, it must make a dealing disclosure and an opening position disclosure. Dealing disclosures by a bid party must be made by no later than 12 noon (London time) on the business day following the date of the dealing.

C. Dealing Disclosures

The Code requires that any person who is or becomes interested in 1 per cent or more of any class of relevant securities of the target or of any paper bidder must make a dealing disclosure if the person deals in any relevant securities of the target 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; and (ii) any paper bidder, save to the extent that these details previously have been disclosed under Rule 8. Dealing disclosures by persons interested in 1 per cent or more must be made by no later than 3:30 p.m. (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 the target 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, there are general disclosure obligations imposed on significant shareholders which apply outside (as well as during) an offer period upon the acquisition of voting rights in companies listed on a regulated market in the UK or with securities admitted to trading on AIM. The Disclosure Rules and Transparency Rules (**DTRs**) and the AIM Rules impose public disclosure obligations where a person acquires in aggregate 3 per cent or more of the voting rights in a UK issuer or an AIM company or moves through prescribed percentage thresholds.

Like the Code, the DTRs and the AIM Rules require disclosure of dealings in derivatives and other financial instruments which provide only economic exposure to securities that are admitted to trading.

5. Conditions to an Offer

A. Conditions

It is normal for UK bids (other than mandatory offers) to be conditional upon the satisfaction of a number of conditions. The Panel views these conditions as falling into four categories: (i) minimum acceptances and statutory scheme conditions; (ii) regulatory clearances; (iii) mandatory (e.g., where a bidder requires shareholder approval to issue consideration securities); 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 transaction, 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 must not normally be subject to conditions or preconditions which depend solely on subjective judgements by the bidder or the target (or, in either case, their directors), 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 that must be satisfied or waived before the offer is formally made by the publication of the offer document, whereas a condition to the offer itself is a condition which must be satisfied or waived before the offer is able to close. Except with the consent of the Panel, the only preconditions permitted are those relating to an official authorisation or regulatory clearance relating to the bid. In addition, either the target must agree to the precondition or the precondition must relate to a material official authorisation or regulatory clearance.

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 most 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. The materiality threshold applied by the Panel is extremely high and the bidder will generally need to demonstrate that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction.

The acceptance condition, statutory scheme conditions and other mandatory conditions 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.

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

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 per cent of the target's voting rights. Once an offer has become or is declared unconditional, 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 per cent of the shares for which the offer is made (because this is the level at which the power to compulsorily acquire shares which have not yet been assented to the offer may be exercised). This condition can only be satisfied or waived on the 60th day after the formal offer document is published (or on such earlier date specified by the bidder as being the "Unconditional Date") and only after all other conditions have been satisfied or waived.

An acceptance condition is not required for a scheme of arrangement; instead a bid structured as a scheme will incorporate statutory conditions including a condition that the scheme is approved by a majority in number representing 75 per cent in value of the target shareholders present and voting at a shareholder meeting.

Regulatory Clearances

If a condition relating to a regulatory clearance remains outstanding in the latter stages of an offer, the Panel will suspend the offer timetable at the parties' joint request or, in the case of a unilateral request by either bid party, if the Panel agrees that the relevant clearance is material. The Panel will consider a clearance to be material if the failure to obtain it could give rise to circumstances which are of material significance to the bidder in the context of the offer.
A determination by the Executive as to the materiality of a clearance condition in this context should not be taken as an indication that a bidder would be able to invoke such a condition to lapse its offer later in the bid process.

If, following a timetable suspension such clearance is received (or the relevant condition is waived), the offer timetable will resume.

Protective Conditions

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, they 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 Rule 2.7 Announcement which are of an entirely exceptional nature striking at the heart and purpose of the transaction. Following the publication of a Rule 2.7 announcement, failure to identify a specific liability of the target group in the course of due diligence before the offer is made would not normally provide sufficient grounds for a bidder to withdraw its offer.

A condition as to sufficient financing becoming available to satisfy the consideration payable upon completion of the offer will not normally 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 are generally only found 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 also have been set out in the Rule 2.7 Announcement). It must normally be published within 28 days of the Rule 2.7 Announcement and, in hostile offers, the bidder must wait 14 days following the Rule 2.7 Announcement before publishing the offer document. In a scheme of arrangement, a scheme circular (also referred to as a scheme 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 target's chair. The offer document is accompanied by a form of acceptance which will be used by shareholders of the target to accept the offer unless they accept through CREST (the paperless settlement system).

Rule 23, reflecting General Principle 2, provides that target 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 made 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.

The Code contains prescriptive provisions on the contents of an offer document. Key information includes:

- the bidder's long-term commercial justification for the offer;
- the bidder's intentions regarding the future business of the target and its strategic plans for the target, including regarding research and development functions;
- the bidder's intentions as to the continued employment of the employees of the target and any changes in the balance of their skills and functions;
- the bidder's intentions relating to any target pension schemes with a defined benefits element;
- financial information on the bidder and the target;
- a description of how the offer is to be financed, or any target working capital or other debt is to be refinanced;
- disclosures of the bidder's interests in the target's share capital; and
- the target directors' interests in the target's share capital and disclosures on certain material contracts of the target.

Following the publication of the initial offer document or target board response circular, information must be updated if there is a material change in information previously published in connection with the offer or if material new information arises.

Two important aspects of the disclosure regime merit special attention. 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 of the Rule 2.7 Announcement. Only "headroom" or market flex provisions in a credit facility are regarded as sufficiently commercially sensitive to merit redaction (and in the case of the latter, only until the time the offer document is published). Second, statements about the bidder's intentions regarding the target business are subject to a specific Code regime, as described in the following section.

B. Intention Statements and Post-Offer Undertakings

The Code distinguishes between, on the one hand, statements of intent made by the bidder, and on the other, commitments by the bidder to a certain course of action with respect to the combined business post-closing. The former are classed as "post-offer statements of intent" (referred to as **SOIs**), while the latter constitute "post-offer undertakings" (or **POUs**). A binding commitment made to one or more identified parties including an undertaking given to a government or regulatory authority to obtain an official authorisation or regulatory clearance, will not be treated as a POU by the Panel.

Rules 2.7 and 24.2 of the Code require the bidder to disclose in the Rule 2.7 Announcement and offer document its intentions with respect to, amongst other things, the target's management, employees and locations of business, together with the long-term commercial justification for its offer and its intentions regarding the future business of the target (including any research and development functions). If the bidder has no intention to make any such changes following close of the transaction, it must make a negative statement to that effect.

As with other statements made during a bid, any bid party making an SOI will be held to a high standard of accuracy; the SOI must reflect the party's intention at the time it is made and be made on reasonable grounds. Where a party has made an SOI and subsequently decides to take a different course of action within 12 months of making that statement (or other specified "hold true" period), it must consult the Panel. The party will then normally be required by the Panel to make an announcement describing its chosen course of action and explaining its reasons for deviating from its previous statement. Further, at the end of a 12-month period following the end of the offer period, the party must confirm in writing to the Panel whether it has complied with that statement and also publicly announce such confirmation.

A party to an offer wishing to give a POU must consult the Panel prior to giving the undertaking, and the statement must: (i) state that it is a post-offer undertaking; (ii) specify any time period for which the undertaking is made or the date by which the course of action will be completed; and (iii) state any qualifications or conditions to which it is subject. The terms of the POU must be specific and precise, capable of objective assessment and not depend on subjective judgements by the relevant bid party or its directors.

Where a party has given a POU, it must comply with its terms for the period of time specified in the undertaking and complete any course of action to which it has committed by the date specified in the undertaking. Having given a POU, the party will be excused compliance only if a qualification or condition set out in the undertaking applies. The party will be required to submit written reports to the Panel after the end of the offer period at such intervals and in such form as the Panel may require. The Panel may also require that a supervisor be appointed to monitor the party's compliance with the POU and report to the Panel, a structure similar to that employed by antitrust regulators when they seek to ensure compliance with conditions to clearance decisions.

C. Responsibility

Rule 19.1 of the Code requires that *"Each document, announcement or other information published, or statement made, during the course of an offer must be prepared with the highest standards of care and accuracy. The language used must clearly and concisely reflect the position being described 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 (on certain contractual offers, there may also be potential criminal liability for failure to comply with prescribed content requirements for offer documents or response circular(s)).

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 must contain a 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 (including any expressions of opinion) 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.

D. Profit Forecasts, Profit Estimates, Quantified Financial Benefits Statements and Asset Valuations

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

A profit forecast is any form of words which states or by implication indicates a figure (or a minimum or maximum figure) for the likely level of profits for a current or future financial period(s). It extends to words containing data that enable such a figure to be calculated. The Rules regarding profit forecasts apply to targets and to paper bidders.

If a non-ordinary course profit forecast is published during or at the commencement of an offer period, it must be accompanied by a report from accountants (stating that it has been properly compiled on a consistent basis of accounting) and the financial adviser (stating that it has been prepared with due care and consideration). If a non-ordinary course profit forecast is published after the target board receives an approach but before any announcement is made to commence the offer period, it must be repeated and reported on in the first document published in connection with the offer. If a non-ordinary course profit forecast was published before the target board was approached, the directors can: (i) repeat the forecast and confirm that it remains valid and has been properly compiled on a consistent basis of accounting (**directors' confirmations**); (ii) withdraw the forecast; or (iii) replace it with a new forecast that is reported on as above.

The application of these Rules may be more lenient where a profit forecast is or has been published in accordance with established practice as part of a party's ordinary course of communications with the market.

A profit forecast for a period ending more than 15 months from the date of first publication will normally require directors' confirmations rather than reports from advisers. Where such a forecast is made or exists during an offer period, a corresponding forecast is also required for the current year and any intervening year(s). These corresponding forecasts will need to be reported on or confirmed, in line with the requirements set out above.

Financial results for a period which has expired but for which audited results are not yet published is a "profit estimate". Where a profit estimate is included in preliminary, half-yearly or interim financial disclosure which complies with certain regulatory requirements or listing rules, it may not be subject to the requirements above regarding reporting on, or confirmation of, profit forecasts.

More stringent rules apply where the offer is a management buy-out or is being made by the existing controller(s) of the target.

Quantified Financial Benefits Statements

Additional Rules apply where a party to an offer makes a statement quantifying the expected financial benefits of a proposed bid succeeding, or of a transaction or measures to be implemented if the proposed bid fails. Such a statement made at the commencement of or during an offer period will need to be reported on by accountants and financial advisers in a similar manner as for a profit forecast (see above). The statement will need to be accompanied by additional disclosure, including the principal assumptions, sources of information, supporting analysis, disbenefits and the costs of realising the financial benefits. The foregoing restrictions do not apply to a quantified financial benefit statement made by a bidder offering only cash.

Asset Valuations

Additional Rules apply where a party to an offer gives a valuation of assets (including land, buildings, plants, equipment, contracts, stocks, intangible assets and parts of a business) in connection with an offer. Such a valuation made at the commencement of or during an offer period will need to be supported by the opinion of an independent valuer.

E. Target Response

The target board's response will be included in the offer or scheme document on a recommended bid. Otherwise, within 14 days of the publication of the offer document, the target board must normally 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 financial advisers. Further, the target board must provide its shareholders in good time with all the facts necessary to enable them, taking into account the views of the target board and the target'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.

Additionally, target employee representatives and pension trustees are able to provide their views on bids. To the extent those views are received in good time to be incorporated 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

The Code contains detailed requirements relating to the timing of contractual offers.
The following is a summary offer timetable:[5]

D 28	Date of Rule 2.7 Announcement (firm intention to make an offer)
D day [5]	Offer document published (normally no later than 28 days after the Rule 2.7 Announcement and at least 14 days after in the case of a hostile bid)
D 14	Last date for publication of first response circular of target on a hostile bid
D 37	Timetable suspension available if any material official authorisation or regulatory clearance is outstanding
D 39	Last date for release of material new information by target
D 46	Last date for revision of the offer
D 60	Last date for offer to become unconditional
D 74	Earliest date on which offer can close (assuming the offer became unconditional on Day 60) Last date for shareholders to receive consideration

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 publication of the new bidder's offer document. If a competitive bid situation continues to exist in the later stages of the offer period, the Panel will normally require an auction procedure to be used to identify a winning bidder.

With respect to schemes of arrangement, bidders and targets are required by the Code to implement a scheme in accordance with a timetable published in the circular to target shareholders unless the target board withdraws its recommendation.

[5] References to days or "D" in the table above are to calendar days, not business days.

8. Frustrating Action and Deal Protections

A. Frustrating Action

During an offer (or prior to an offer if the target has reason to believe that a bona fide offer may be imminent), Rule 21 prohibits a target board 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.

In addition to the general prohibition on taking frustrating action, Rule 21 explicitly prohibits a target board from: (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 of 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. The Panel will normally consent to the grant of options, the timing and level of which are in accordance with normal practice, under an existing share option scheme of the target. The Panel must be consulted if there is any doubt about whether any proposed action by the target board may be caught by Rule 21. In certain circumstances, the Panel may be prepared to grant a dispensation from the application of Rule 21 e.g. where the bidder consents to the target board taking the proposed action.

B. Inducement/Break Fees and Other Deal Protections

The Code prohibits *"any offer-related arrangement with either the offeror or any person acting in concert with it during an 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, nor an agreement between a bidder and pension scheme trustees relating to future funding of a defined benefits scheme.

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

- a hostile bid has been announced and the target wishes to bring in a favoured competing bidder (or white knight), in which case the target may be allowed to agree to an inducement fee in favour of the white knight, subject to the proviso that it be no more than 1 per cent of the white knight's offer;
- a 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
- a target is in financial distress and seeking a bidder.

9. Publication of Information

A. Equality of Information — Shareholders

General Principle 1, which requires equivalent treatment of target shareholders, applies not only to the terms of an offer, but also to access to information. Information relating to an offer and the bid parties must be made equally available to all target shareholders in order to ensure they have equal opportunity to consider the merits of a bid.

The provision of information encompasses everything from informal conversations with journalists or analysts to formal documents issued to shareholders. Generally, all information concerning an offer must be made available as nearly as possible at the same time and in the same manner 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 material new 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, an announcement must be made giving all relevant details. The Panel may also require a document to be sent to shareholders and made available to employee representatives and pension scheme trustees.

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

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 only apply 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 authoritatively 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 that information provided during the course of a bid not be false or misleading.

Section 89 of the Financial Services Act 2012 applies where a person dishonestly conceals any material facts or makes a statement which is false or misleading in a material respect, either knowingly or as a result of being reckless as to whether it is false or misleading. It is a criminal

"Information relating to an offer and the bid parties must 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."

offence if this is done with the intention of inducing, or being reckless as to whether it may induce, another person to enter or offer to enter into (or not enter or offer not to enter into) an agreement, among other things, to acquire shares or to exercise or not exercise 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.

E. Social Media

Parties to an offer must not use social media to publish information relating to an offer unless they publish: (i) the full text of an announcement which has already been publicly announced; (ii) the full text of a document which has already been published on a party's website in accordance with the Code; (iii) a video which has already been published with the consent of the Panel; or (iv) a link to a webpage which includes such announcement, document or video.

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 or put itself in a position whereby it would be obliged under Rule 9 of the Code (that is, the mandatory bid requirement referred to above) to make an offer.

There are circumstances in which the Panel has indicated that it will normally grant consent for a further offer to be made notwithstanding that the 12-month period has not elapsed. These include 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 successful completion of its offer, make a second offer to any minority 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.

E. 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 (X) and any company which controls, is controlled by or is under the same control as X, all with each other;

b) a company (Y) and any other company (Z) where one of the companies is interested, directly or indirectly, in 30% or more of the equity share capital in the other, together with any company which would be presumed to be acting in concert with either Y or Z under presumption (a), all with each other;

c) a company's pension schemes, and the pension schemes of any company with which the company is presumed to be acting in concert under (a) or (b), with the company;

d) the directors of a company (together with their close relatives and the related trusts of any of them) with the company;

e) an investment manager of or investment adviser to:

(i) an offeror;

ii) an investor in a new company (or other vehicle) formed for the purpose of making an offer; or

(iii) the offeree company,

with the offeror or offeree company (as appropriate), together with any person controlling, controlled by or under the same control as that investment manager or investment adviser;

f) a connected adviser with its client and, if its client is acting in concert with an offeror or the offeree company, with that offeror or offeree company 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);

g) the 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;

h) a person, the person's close relatives, and the related trusts of any of them, all with each other;

i) the close relatives of a founder of a company to which the Code applies, their close relatives, and the related trusts of any of them, all with each other; and

j) shareholders in a private company or members of a partnership who sell their shares or interests in consideration for the issue of new shares in a company to which the Code applies, or who, in connection with an initial public offering or otherwise, become shareholders in a company to which the Code applies.

For the purposes of presumptions (a) and (b):

- a reference to a company includes any other undertaking (including a partnership or a trust) or any legal or natural person;
- under presumption (a), interests of either 30% or more in a company's shares carrying voting rights or the majority of a company's equity share capital do not dilute through a chain of ownership and under presumption (b), interests of 30% or more in a company's equity share capital dilute through a chain of ownership.

A company (or, where appropriate, a fund manager, a principal trader or an adviser) will be regarded as "controlling" another company if it is interested in:

(i) shares carrying 30% or more of the voting rights of that other company; or

(ii) a majority of the equity share capital in that other company,

and references to a company being "controlled by" or "under the same control as" another company are construed in the same way.

A reference to a company includes any other undertaking (including a partnership or a trust) or any legal or natural person.

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 the person:

a) owns them;

b) has the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attached to them or has general control of them;

c) by virtue of any agreement to purchase, option or derivative:

   (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) is party to any derivative:

   (i) whose value is determined by reference to their price; and

   (ii) which results, or may result, in the person having a long position in them; and

e) in the case of Rule 5 only (which restricts the timing of acquisition of a position greater than 30%, or increasing a position between 30 and 50%), has received an irrevocable commitment in respect of them.

Offer period

Offer period is the expression used in the Code to describe the period during which a Code company is considered to be in play as a takeover target. The offer period commences when the first announcement is made of an offer or possible offer (with or without terms) for a Code company and extends until the date when the offer becomes or is declared unconditional or lapses (and, in the case of lapse, provided all other publicly identified bidders and potential bidders have withdrawn from the bid process). An announcement that an interest, or interests, in shares carrying in aggregate 30% or more of the voting rights of a company is for sale or that the board of a Code 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 (and, in the case of lapse or withdrawal, provided all other publicly identified bidders and potential bidders have withdrawn from the bid process).

Post-offer intention statement

A statement made by a party to an offer in any document, announcement or other information published by it in relation to the offer relating to any particular course of action that the party intends to take, or not take, after the end of the offer period, other than a post-offer undertaking.

Post-offer undertaking

A statement made by a party to an offer in any document, announcement or other information published by it in relation to the offer relating to any particular course of action that the party commits to take, or not take, after the end of the offer period and which is described by that party as a post-offer undertaking.

Relevant securities

Relevant securities include:

a) securities of the target which are being offered for or which carry voting rights;

b) equity share capital of the target and a bidder;

c) securities of a bidder which carry substantially the same rights as any to be issued as consideration for the offer; and

d) securities of the target and a bidder carrying conversion or subscription rights into any of the foregoing.

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Skadden

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