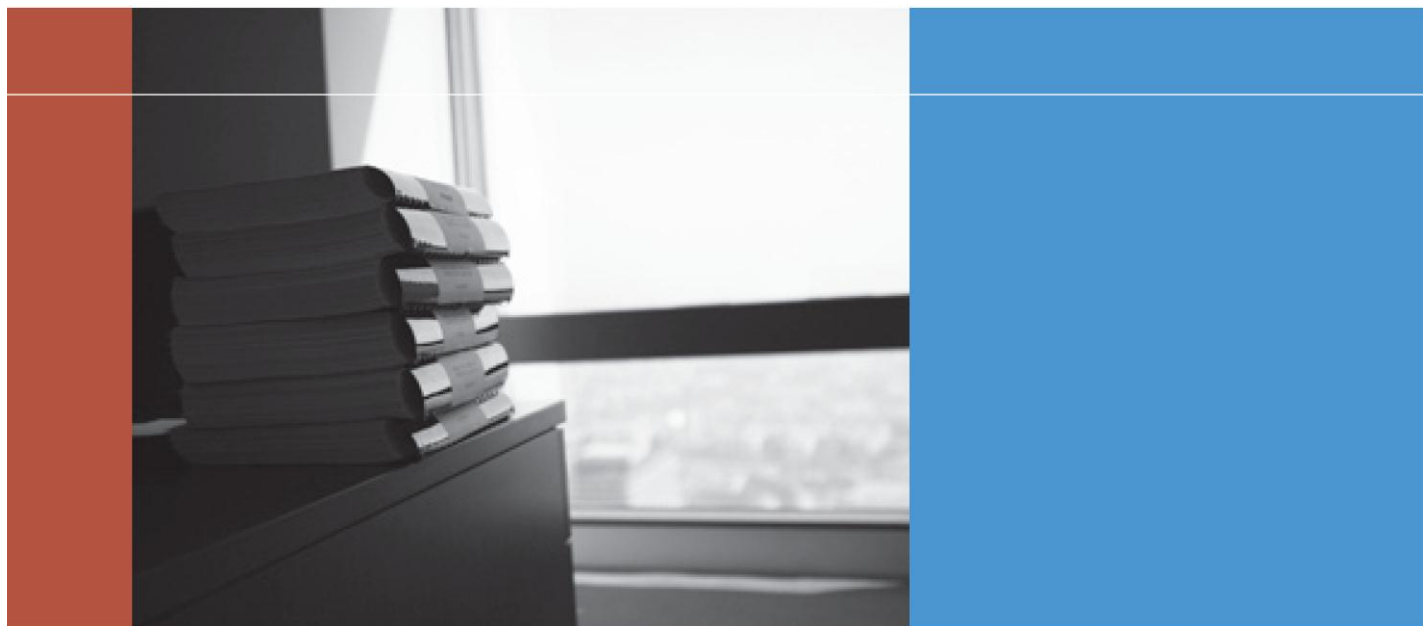


The City Code on Takeovers and Mergers

- An Introduction

November 2011





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Introduction

The main principles and rules governing the planning and day-to-day conduct of a takeover offer for a UK public company are covered by a set of general principles and rules set out in The City Code on Takeovers and Mergers (known as the City Code). The purpose of this guide is to provide an introduction to these general principles and rules.

Other relevant legislation includes the Companies Act 2006, the Financial Services and Markets Act 2000 (FSMA) and the insider dealing provisions of the Criminal Justice Act 1993. UK and EU competition legislation and the UK Financial Services Authority's Listing, Prospectus and Disclosure and Transparency Rules may also apply.



What is the City Code?

The City Code is a set of general principles and rules governing the conduct of takeovers and mergers of companies with registered offices in the UK, the Channel Islands and the Isle of Man. It also applies to a limited extent to companies in other European Economic Area (EEA) countries. The Code is designed principally to ensure that shareholders are treated fairly and provides an orderly framework within which takeovers are conducted. It is issued and administered by the Takeover Panel (the Panel), which has been designated as the supervisory authority to carry out certain regulatory functions in relation to takeovers under the EU Takeover Directive. The Panel is an independent body made up of representatives from UK financial institutions and professional associations and other members appointed by the Panel. The Panel's day-to-day business is carried out by an Executive comprising full-time employees and secondees from the investment banking community, accountancy firms, law firms and the civil service. It is headed by a Director General who is usually a director of an investment bank seconded for generally a two year period.

Legal status

Following implementation of Part 28 of the Companies Act 2006, the Panel is a statutory body and the City Code has statutory effect. The Panel enforces the City Code and can give any direction that, for example, appears to it to be necessary to restrain any person from acting (or continuing to act) in breach of the City Code or otherwise to secure compliance with it. It can also order compensation to be paid in certain cases and can seek enforcement of the City Code and its rulings by the UK courts. The Panel also has other various disciplinary powers. It can ask the Financial Services Authority (FSA) to take enforcement action and involve the FSA if a party's behaviour during an offer amounts to market abuse for the purposes of FSMA. Sanctions available to the FSA for market abuse include unlimited fines. Compliance with the City Code may also be relevant in determining whether criminal or civil liabilities will arise.

It is important to realise that it is the spirit as well as the letter of the City Code that must be observed. The general principles are expressed in broad general terms and the Code does not define the precise extent of, or the limitations on, their application. The great strength of the City Code is its flexibility. The application of the general principles and rules may vary from case to case since the facts of each individual case may be different or new. For this reason, the Executive is available to give guidance and rulings on points of interpretation. Accordingly, legal or other professional advice is not generally an appropriate alternative to obtaining a view or ruling from the Executive.

What is the City Code?



Application of the City Code

The City Code applies to all types of takeover and merger transactions relating to relevant companies, including offers for only part of the share capital.

The City Code applies to all offers:

- for companies that have their registered office in the UK, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market in the UK or on any stock exchange in the Channel Islands or the Isle of Man; and
- for other companies that have their registered offices in the UK, the Channel Islands or the Isle of Man and that are considered by the Panel to have their place of central management and control in those jurisdictions (note that it only applies to private companies if their shares were previously listed on the London Stock Exchange or where these have been the subject of certain types of public offering or trading in the past).

Where a company has its registered office in the UK but its securities are admitted to trading on a regulated market in one or more EEA member states but not in the UK, the Panel will share jurisdiction over the offer with the takeover regulator in the other relevant state and only certain City Code provisions will apply. This will also be the case if a company has securities admitted to trading only on a UK regulated market but its registered office is in another EU member state where it does not have securities admitted to trading. Shared jurisdiction may also apply where a company has its securities admitted to trading on regulated markets in more than one EEA member state (including the UK) but not if the company has securities admitted to trading on a regulated market in its own country.



Main principles of the City Code

The City Code contains detailed rules covering each stage of a takeover or merger. The purpose of this guide is to outline the main principles on which the City Code is based and to set out the principal matters of which a potential offeror should be aware when considering making an offer.

The City Code sets out six general principles for the good conduct of takeover offers. These are reproduced in Appendix I.

The City Code rules elaborate on and seek to implement the general principles. The rest of this guide deals with the rules relating to the more important of these general principles.



Concert parties and acting in concert

Many of the City Code rules apply not only to the offeror but also to parties who co-operate to help it achieve control or who have an interest in the outcome of the offer.

The principal object of this is to prevent offerors circumventing the City Code rules, for example by using third parties to purchase shares in the target.

Acting in concert

Parties who help the offeror achieve control of the target are generally treated as part of the offeror's team and, accordingly, rules that apply to the offeror also apply to them. Such parties are said to be 'acting in concert'. In particular dealings by those acting in concert are treated effectively as dealings by the offeror. Persons acting in concert are defined as: '...persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company'. The offeror and persons acting in concert form what is known as a 'concert party'.

Certain persons are presumed to be acting in concert, unless the contrary is established. A list of these persons appears in Appendix II.

The existence or non-existence of a concert party and the consequent aggregation or non-aggregation of their interests is especially important in deciding whether or not the 30 per cent threshold has been reached, which would require a 'mandatory bid' to be made under Rule 9 of the City Code (see below). Also, in general, disclosure requirements and restrictions on acquisitions to which an offeror is subject will usually apply to concert parties. The offeror and its advisers should therefore take great care to ensure a concert party is not created unintentionally and should consult the Executive if in doubt.

In particular, any person acting in concert with the offeror must disclose dealings in shares and other securities of the target (or in shares or other securities of the offeror in a securities exchange offer, i.e. if the consideration offered by the offeror includes securities) by noon on the following business day under Rule 8 (see below).

An offeror may also be required to disclose any arrangements (for example, indemnity or option arrangements) entered into by or with a person acting in concert with it (see Note 6 on Rule 8).



Equal treatment for all shareholders

It is a fundamental general principle of the City Code that all shareholders of the same class of a target must be treated similarly by an offeror.

A number of rules in the City Code are designed to ensure equal treatment. In particular, the City Code contains rules to ensure that:

- equivalent offers are made to all shareholders; and
- the same information is provided to all shareholders.

Equivalent offers

An offeror must make comparable offers to the holders of each class of share capital (Rule 14). An appropriate offer must also be made to optionholders and holders of convertible securities (Rule 15). An offeror may not treat any particular shareholder more favourably than any other; special deals are not allowed (Rule 16).

The offeror must offer the same price to all holders of the same class of shares. Where an offeror (or any person acting in concert with it) acquires an interest in shares of the target within the three month period before the start of the offer period (and in certain circumstances even before this period), the value of the offer must not be less than the highest purchase price paid during this period (Rule 6.1). (Note that ‘interest’ is defined very widely and includes where a person owns securities, has the right to exercise voting rights attaching to them, or has entered into an option arrangement or derivative transaction relating to them.) If, after the commencement of the offer period, an offeror (or any person acting in concert with it) acquires an interest in target shares at above the offer price, the offeror must normally increase its offer to not less than that price. This will effectively result in the offeror having to make a revised offer (Rule 6.2). Persons who have already accepted the original offer are entitled to be paid the revised price (Rule 32.3).

If an offeror (or any person acting in concert with it) has acquired for cash interests in shares carrying 10 per cent or more of the target’s voting rights within a 12 month period before the commencement of the offer period, or during the offer period, the offer will normally have to include a cash offer at not less than the highest cash price paid by the offeror during the offer period and in the previous 12 months. The Panel has a discretion to apply the obligation to provide cash when, for example, less than 10 per cent has been acquired if it considers this necessary to ensure that the general principle of equal treatment for all shareholders is upheld (for example, where shares have been purchased from the directors of the target). Also, if an offeror (or any person acting in concert with it) acquires any interest in target shares for cash



during the offer period, the offeror will normally have to offer cash to all target shareholders (Rule 11.1).

If an offeror acquires interests in shares carrying 10 per cent or more of the voting rights in exchange for its own shares in the three months before and during the offer period, it will have to make a share exchange offer to all shareholders (Rule 11.2).

Thus under Rule 11 all shareholders of the same class should receive the same price for their shares and have an opportunity to receive the same type of consideration.

Same information

The City Code obliges both offeror and target to ensure that shareholders receive sufficient information to enable them to reach a properly informed decision as to the merits or demerits of an offer and to enable them to make the decision in good time (Rule 23). The same information must be made available to all shareholders as nearly as possible at the same time (Rule 20.1).

The offeror and target are required to provide shareholders and persons with information rights with documents containing specific detailed information within specific time limits; in particular, each company is required to disclose detailed financial information about itself (including details of any current ratings from rating agency) (Rules 24 and 25) and the offeror must disclose its intentions regarding the target's business, its location and employees (it is a criminal offence to fail to comply with this last disclosure requirement), to the extent that the offeror has no plans, a negative statement to that effect must be made. Any such statements as to an offeror's future plans, including any negative statements, should remain true and must be adhered to during any time period set out in the documents or, if none, at least 12 months (the Panel has confirmed that it will not consider offerors bound to statements where there has been a material change in circumstances in the intervening period). The offeror must also give a detailed description of the financing of the offer (including the refinancing of existing debtor working capital facilities of the target in addition to financing of the bid itself).

The information provided to shareholders and persons with information rights must be accurate (Rule 19.1) and up-to-date (Rule 27.1). Further, the directors of the offeror and the target must state that they accept responsibility for the information in such documents (Rule 19.2 — see below).

Competing offerors must also be provided with the same information, even if one offeror is less welcome than another (Rule 20.2).

The information provided during the course of an offer must be prepared to the highest standards of accuracy (Rule 19.1). Particular rules apply to the issue of advertisements, telephone campaigns and the giving of interviews (Rules 19.4, 19.5 and 19.6). The principal purpose of these rules is to ensure that such information is presented fairly and impartially.



The Panel has also indicated that the City Code's principles of care, responsibility and availability of documentation should apply to offer-related information made available on a company's website. It has developed a policy on how the City Code should apply in this area.

In order to ensure a uniform flow of information, the City Code also requires an offeror (and others) to disclose the progress of the offer. There are, in practice, three stages, which are set out below.

Pre-announcement stage: obligation of secrecy

Before an announcement is made, absolute secrecy must be maintained by all persons involved so as to minimise the chances of an accidental leak of information; information should be confined to those within the offeror and (if it is an agreed bid) the target who need to know (Rule 2.1). The Panel has indicated, for example, that at this stage pre-bid talks with trading partners, customers, suppliers and creditors should not take place. The purpose of this rule is to ensure that rumours do not give rise to speculation in the companies' shares before a formal announcement is made.

Announcement stage: obligation to make an announcement

On the other hand, there are a number of situations where an offeror may be obliged to make an announcement indicating its intentions towards the target. The obligation of an offeror to make an announcement potentially arises once it first actively considers making an offer for the target. However, once a proposed offer has been communicated to the target, responsibility for the announcement will rest primarily with the board of the target.

In particular, an announcement must be made (under Rule 2.2):

- as soon as a firm intention to make an offer has been notified to the target;
- as soon as an obligation to make a mandatory bid has arisen (see below);
- where, for the purpose of pre-announcement discussions, the number of persons aware of the offer (and therefore the risk of information leaking) will be increased beyond a very restricted number; or
- if the target becomes the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for believing that this results from the offeror's actions.

The object of this Rule is to avoid creating an opportunity for speculation and insider dealing. It is vital to consult the Panel if there is any rumour or speculation or if the target's share price starts to move beyond normal market movements. The Panel is particularly vigilant with regards to this Rule and very ready to censure companies and their advisers who delay making



any announcement or consulting them. A party and its advisers also risk being in breach of the FSMA market abuse regime if they fail to make an announcement where one is required by the City Code, or they delay or avoid an announcement when one is required to avoid a misleading impression arising in relation to publicly traded securities.

If an offeror is obliged to make an announcement, this may be of a firm intention to make an offer or may be an announcement that it may make an offer (referred to in the City Code as a possible offer announcement – Rule 2.7). An offeror may also make a possible offer announcement without being required to do so by the City Code but because, for example, it wants to gauge market reaction or put pressure on the target board or do extensive due diligence. The offeror is not at this stage committed to make an offer. The Panel has recently amended the City Code to redress the balance brought about by a significant increase in the number of “virtual bid” situations because of the uncertainty they cause in the market. Possible offer announcements, whether made by a potential offeror or a potential target, following an approach, must now name the relevant offeror. It must also, if made by the target, in addition name any other potential offeror(s) from whom the target has received an approach or with whom it is in talks.

Any publicly named potential offeror is subject to a mandatory “put up or shut up” period and must (except the Panel’s consent), within 28 days of the date on which it is publicly identified, take one of the following actions:

- make a firm offer announcement (Rule 2.7); or
- announce that it will not make an offer, following which it will be subject to the restriction in Rule 2.8 (see further below).

The Panel will normally consent to an extension of a 28-day “put up or shut up” deadline at the request of target board. If the Panel does so, the target company must then make an announcement setting out the new deadline and commenting on the status of the negotiations between the target and the potential offeror and the anticipated timetable for their completion.

Any announcement of a firm intention to make an offer must contain all the terms and conditions of the offer (Rule 2.7). Where the offer is in cash, or includes an element of cash, the announcement must include confirmation by the target’s adviser that resources are available sufficient to satisfy full acceptance of the offer. Further, once such an announcement is made the offeror will normally be committed to proceeding with the offer (Rule 2.7). Accordingly, an offer should only be announced if an offeror has every reason to believe it will be able to implement the offer. On the other hand, if a potential offeror announces that it has no present intention of making an offer, it will normally be prevented by the Panel from bidding for the target for a period of six months (Rule 2.8).

For this reason a potential offeror contemplating making a bid should take extreme care to ensure secrecy and security during the period before an announcement is made. Otherwise, it



is quite possible that it may be forced to make an announcement before it is in fact ready to do so which will trigger a short time period to formulate its offer. This is especially true for private equity and other potential offeror's who are reliant on obtaining third-party financing, and who will need to have bid financing arranged sooner than has historically been the case.

The target must circulate details of the offer to its shareholders and persons with information rights promptly after the announcement and to the Panel (Rule 2.12). The offeror and target must also make the announcement readily available to their employee representatives or their employees if there are no representatives. In addition, the target must inform the employee representatives at the earliest opportunity of their right to give their opinion on the effects of the offer on employment and publish the opinion (by appending it to the target board's circular) at the target company's expense.

Similarly, if an offer is amended an announcement must be made immediately (Rule 7.1).

There has been an increase in the number of pre-conditional offers announced in recent years. In this situation a party announces that it will make an offer provided certain pre-conditions are met, for example regulatory clearances. This means that an offer has to be made only if the relevant clearances are obtained. Also, the formal City Code timetable will start only once the pre-conditions have been satisfied. The Code permits very limited pre-conditions and these always have to be agreed in advance with the Panel.

Post-announcement stage: disclosure of dealings and positions

Once an announcement has been made of a possible or proposed offer persons subject to the City Code's disclosure requirements come under an obligation to announce all interests or short positions in target securities by noon on the tenth business day (Rule 8.1) after the announcement (an Opening Position Disclosure). Dealings by any party to the offer or person acting in concert with it must be reported by noon on the next business day (Rule 8.1). In addition, dealings by persons, who are not party to the offer or any persons acting in concert with them, with interests in, or who become interested in, 1 per cent or more of any class of the target's shares must also be reported by 3.30 pm on the business day following the date of the transaction (Rule 8.3). If all or part of the consideration for the offer comprises shares of the offeror, dealings in offeror securities must be disclosed on the same basis.



Building a stake: restrictions on dealings

The City Code places a number of restrictions on a potential offeror wishing to build up a stake before making an offer. There are two other very important restrictions to take into account when the offeror has information that is not generally known to the market. These are the criminal offence of insider dealing and the civil restriction on insider dealing, which is part of the market abuse prohibition in FSMA.

Before the public announcement of an offer, only the offeror should deal in securities of the proposed target; no other person who is privy to confidential price-sensitive information concerning a potential offer may deal in such securities (Rule 4.1(a)).

As noted already, if an offeror acquires an interest in shares in the target within the three months before the commencement of the offer period (or in certain circumstances even before this period), the value of the offer, when announced, must be no less than the value at which such earlier acquisitions were made (Rule 6.1). If the offeror acquires an interest in shares for cash carrying 10 per cent or more of the voting rights of the target in the 12 months preceding the commencement of the offer period or during the offer period, or acquires an interest in any target shares for cash during the offer period, the offer will normally have to include a cash offer at not less than the highest cash price paid during the relevant period (Rule 11.1). An offeror must, therefore, exercise care in making any pre-offer acquisitions. Also on an all share offer, no acquisitions of interests in shares for cash at all should be made by the offeror or any concert party during the offer period unless the offeror is prepared to offer cash to all target shareholders.

Under the Disclosure and Transparency Rules (DTRs), anyone who holds as a shareholder, or through a holding of a financial instrument, 3 per cent or more of a company's voting rights must, within 2 trading days, disclose the amount of its holding to the company concerned. The company, if listed in London, is then obliged to notify one of the Regulatory Information Services who will publish the information.

Under the City Code, an offeror is generally restricted (Rule 5.1), before or after the announcement of an offer, from acquiring interests in shares carrying 30 per cent or more of the voting rights in the target. However, there are certain exceptions (Rule 5.2):

- before announcement of the offer, from a single shareholder if it is the only such acquisition within any seven day period;
- immediately before announcement of the offer, if the offer will be recommended by the target (or the acquisition is agreed to by the target) and the acquisition is conditional upon the announcement of the offer;
- after announcement of the offer, if the acquisition is agreed to by the target;



- after announcement of the offer, if the offer or any competing offer has been recommended by the target (even if such a recommendation has subsequently been withdrawn);
- after the commencement of the offer, if the first closing date of the offer (or any competing offer) has passed (usually 21 days after the offer document is posted) and the relevant UK and EU competition authorities have cleared the offer (or any competing offer) or it does not come within the scope of the relevant legislation;
- after the announcement of the offer, if the offer has become unconditional in all respects; or
- after the announcement of the offer, if the acquisition is by way of acceptance of the offer.

Some important stake-building thresholds are set out in Appendix III.

Note that advisers to a target company cannot acquire interests in target shares during the offer period.

The City Code has recently been amended also to generally prohibit deal protection measures, including inducement fee arrangements. An inducement or break fee is now only possible where the target board wishes to incentivise a white knight, where the target initiates a public auction or it is in financial distress. The prohibition of “offer-related arrangements” extends to undertakings given to an offeror by a target to take action to implement an offer or to refrain from taking action which might facilitate a competing transaction. The potential early identification of offerors and the mandatory “put up or shut up period”, coupled with the prohibition of deal protection measures, mean that the execution risk for an offeror has increased. Offerors who are concerned with interloper risk are therefore likely to make more use of stakebuilding (although as noted above, any significant stakebuild (of more than 3 per cent. of a target) will require public disclosure) and continue to use irrevocables (or lock-ups) to protect themselves.



Mandatory bid

One of the most significant City Code rules is the mandatory bid rule (Rule 9). The rule states that if a person acquires an interest in shares that (taken together with shares in which persons acting in concert with him are interested) carry 30 per cent or more of the voting rights of a company, the offeror is required to make a cash offer for the target at the highest price paid by the offeror (or any person acting in concert with it) for any interest in target shares in the 12 months before the offer is announced.

The reason for this rule is that the Panel believes that a holding of 30 per cent or more, although not giving legal control, gives the holder effective control over the affairs of the company. The Panel considers it is unfair that shareholders should find they have become shareholders in a business that may have different management and objectives and may be less attractive to the shareholders (and the market) than previously without having the chance to sell their shares. Accordingly, the Panel's view is that this should be treated as a change of control and that the remaining shareholders should be given the opportunity to sell their shares. Again, the underlying objective is to achieve equal treatment for all shareholders. It is also a requirement of the EU Takeover Directive that member states have a mandatory offer rule when control passes.

The requirement to make a mandatory bid under Rule 9 can have serious adverse consequences for an unwary offeror. Not only does the City Code oblige it to make an offer for all the shares in the target (whether or not that was its original intention), but the City Code also limits the terms and conditions on which it may do so. Most significantly, a mandatory offer may be conditional only on the offeror obtaining shares carrying 50 per cent or more of the voting rights in the target. This level may be lower than the offeror would like to achieve. In addition, the offeror will lose the protection of the other conditions on which the offer could have been made (see below).

The obligation to make a mandatory offer under Rule 9 will also apply if a person who, together with persons acting in concert with it, is interested in shares carrying between 30 per cent and 50 per cent of the voting rights of a company and there is an acquisition of an interest in any other shares that increases the percentage.

It is for the purposes of Rule 9 that the Panel most often has to decide whether persons are acting in concert or not. Generally, great care should be exercised to avoid unintentionally giving rise to an obligation to make a Rule 9 offer. Where there is any doubt, an offeror is advised to speak to the Panel at an early stage.

Dispensations from the obligation to make a mandatory bid under Rule 9 are available from the Panel in certain circumstances (Appendix 1 to the City Code), for example if an offeror

Mandatory bid



accidentally acquires an interest in 30 per cent or more of the voting rights of the target; in such a circumstance, the offeror would then be required to sell down to below 30 per cent.



Responsibility

Any document or advertisement issued to shareholders and persons with information rights in connection with an offer must satisfy the highest standards of accuracy. The information contained in it must be adequately and fairly presented (Rule 19.1). These standards also apply to any offer-related information a company puts on a website.

The directors of the relevant companies are responsible for ensuring the accuracy of such documents. Further, such documents, advertisements, and information placed on a website must carry a responsibility statement (Rule 19.2). A responsibility statement must state that the directors of the offeror and the target accept responsibility for the information contained in the document or advertisement and that, to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case), the information contained in the document or advertisement is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the import of such information.

The legal effect of the responsibility statement is that the directors may become personally liable to acceptors of the offer if they have failed to take reasonable care in the preparation (or in overseeing the preparation) of the document or advertisement. Before any documents or advertisements are published, therefore, the directors must be satisfied that they comply with the required standards.

Some directors, for example non-executive directors, may for practical reasons delegate supervision of documents or advertisements, where appropriate, to a committee of directors. The City Code states that they must, however, reasonably believe that the persons to whom such supervision has been delegated are competent to carry it out and that they must ensure that they disclose to such persons any relevant facts known to them and any relevant opinions they may have (Rule 19.2, Note 1). This does not absolve them from the principle (set out in the Introduction to the City Code) that each director has a responsibility to ensure, so far as he is reasonably able, that the City Code is complied with in the conduct of an offer. Appendix 3 to the City Code also lays down further detailed guidelines for directors on their responsibilities.



Frustrating action

The City Code recognises that the interests of the board of the target and its shareholders may not always be the same. As a result, in keeping with the principle of fair treatment for shareholders, a further obligation is imposed on the board of the target not to take any action that could frustrate the offer.

Accordingly, the board of the target must not, from the time when either an offer is communicated to it or it has reason to believe that a bona fide offer may be imminent, take any action that may result in any bona fide offer being frustrated or shareholders being denied the opportunity to decide on the merits of the offer, unless its shareholders approve otherwise in general meeting. Examples of frustrating action are set out in Rule 21 and include:

- issuing new shares;
- granting options over unissued shares;
- creating securities carrying rights to convert into (or subscribe for) target shares;
- selling (or acquiring) assets of a material amount; and
- entering into contracts otherwise than in the ordinary course of business.

The target can ask the Panel if it can take relevant action without shareholder approval if it is in pursuance of a contract entered into earlier or another pre-existing obligation.



Timetable

The City Code recognises that making a takeover offer may disrupt the normal business activities of a target. The City Code therefore lays down time limits governing the overall period of an offer and the different stages within it. These rules have to be incorporated in the offer document as contractual terms of the offer. In the context of an offer structured as a court sanctioned scheme of arrangement, the Panel permits the offeror to prescribe specific dates by which the shareholder or court meetings will be held and if not held by that date, the offeror will be entitled to lapse its offer or agree with the target a later date. Typical outline timetables for a contractual takeover offer and an offer structured as a court sanctioned scheme of arrangement are set out below.

Acceptance condition

The principal factor determining the success or failure of an offer is whether or not the offeror obtains sufficient acceptances to give it the required degree of control over the target. The offeror must make the offer subject to a condition that a minimum acceptance level is achieved. This is known as the ‘acceptance condition’. The minimum acceptance condition permitted is shares carrying over 50 per cent of the target’s voting rights (Rule 10). If this level is not achieved within 60 days from posting the offer document to target shareholders (which must take place within 28 days of the announcement of a firm intention to make an offer, and often occurs much earlier), the offer must lapse unless the Panel agrees otherwise. More often a 90 per cent acceptance condition will be specified because once this level is achieved the offeror will usually be able to force the remaining minority shareholders to sell their shares under the compulsory acquisition procedure set out in the relevant legislation. An offer will not close unless the acceptance condition is satisfied, at which point the offer is said to be ‘unconditional as to acceptances’.

Other conditions

Other conditions may also be attached to the offer. Normally, however, the Panel will not allow subjective conditions (for example, conditions that leave the decision to proceed with the offer solely in the hands of the offeror) (Rule 13). Other conditions may include, for example, the obtaining of shareholder and regulatory consents to the takeover. An offeror will only be able to rely on a condition (other than the acceptance condition or a condition relating to UK or EU regulatory clearance) so as to cause its offer to lapse if the circumstances giving rise to the right to invoke the condition are of material significance to it in the context of the offer. This is a very high test.

All other conditions must be satisfied (or waived) within 21 days of the fulfilment of the acceptance condition. At this stage the offer is said to be ‘unconditional in all respects’ or ‘wholly unconditional’.

Timetable



Timetables

A typical outline timetable for a contractual takeover offer is as follows:

| Day | Event |
|-----------------------|---|
| A (P-28) ¹ | Announcement by offeror of intention to bid for target |
| P (A+28) | Last day for posting of offer document ² |
| P+14 (A+42) | Last day for posting target's written response to the offer ³ |
| P+21 (A+49) | First day on which offer may close ⁴ |
| P+39 (A+67) | Last day for target to announce material new information (including trading results, profit or dividend forecasts, asset valuations or proposals for dividend payments or for any material acquisition or disposal) (Rule 31.9) |
| P+42 (A+70) | Accepting target shareholders may withdraw their acceptances if offer not unconditional as to acceptances (Rule 34) |
| P+46 (A+74) | Last day for offeror to revise its offer ⁵ |
| P+60 (A+88) | Last day for offer to be declared unconditional as to acceptances ⁶ |
| P+81 (A+109) | Last day for offer to be declared wholly unconditional ⁷ |
| P+95 (A+123) | Last day for paying the offer consideration to target shareholders who accepted by day 81 (Rule 31.8) |

¹ A = Date of announcement P = Date of posting

² The offer document must be posted to shareholders within 28 days of the announcement of an intention to make the offer (Rule 30.1). It is often posted well before the 28 day period expires.

³ The board of the target should advise its shareholders of its views on the offer by means of a circular as soon as possible and normally within 14 days of publication of the offer document (Rule 30.2). If it is a recommended offer, the target board's views will normally be contained in the offer document.

⁴ The offer must initially be open for 21 days (Rule 31.1). There is no requirement to extend the offer after 21 days if the conditions have not been satisfied by then (Rule 31.1). If the offer is extended, the next closing date must be stated (Rule 31.2).

⁵ If an offer is revised, then it must be kept open for at least 14 days after the revised offer document is posted (Rule 32.1). Because the acceptance condition must be met within 60 days, this means that no revised offer document may be posted after day 46.

⁶ If the acceptance condition is not satisfied by this stage, the offer will lapse (Rule 31.6).

⁷ All conditions must be fulfilled or waived within 21 days of the date the offer is declared unconditional as to acceptances (i.e. day 60 or before) (Rule 31.7).

Timetable



A typical outline timetable for an offer structured as a court sanctioned scheme of arrangement is as follows:⁸

| Day | Event |
|----------------------------------|---|
| A (P-28) | Announcement by offeror of intention to bid for target |
| A+18 ⁹ (P-10) | Issue Claim Form for leave to convene Court meeting(s) Sign witness statement in support exhibiting scheme document in substantially final form and lodge at Court |
| A+25^{8 10} (P-3) | Hearing for leave to convene Court meeting(s) Court order made |
| P (A+28 ^{10 11}) | Post scheme document |
| P+23 (A+51) | Court meeting(s) and general meeting held |
| P+24 (A+52) | Sign witness statement and chairman's report Lodge witness statement, chairman's report and witness statement of service at Court |
| P+31 (A+59 ⁸) | Directions hearing |
| P+33 (A+61) | Advertise final hearing |
| P+41 (A+69 ⁸) | Hearing to sanction scheme ¹² Court order made |
| P+42 (A+70) | Court order registered by registrar of companies Scheme becomes effective |

⁸ The dates given are an approximate guide. The Court dates (in bold) must be agreed with the Court. They will be determined by the day of the week and availability in the Court diary. The timetable ignores Court vacations when special rules apply.

⁹ This could be on same date as announcement if documentation is sufficiently advanced. For confidentiality reasons, it is very unusual for this to happen before announcement.

¹⁰ The period between A+25(P-3) and A+28(P) will be determined by how long is needed for the bulk print after the Court order has been made.

¹¹ In accordance with Rule 30 of the Code, the scheme document should be posted within 28 days of announcement.

¹² It is frequently the case that a "split" final hearing is required - i.e. one to sanction the scheme and a subsequent one to confirm the reduction of capital provided for by the scheme. In this event, the second hearing is usually one or two business days after the first and A+70 (P+42) needs to be adjusted accordingly.

Timetable



These timetables may be varied under certain circumstances. An offeror will usually want the offer to remain open as long as possible. Occasionally, however, an offeror may include a statement that the offer will not be extended beyond a specified date unless it is unconditional as to acceptances (a ‘no extension statement’). An offeror should generally take great care before including a no extension statement since an offeror will be able to extend its offer only in wholly exceptional circumstances except where the right to do so has been specifically reserved (Rule 31.5).

A similar rule applies to statements that the offer will not be increased (a ‘no increase statement’). In general this will prevent an offeror increasing the value or type of consideration in its offer other than in wholly exceptional circumstances except where the right to do so has been specifically reserved (Rule 32.2).

Competitive Offers

The original offeror’s timetable will cease to apply in the case of a competitive offer. In this case both the original offeror and new offeror will work to the new offeror’s timetable (Rule 31.6).

Reference to antitrust authorities

If the offer is referred to the Competition Commission, or the European Commission initiates proceedings, before the first closing date or the date the offer is unconditional as to acceptances (whichever is the later), the offer must automatically lapse (Rule 12.1). If the offer is cleared the Panel will usually consent to the offeror making a new offer within 21 days of clearance.



Restrictions following offers

Where an offer has either been withdrawn or has lapsed, neither the offeror (nor any person who acted in concert with the offeror) nor any person who subsequently acts in concert with any of them may within 12 months from the date of withdrawal or lapse of such offer do the following, except with the consent of the Panel (Rule 35.1):

- make an offer for the target;
- acquire any interest in shares leading to a requirement for a mandatory bid under Rule 9; or
- acquire any interest in target shares that would take his aggregate interest to 30 per cent or more.

Consent will usually be given if an offer has lapsed under Rule 12.1 because of a reference to the Competition Commission that has subsequently been cleared or if a favourable decision has been given by the European Commission. This will also be the case if the new offer is recommended by the target or a competing offer has been made for the target (notes on Rules 35.1 and 35.2).



Appendix I: General principles of the City Code

1. All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.
2. The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.
3. The board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.
4. False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.
5. An offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.
6. An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.



Appendix II: Concert parties

Without prejudice to the general application of the definition, the following persons will be presumed to be persons acting in concert with other persons in the same category (i.e. the same paragraph), unless the contrary is established:

- a company, its parent, subsidiaries and fellow subsidiaries, and their associated companies, and companies of which such companies are associated companies, all with each other (for this purpose ownership or control of 20 per cent or more of the equity share capital of a company is regarded as the test of associated company status);
- a company with any of its directors (together with their close relatives and related trusts);
- a company with any of its pension funds;
- a fund manager (including an exempt fund manager) with any investment company, unit trust or other person whose investments such fund manager manages on a discretionary basis, in respect of the relevant investment accounts;
- a connected adviser with its client and, if its client is acting in concert with an offeror or with the offeree, with that offeror or with that 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); and
- 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.



Appendix III: Building a stake: relevant thresholds

| Shares of target | Consequence |
|--------------------|--|
| 3 per cent | Obligation (DTRs) to disclose interest in shares to target within two trading days. Target must inform a Regulatory Information Service. Obligation to disclose each further full 1 per cent interest acquired. |
| 30 per cent | Mandatory offer triggered (Rule 9). Restrictions in Rule 5 of the City Code relevant. If offeror has interest of between 30 per cent and 50 per cent (usually as a result of an unsuccessful previous offer) mandatory offer triggered if any further interest acquired. |
| 50 per cent | Minimum acceptance condition under the City Code. Control effectively passes. |
| 90 per cent | Enables compulsory acquisition of remaining 10 per cent. |



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