

Takeovers of UK Companies – Mind the Gaps and Traps

Insights and deal-critical recommendations from a panel of M&A Experts

22 September 2015

Panelists: Philip Robert-Tissot, James Ben (*Rothschild*), Dennis Friedman, Nigel Stacey & Selina Sagayam
(*Gibson Dunn*)



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Your Panel

Philip Robert-Tissot



Philip was Director General of the UK Takeover Panel from April 2013 to June 2015. Prior to that role Philip was a Managing Director and Chairman of Citi's EMEA M&A business, having previously been Head of UK Banking & Broking. With 24 years as an investment banker with Schroders/Citi, he was one of Citi's most experienced UK financial advisory practitioners.

**James Ben
Rothschild**



James is a Managing Director and Co-Head of U.S. Consumer Retail at Rothschild. Before joining Rothschild, Mr. Ben was head of the Global Consumer and Retail M&A Group at Barclays and Lehman Brothers and previously was a senior M&A banker with Lehman Brothers' Global Technology M&A group. Over the course of his career, Mr. Ben has advised on over \$100 billion in M&A transaction volume in the consumer, retail, technology and industrial sectors. Before joining Lehman Brothers, Mr. Ben was a lawyer in the M&A Group of Sullivan & Cromwell

**Selina Sagayam
Gibson Dunn**



Selina is a corporate finance practitioner and Head of Practice Development in the London office of Gibson Dunn. Selina is recognized as a leading lawyer in the fields of Corporate/M&A and corporate governance. She spent two years seconded in the senior role at the UK Panel on Takeovers and Mergers and has extensive experience advising on transactions involving public companies, including issuers and shareholders on (hostile) takeovers and public campaign/activist situations.

**Dennis Friedman
Gibson Dunn**



Dennis is a partner in the New York office of Gibson, Dunn & Crutcher. He has led the Firm's Mergers and Acquisitions Practice for many years. He is a widely recognized corporate lawyer with extensive experience in the mergers and acquisitions, corporate governance and capital markets areas. In addition to his 35-year-plus legal career, Dennis was an investment banker at several major Wall Street firms, where he was a senior M&A banker and also the head of a merchant banking group (1986 to 1992).

**Nigel Stacey
Gibson Dunn**



Nigel is an English qualified Partner in the London office, he has more than 20 years of experience specialising in corporate finance and mergers and acquisitions. Nigel has acted on some of the UK's most high profile transactions and has advised on deals with an aggregate value in excess of \$600bn. Nigel practiced with Ashurst from 1999 and became a Partner in that firm in 2000. Prior to this he practiced with Slaughter and May. He joined Gibson Dunn in July 2014.

Discussion Topics

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The regulator
and the regime

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Announcement
regime

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Due diligence

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Approaching
financiers and
other
stakeholders

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Committed
finance

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Defensive
measures

Principles-based Regulation

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.

Announcement Regime

When does regime apply?

ONLY if Bidder is **actively considering** making an offer

Who has responsibility for consulting Panel/making announcement?

Pre-approach to Target: <i>Bidder</i>	Post-approach to Target: <i>Target</i>	If approach rejected by Target: <i>Bidder</i>
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Triggers for consulting Panel/ potentially making an announcement

Rumour and speculation
and/or
untoward movement in share price

Why did trigger occur?

If pre-approach, are there reasonable grounds for concluding **Bidder's actions** have led to the situation?

If post-approach test n/a

Possible outcomes following Panel consultation

No announcement required

Bidder “**downs tools**” with Panel consent

“**No offer**” announcement

“**Possible offer**” announcement

Announcement Regime: Consequences of Possible Outcomes

Outcome

Bidder “downs tools”
with Panel consent

“No offer”
announcement made
promptly

“Possible offer” announcement made
promptly

Consequences

No active consideration
for 3 months

**PUT UP OR SHUT UP (“PUSU”)
REGIME APPLIES:**

By day 28* Bidder to announce
either firm intention to make offer
or no intention to make an offer
(Bidder offside for 6 months)

Unless Target consents or third party bids, Bidder
cannot for 6 months:

- announce an offer
- make any statement raising possibility of
making offer
- take any steps in connection with possible
offer where knowledge of possible offer
would extend beyond Bidder and its advisers

If offer is to be made:

- committed funding in place and
diligence completed by time of
announcement
- offer to be posted within 28 days

* can be extended with Panel and Target consent

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Deal Protections

Prohibited Arrangements	Permitted Exceptions and Exemptions
<p>Broad general prohibition on any “offer-related arrangement” on bids, merger of equals or “whitewash” transactions covering the following:</p> <ul style="list-style-type: none">• Inducement fees, work-fees and other arrangements having similar effect even if no cash payment made, no matter how structured• “Old style” implementation or merger agreements• Any type of deal-protection measures including:<ul style="list-style-type: none">• Matching rights• No-shops, non-solicitation of competing bidders• Restrictions on changing timetable• Exclusivity arrangements• Limiting information to competing bidders• Business restrictions pending completion of offer• Warranties and/or representations about Target	<p>Offer-related arrangements do not include arrangements in favour of or with Bidder covering the following:</p> <ul style="list-style-type: none">• Confidentiality undertakings• Non-solicit of employees, customers or suppliers of Bidder• Provision of information and assistance to secure regulatory approvals• “Plain vanilla” director shareholder irrevocable commitments, letters of intent• Imposing obligation on Bidder e.g. reverse break fee• Existing employee incentive arrangements of Target• With Target pension trustees re future funding of Target pension

Deal Protections (contin.)

Prohibited Arrangements Regime	Permitted Exceptions and Exemptions
<p>Extends to any arrangement given by Target or Target directors as noted above and covering:</p> <ul style="list-style-type: none">• Agreement to make recommendation, not change recommendation• Convene board meetings, vote in favour of resolutions• Notify about competing bidders• Provide diligence information• Assist with satisfaction of Bidder conditions• Assist with preparation of bid documents	<ul style="list-style-type: none">• Inducement fee in favour of competing Bidders or “white knights”, provided <i>de minimis</i> i.e. 1% of value of Target
<ul style="list-style-type: none">• Extends to any arrangement with Bidder or concert parties of bidder	<ul style="list-style-type: none">• Inducement fee in favour of preferred Bidder in a formal sale process, provided <i>de minimis</i>
<ul style="list-style-type: none">• Any commitments permitted by regime to be fully disclosed and put on display• Panel consent required for dispensations	<ul style="list-style-type: none">• Inducement fee or other offer-related arrangement if Target is in financial distress• Regime does not extend to non-director shareholder arrangements

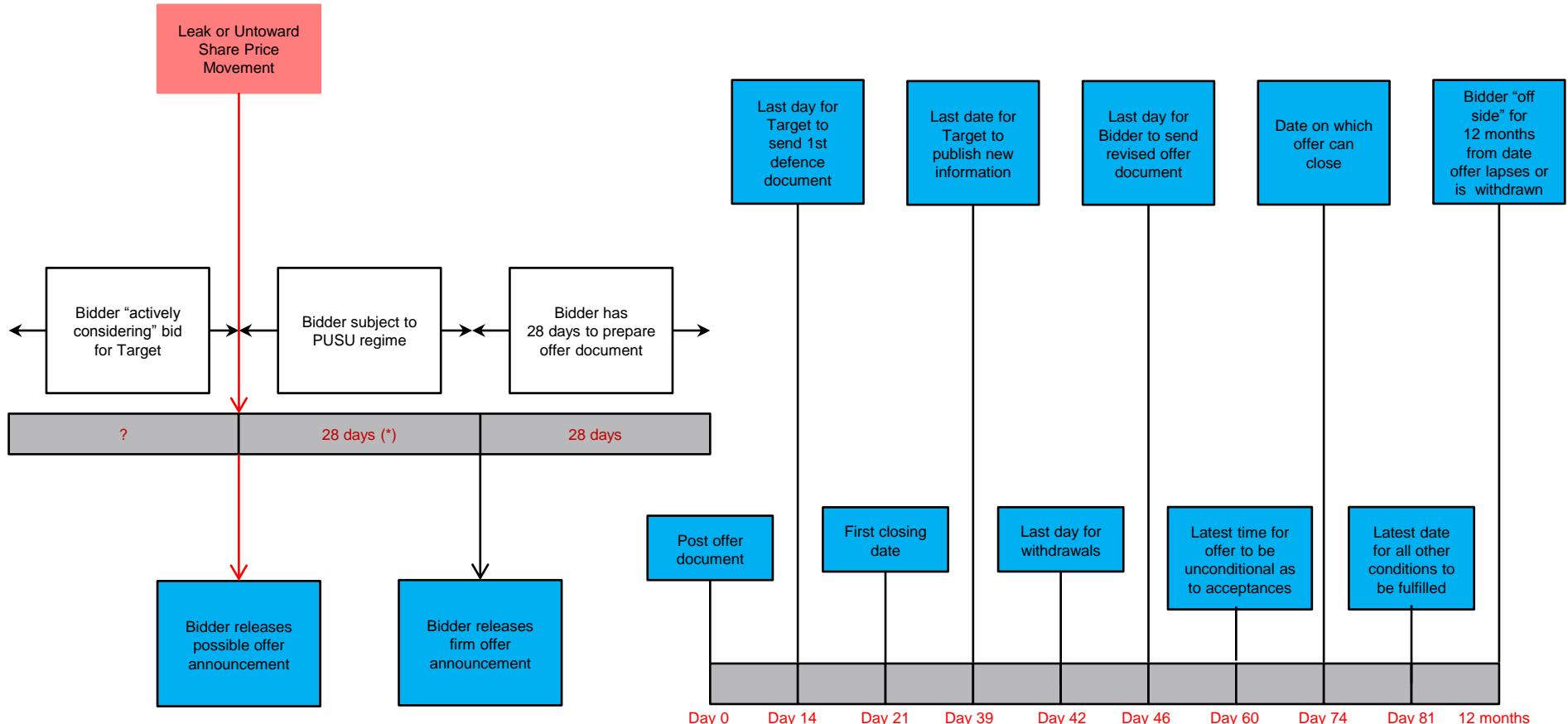
Communications

Advertisements	<ul style="list-style-type: none">Generally prohibited unless they fall within specific list of exceptions including: (i) product information not bearing on offer; (ii) corporate image advertising; (iii) non-controversial information e.g. reminder re closing datePanel clearance required for any advertisements not in “white list”
Telephone Campaigns	<ul style="list-style-type: none">Only financial advisers competent with Code requirements can run/ oversee a Target shareholder telephone campaignNo new information can be provided; only accurate previously published information can be referred toSpecific additional requirements re campaigns to secure irrevocables
Interviews and Debates	<ul style="list-style-type: none">Parties should try to ensure radio, TV interviews are not interrupted mid-flow of presentation of pointsConfrontations between Bidder and Target are to be avoided
Statements of Support	<ul style="list-style-type: none">Parties to avoid making any statements about the existence or level of shareholder support unless statements clearly conveyed to relevant party (and not withdrawn)Statements must be capable of verification
Profit forecasts, asset valuations, quantified benefit statements	<ul style="list-style-type: none">Statements which constitute “profit forecasts”, statements as to value of key assets or quantified benefit statements should not be madeIf made, they may in certain circumstances (if not capable of being withdrawn and are withdrawn) need to be formally reported upon

Communications (contin.)

Post-Offer Undertakings (POUs)	Post-Offer Intention Statements
<ul style="list-style-type: none">Prior consultation with Panel requiredMust clearly state on its face:<ul style="list-style-type: none">That it is a POUThe period of time that undertaking coversAny qualifications or conditions	<ul style="list-style-type: none">Must be made on reasonable groundsMust be an accurate statement of party's intention at the time it was made.
<ul style="list-style-type: none">Substance of POU must be:<ul style="list-style-type: none">Clear and preciseReadily understandable and capable of objective assessmentNot dependent on subjective judgements	<ul style="list-style-type: none">Party held to it for period of 12 months or such other period as specified
<ul style="list-style-type: none">Not possible to get out of POU unless qualification applies. Prior Panel consent required. Panel may enforce breach of a POU	<ul style="list-style-type: none">If party proposes to take different course of action or not take action proposed, must consult with Panel in advance
<ul style="list-style-type: none">Regular reports to Panel on satisfaction of POU. Panel may require appointment of Supervisor	<ul style="list-style-type: none">If different course taken, prompt announcement required

Timetable



(*) : Extensions possible with Target and Panel consent

Note: Example timetable in case of a contractual offer with no competing bids. Offers effected by court approved schemes of arrangement will be subject to a different timetable

Lapsing a Bid

Pre-conditions in possible offers and firm intention offers	<ul style="list-style-type: none">• May be permissible if clearly set out in voluntary pre-conditional possible offer statements. Panel consent required• Generally, pre-conditions in firm intention offer announcements prohibited unless they relate to regulatory conditions. Panel consent required.
Financing pre-conditions and conditions	<ul style="list-style-type: none">• General prohibition on financing conditions and pre-conditions in any firm intention announcement• In exceptional cases, Panel may be prepared to allow financing pre-condition if lengthy period to secure regulatory clearance and not reasonable for Bidder to maintain committed financing
General conditions on UK bids	<ul style="list-style-type: none">• Largely standardised. High materiality levels. No conditions dependent solely on subjective judgement of directors or where fulfilment in their hands• New regime on bespoke/tailored, negotiated conditions – in theory, to improve chances of invocation
Anti-trust conditions	<ul style="list-style-type: none">• Must include as offer term that bid will lapse if referred to UK Competition Commission (Phase 2 CMA reference) or European Commission proceedings/referral• No automatic lapse provisions for non-UK/EU clearances
Invocation of pre-conditions and conditions	<ul style="list-style-type: none">• Circumstances giving right to invoke must be of “material significance” in the context of the offer• In practice, no Bidder has been successful in invoking general conditions

Key Takeaways

- Open jurisdiction, free of political interference
- Takeover regime and lack of litigation ensure speed, certainty and flexibility
- Target cannot undertake defensive or frustrating actions
- In UK, nearly half of all attempted hostile takeovers succeed (cf 25% in US)
- Panel seeks to be collaborative, encourages and is available for timely consultation

Q&A