Public M&A 2019

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the second edition of *Public M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Egypt and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Alan M Klein of Simpson Thacher & Bartlett LLP, the contributing editor, for his assistance in devising and editing this volume

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STRUCTURES AND APPLICABLE LAW

Types of transaction

1 | How may publicly listed businesses combine?

The combination of publicly listed businesses in the UK may be implemented through several different transaction structures, which are summarised below. All answers focus on the acquisition of public limited companies incorporated in, and whose securities are listed in, the UK that are subject to the City Code on Takeovers and Mergers (the Takeover Code).

In practice, the vast majority of transactions make use of one of the following structures:

- a contractual offer made by a bidder to a target company's shareholders to acquire the shares of the target company (a takeover offer); or
- a court-sanctioned scheme of arrangement under Part 26 of the Companies Act 2006, pursuant to which all of the shares of a target company are transferred to the bidder (a scheme). A scheme generally requires the cooperation of the target company and so in practice is only used in recommended (not hostile) bids.

Under either structure, the consideration for the bidder's acquisition of the target company's shares may be cash, securities or a combination of both.

A takeover offer can be quicker to implement than a scheme and is capable of being successful with a lower level of support from the target company's shareholders. It is possible for the acceptance condition to be set as low as 50 per cent of the target's voting rights plus one share (ie, a simple majority).

A scheme requires that a majority in number representing 75 per cent in value of each class of the target company shareholders attending and voting either in person or by proxy at specially convened shareholder meetings vote in favour of the scheme. Once a scheme is approved by the target company shareholders and sanctioned by the court, it has the effect of binding 100 per cent of each relevant class of the target's shareholders, whether or not they attended the meetings or voted in support of the scheme.

Statutes and regulations

2 | What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The main laws and regulations governing acquisitions of publicly listed companies in the UK include:

- Parts 26 (Arrangements and Reconstructions), 27 (Mergers and Divisions of Public Companies) and 28 (Takeovers) of the Companies Act 2006, which provide the fundamental statutory framework;
- the Takeover Code, which provides for regulation of takeovers by the Panel on Takeovers and Mergers (the Takeover Panel). The Takeover Code applies to all companies that have their registered office in the UK if any of their securities are admitted to trading on a regulated market in the UK (eg, the Main Market of the London Stock Exchange) or a multilateral trading facility in the UK (eg, AIM) or on any stock exchange in the Channel Islands or the Isle of Man;
- the Financial Services and Markets Act 2000 (FSMA), which regulates the financial services industry and makes provision for the official listing of securities, public offers of securities and the communication of invitations or inducements to engage in securities transactions;
- the Financial Conduct Authority (FCA) Handbook (which includes the Listing Rules, the Prospectus Rules and the Disclosure Guidance and Transparency Rules (DTRs) made by the FCA, including various obligations applicable to business combinations involving listed companies);
- the Criminal Justice Act 1993, which, together with the Market Abuse Regulation EU No. 596/2014 (MAR), the Listing Rules, the DTRs and the Takeover Code, regulates insider dealing and market abuse. The requirement under the DTRs that companies must maintain 'insider lists' (namely lists of those people party to inside information at any time) should be borne in mind at an early stage in any proposed transaction; and
- the UK merger control rules contained in the Enterprise Act 2002 (as amended), and the EU merger control rules contained in the EU Merger Regulation (the EUMR) (see 'Antitrust' section below for further details).

Antitrust

UK

The UK merger control rules are contained in the Enterprise Act 2002 (as amended). The Enterprise Act 2002 applies to transactions that result in the creation of a relevant merger situation, which is where:

- the turnover of the target business in the UK exceeds £70 million; or
- as a result of the merger, the parties obtain or increase a 25 per cent or more share of supply of any goods or services in the UK or a substantial part of it; and
- two or more enterprises are brought under common ownership or control and, therefore, cease to be distinct.

The UK has a voluntary merger regime, meaning that there is no obligation on the parties to notify a transaction to the UK competition authority, the Competition and Markets Authority (CMA), before its completion (or at all). The CMA can, however, review cases at its own initiative for up to four months after a merger has completed, or is made public – whichever is later.

The CMA review process involves two phases. At Phase I, the CMA will determine whether there is a realistic prospect that the merger will

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result in a substantial lessening of competition and should, therefore, be subject to an in-depth Phase II investigation by an inquiry group of independent CMA panel members, or can be cleared at Phase I (with or without remedies). While the CMA is responsible for taking decisions in merger cases, the UK government can intervene in cases involving defined public interest considerations (see question 11 for details).

The main stages and features of the CMA process are as follows:

- Parties are expected to engage in pre-notification discussions based on a draft notification before the formal Phase I review period can begin. Pre-notification discussions take a minimum of two to four weeks, and can be considerably longer.
- The Phase I review period lasts a maximum of 40 working days. A Phase II investigation lasts 24 weeks (and may be extended by a further eight weeks if there are special reasons for doing so).
- Parties can offer remedies within five working days of receiving the CMA's Phase I decision.
- The CMA can impose orders preventing the parties from completing the transaction or integrating their businesses post-completion.
- The CMA has formal investigation powers and the ability to impose penalties on parties who do not comply.
- Merger fees are payable in all qualifying merger cases reviewed by the CMA (whether notified voluntarily or called in).

In March 2018, the UK government introduced new merger thresholds to allow greater intervention in transactions that may raise national security concerns (see question 11 for details).

EU

The EUMR provides a mechanism for the control of mergers and acquisitions at the EU level. The regime is enforced by the Directorate General for Competition of the European Commission in Brussels. Transactions cannot be implemented unless and until they have been cleared by the European Commission.

The EUMR applies to concentrations with an 'EU dimension', which is met where certain jurisdictional thresholds are satisfied. There are two alternative threshold tests: (i) the original thresholds; and (ii) the alternative test, which provides that some transactions not falling within the original thresholds still have an 'EU dimension'.

The original thresholds are as follows:

- the combined worldwide turnover of all the undertakings concerned is more than €5 billion;
- each of at least two of the undertakings concerned has an EU-wide turnover of more than €250 million; and
- if each of the undertakings concerned has an EU-wide turnover of more than two-thirds of its EU-wide turnover in one and the same member state then no EU dimension exists (the 'two-thirds rule').

The alternative thresholds are as follows:

- the combined worldwide turnover of all the undertakings concerned is more than €2.5 billion;
- each of at least two of the undertakings concerned has an EU-wide turnover of more than €100 million;
- in each of at least three member states:
    - the combined aggregate turnover of all the undertakings concerned is more than €100 million; and
    - each of at least two of the undertakings concerned has a national turnover of more than €25 million; and
- this threshold is also subject to the two-thirds rule.

Cross-border transactions not falling within the EUMR may still be subject to the national competition laws of the European Economic Area (EEA) and non-EEA jurisdictions.

Transactions that meet the EUMR thresholds must be notified to the European Commission. It is also possible to request that jurisdiction be transferred from national authorities to the European Commission in certain circumstances. The substantive test under the EUMR is whether the concentration would 'significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'. The Phase I investigation may take up to 25 working days, which could be increased to 35 working days where the parties have submitted undertakings for consideration by the European Commission. Should the European Commission need to carry out more in-depth investigations and commence Phase II proceedings, it has a basic period of 90 working days to complete its investigation.

Transaction agreements

3 | Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

In any transaction subject to the Takeover Code (whether implemented by way of a takeover offer or a scheme), the Takeover Code requires the bidder first to announce its firm intention to make an offer. This announcement – known as a firm offer announcement or Rule 2.7 announcement – must contain all the terms and conditions of the offer and certain disclosures about the parties to the offer (see question 5 for details). The firm offer announcement may also contain preconditions (ie, conditions which must be satisfied before the offer will be made, as opposed to conditions which must be satisfied before the offer can complete). See question 12 for more details regarding preconditions and offer conditions.

The principal document in a takeover offer is an offer document, which largely tracks the information in the firm offer announcement, but contains the formal offer to the shareholders of the target company. If the offer is recommended, the offer document would also contain a recommendation letter from the chairman of the target. In a hostile takeover offer, the target company's board would issue one or more defence documents setting out why it believes target company shareholders should not accept the hostile takeover offer.

In a scheme, the principal document is the circular to the target's shareholders – known as the scheme document – which sets out the terms of the scheme and includes notices convening the requisite shareholder meetings to approve the scheme. Similar to an offer document, the information in a scheme document largely tracks the bidder's firm offer announcement.

The content requirements for an offer or scheme document under the Takeover Code are summarised in question 5 below.

In a recommended takeover offer or scheme, it is customary for the bidder and target company to enter into a 'cooperation' or 'bid conduct' agreement setting out, for example, the parties' agreement to cooperate in obtaining regulatory clearances and provisions relating to sharing information for the purpose of preparing the offer or scheme document. However, offer-related arrangements between the bidder and the target are heavily regulated by the Takeover Code and the Takeover Panel and only very limited commitments are permitted to be included. For further details on the restrictions on deal protection measures available to bidders, see question 10.

The transaction agreements are usually governed by English law.

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FILINGS AND DISCLOSURE

Filings and fees

4 Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

Formal documents and announcements in public offers governed by the Takeover Code must be sent to the Takeover Panel – although the Takeover Panel famously does not pre-vet or pre-approve offer documentation – and, if listed shares form part of the consideration, a prospectus relating to those shares may be required, in which case it would need to be pre-vetted by the FCA.

In a scheme, the court order sanctioning the scheme must be filed with the Registrar at Companies House in order for the scheme to take effect.

On the assumption that the shares in the UK target company are held in dematerialised form, with transfers settled through CREST, stamp duty reserve tax (SDRT) will generally be payable by the bidder at a rate of 0.5 per cent of the consideration paid for the shares. This is discussed in further detail in the response to question 18.

The Takeover Panel, the FCA and the Stock Exchange charge fees, which are broadly dependent on the value of the transaction in question and the nature of the transaction. The Takeover Panel's fees range between £2,000 and £350,000 while the FCA may charge fees up to a value of £50,000.

Under the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (as amended), the CMA can levy fees in certain circumstances where there is a relevant merger situation. These fees range from £40,000 to £160,000, depending on the target's UK turnover and are generally payable once the CMA has made a decision following a Phase I investigation. No fees are payable in respect of notifications to the European Commission under the EUMR.

Information to be disclosed

5 What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

The Takeover Code's disclosure regime is intended to provide the market with a greater degree of transparency during the course of a takeover as compared to the disclosure rules applicable at other times (eg, under MAR and the DTRs). The Takeover Code's disclosure rules can be divided into three subsets: (i) disclosure of the existence of a potential offer; (ii) disclosure relating to the offer itself and the parties to the offer (eg, in the bid documentation); and (iii) disclosure of shareholdings and trading by the parties to the offer and other substantial shareholders during the offer period (on which see question 6).

The Takeover Code provides that, prior to an offer being announced, from such time as the bidder begins to 'actively consider' a possible offer, if there is any rumour or speculation regarding the possible offer, or an untoward movement in the target's share price, the Takeover Panel may require the target or the potential bidder to make an immediate announcement either confirming that the bidder is considering making an offer or stating that the bidder will not make an offer. Transactions governed by the Takeover Code frequently enter the public domain for the first time as a result of an announcement required under this rule. An announcement of a possible offer automatically triggers a 28-day 'put-up or shut-up' deadline on the bidder to announce a firm offer or announce that it will not make an offer. If a potential bidder makes a statement that it will not make an offer, the potential bidder and its concert parties will be restricted from announcing an offer, and taking certain other actions, for a period of six months (subject to certain carveouts, eg, if a third party announces a firm bid for the target). Announcement of a possible offer will commence an 'offer period' in relation to the target.

The formal offer document (or scheme document, in the case of a scheme) must detail, among other things, (i) the terms and conditions of the offer, (ii) background information on the bidder and its financing arrangements, (iii) the bidder's strategic intentions for the target (including its employees, places of business, fixed assets and any research and development functions), (iv) any irrevocable undertakings received from target shareholders, and (v) any arrangements between the bidder and the target, or their respective concert parties, including any management incentivisation or rollover arrangements. A prospectus, if required in connection with any share consideration offered, must contain all information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer, and the rights attaching to the securities in question.

Disclosure of substantial shareholdings

6 What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Under rule 5.1.2 of the DTRs, which implement the EU Transparency Directive (2004/109/EC), any person who directly or indirectly acquires 3 per cent or more of the voting rights in a UK listed company is required to notify that interest to the company concerned (and the FCA in the case of acquisitions on regulated markets) as soon as possible, but not later than two trading days after the acquisition. The listed company is in turn required to announce any interest notified to it via a regulatory information service (RIS) by the end of the next trading day. Further acquisitions that reach or break through percentage points above 3 per cent must also be notified. The DTRs contain provisions requiring the aggregation of voting rights held by parties acting in concert and apply to entitlements to acquire shares and financial instruments considered to be economically equivalent to shares.

Separately, rule 8 of the Takeover Code contains a regime for the public notification of shareholdings in certain circumstances. At the start of an offer period, the bidder and the target must disclose, via an RIS, their respective interests in target securities in the form of an 'Opening Position Disclosure'. For this purpose 'interest' includes, broadly, any long exposure to the target's securities, including via derivatives. The opening position disclosure must also include any interests held by the parties' respective concert parties (eg, directors and advisers). Any person who holds an interest in 1 per cent or more of any class of the target's securities at the start of the offer period must also make an opening position disclosure on the same basis. During the offer period, the parties to the offer and any person who holds (or, as a result of any dealing, comes to hold) 1 per cent or more of any class of the target's securities must disclose the details of any dealing in the target's securities via an RIS by 12 noon on the business day following the dealing. Disclosures may also be required in respect of the bidder's securities (eg, if the bidder is offering securities as consideration in the offer).

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DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

7 What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Under the Companies Act 2006, directors of a UK company have a duty:

- to act in accordance with the company's constitution and exercise powers for the purposes for which they were conferred;
- to promote the success of the company;
- to exercise independent judgment;
- to use reasonable care, skill and diligence;
- to avoid conflicts of interest;
- not to accept benefits from third parties; and
- to declare interests in proposed transactions and arrangements.

Directors' duties are owed to the company. The duty to promote the success of the company requires a director to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. The target board is not under any *Revlon*-style duty to conduct market checks to ensure that the bidder's price is the best price reasonably attainable. However, the UK courts have indicated that, given two competing bids, the board has a duty to recommend the higher bid. When exercising their powers, directors must have regard to various factors including the likely long-term consequences of a decision, the interests of employees, the need to foster the company's business relationships, the community and the environment, the company's reputation and the need to act fairly as between the members of the company. In the context of a takeover, this duty is supplemented by General Principle 3 of the Takeover Code, which requires the directors of the target company to act in the interests of the company as a whole and not to deny shareholders a chance to decide on the merits of a bid.

Additionally, the Takeover Code requires the target's board to:

- obtain competent independent advice on the fairness and reasonableness of the financial terms of the offer and publish the substance of such advice (rule 3 of the Takeover Code);
- publish its opinion on the offer and its reasons for forming its opinion (rule 25 of the Takeover Code);
- ensure sufficient information is made available to the target's shareholders to enable them make an informed decision on the offer (rule 23 of the Takeover Code);
- not take actions that might frustrate an offer or potential offer without shareholder approval (see question 9); and
- ensure the highest standards of care and accuracy are met with respect to information published during the course of an offer and take responsibility for the information provided in documents (rule 19 of the Takeover Code).

Controlling shareholders do not generally owe fiduciary duties to the company or other shareholders (subject to very limited exceptions).

Approval and appraisal rights

8 What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

The general shareholder acceptance or approval requirements for takeover offers and schemes are set out in question 1. Unlike jurisdictions such as Delaware, shareholders of UK publicly listed companies do not have appraisal or similar rights in the context of sales of a public company. However, shareholders of UK publicly listed companies do have certain limited rights to object as set out in further detail below.

Scheme of arrangement

A majority of not less than 75 per cent of the votes cast by each class of shareholders present and voting is required to approve the scheme as well as any related amendments to the company's articles. Eligible shareholders thus have an opportunity to vote against the scheme and/or amendments to the company's articles.

Before deciding whether to sanction a scheme, the court will take into account any objections from interested parties (including dissenting shareholders), although it is very rare for the UK court to exercise its discretion to refuse to sanction a scheme that has been approved by the requisite majorities of target shareholders in circumstances where they are voting on an informed basis.

Takeover offer

Takeover offers are usually conditional on a minimum level of acceptances being received. The acceptance condition must be higher than 50 per cent and is often set at 90 per cent in order to permit the bidder to implement a statutory squeeze-out procedure.

A bidder will only be able to squeeze out non-accepting shareholders in order to guarantee the acquisition of 100 per cent of the shares in a target if it has obtained acceptances in respect of 90 per cent of the shares to which the takeover offer relates.

Non-accepting shareholders can seek to challenge a squeeze-out procedure initiated by the bidder before the court on the grounds that the statutory process has not been complied with or that the takeover offer is unfair (although such challenges are rare and the bar for success is high).

When a takeover offer has become wholly unconditional, bidders often seek to reregister the target as a private limited company to benefit from a more flexible corporate law regime. A shareholder or shareholders holding more than 5 per cent of the shares in the target (or, alternatively, at least 50 shareholders) is entitled to seek to challenge such a reregistration (although in practice challenges are rare and the bar for success is high).

COMPLETING THE TRANSACTION

Hostile transactions

9 What are the special considerations for unsolicited transactions for public companies?

In a hostile transaction, both the target and the bidder issue their own announcements and, following publication of the offer document, the target's board sends a defence document to its shareholders explaining why it thinks the offer should be rejected. From a competition law perspective, the adversarial nature of a hostile bid means that the bidder will often be forced to make any merger control filings (including under the EUMR) unilaterally, without the benefit of information or assistance from the target.

A number of provisions in the Takeover Code (although technically applying to all offers) often need to be considered carefully in hostile transactions. The following are particularly noteworthy:

- the offer must first be notified to the board of the target company or its advisers (although in practice this could be done immediately prior to publication of the firm offer announcement);
- all target company shareholders (of the same class) should be treated equally;
- any information given to one bidder or potential bidder must, on request, be given equally and promptly to any other bidder or bona fide potential bidder;

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- there are constraints on share purchases before or during an offer period, the offer price and the type of consideration that can be offered, and stake building can have consequences for the bidder (eg, setting the minimum consideration for the offer and, if the bidder acquires 30 per cent or more of the target's voting rights, triggering a requirement to make mandatory general offer);
- there are restrictions on the board of the target company taking actions that might frustrate an offer or potential offer. The Takeover Code lists some particular actions that may not be carried out to frustrate a bid without shareholder approval, including issuing shares, issuing or granting options, and disposing of material assets; and
- advisers cannot be incentivised by the payment of a fee conditional upon the failure of a bid.

The Takeover Panel implemented several amendments to the Takeover Code that took effect in January 2018, which affect hostile takeover offers, including:

- the bidder being required to make more specific statements about intentions for the target's business, including its R&D functions, the balance of the skills and functions of its employees and the likely repercussions of the bidder's strategic plans on the location of the target's HQ and HQ functions;
- restriction on publication of offer document until 14 days after firm bid announcement, except with the target's consent. This rule is intended to give the target's board more time to prepare and publish its defence document where there is a hostile takeover offer, and will result in the offer timetable being pushed back; and
- where a target company is required to obtain shareholder approval in relation to any proposed frustrating action, it must send a circular to shareholders and obtain independent advice as to whether the financial terms of the proposed action are fair and reasonable.

Break-up fees – frustration of additional bidders

10 | Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Break fees

The Takeover Code includes a general prohibition against certain deal protection measures for bidders. Break fees, exclusivity and non-solicitation agreements, matching arrangements, implementation agreements and similar bidder protections are not permitted, subject to certain limited exceptions. The Takeover Panel will permit a target company to enter into a break fee arrangement with a bidder if the target board seeks a 'white knight' in the context of a hostile takeover offer, or if the target has put itself up for sale by means of a formal process or is in serious financial distress. Such exceptional break fee arrangements are normally limited to 1 per cent of the value of the target company calculated by reference to the offer price.

Even in the very limited circumstances where a break fee is permitted under the Takeover Code, before agreeing to a break fee, the target board will need to conclude that the break fee is in the best interests of the shareholders of the target as a whole (eg, because, in the absence of the company agreeing to pay such a fee, the shareholders would be deprived of an offer that the board would otherwise recommend).

The Takeover Code does not prohibit the payment of a reverse break fee by a bidder to a target. However, if the bidder is subject to the UK Listing Rules, if the reverse break fee is greater than 1 per cent of the market cap of the listed company, then it will be deemed to be a 'class 1 transaction' and shareholder approval will be required. The Takeover Code also restricts the conditions that can be attached to a reverse break fee (eg, if they could deter potential competing bidders from making an offer).

Financial assistance

Subject to limited exceptions, an English public company may not provide financial assistance directly or indirectly for the purpose of the acquisition of the shares in itself or its holding company. Financial assistance includes guarantees, security, indemnities, loans and any other financial assistance. Additionally, private companies are prohibited from giving financial assistance for the purpose of the acquisition of shares in a public parent company. These restrictions are relevant to bidders and finance providers who will often expect the target's assets to be pledged as security for the acquisition debt once the offer is complete. This militates in favour of bidders setting a higher acceptance condition so that they acquire enough shares to reregister the target as a private company after the offer is complete.

Government influence

11 | Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Public interest considerations

The EU and UK merger control regimes are described in question 2.

The relevant secretary of state is able to intervene only in exceptional cases involving public interest considerations. The Enterprise Act 2002 specifies the public interest considerations in relation to which the secretary of state may intervene, including mergers involving companies in the defence, newspaper and broadcast sectors.

The Enterprise Act 2002 also allows new grounds for intervention to be added by statutory instrument should the need arise.

Foreign investment and national security

In March 2018, the UK government announced its intention to introduce a first set of measures to increase government scrutiny of foreign investment in relation to national security, which will involve lowering the CMA turnover threshold referred to in question 2 from £70 million to £1 million, and removing the requirement for the merger to lead to an increased market share in the above-mentioned sectors. These measures came into effect on 11 June 2018.

In July 2018, the UK government published proposals for legislative reform that would give it significantly greater powers to intervene in transactions on national security grounds. The scope of 'national security' is explained in a draft statutory statement of policy intent; the term, however, has not been defined precisely. National security threats may include acts of terrorism or actions of hostile states related to cyber-warfare; supply chain disruption of certain goods or services; disruptive or destructive actions or sabotage of sensitive sites; and espionage or leverage.

The regime will not be limited to any particular sectors, nor will there be turnover or market-share thresholds to place certain transactions out of scope. However, the following aspects of the UK economy have been identified as likely to give rise to national security risks:

- core national infrastructure sectors such as the civil nuclear, communications, defence, energy and transport sectors;
- certain advanced technologies including computing, networking and data communication and quantum technologies;
- critical direct suppliers to the government and emergency services sectors; and
- military or dual-use technologies.

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The proposals describe a 'voluntary' notification regime whereby parties to a transaction notify the government when a potential 'trigger event' is contemplated or in progress. The government would also have the power to 'call in' trigger events that have not been notified by the parties. Consultation on the proposals closed in October 2018 and greater clarity on the anticipated timeline for enactment of the new regime is expected in the coming months when the government publishes its response. The regime is unlikely to come into effect until 2020.

Conditional offers

12 What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

As set out in questions 1 and 8, a takeover offer will be subject to an acceptance condition which will usually be between 50 per cent and 90 per cent.

A scheme must be conditional on the approval of a majority in number representing 75 per cent in value of a target company's shareholders present and voting (either in person or by proxy), and needs to be sanctioned by the court.

Although it is common for bidders to include wide-ranging conditions in the terms of an offer, the practical effect of these is limited by the Takeover Code and the Takeover Panel's approach to the application of the rules. Under the Takeover Code, an offer must not normally be subject to conditions that depend solely on subjective judgments by the directors of the bidder or the fulfilment of which is in their hands. With the exception of UK or EU competition conditions, a bidder should not invoke any condition so as to cause an offer to lapse, unless the circumstances that give rise to the right to invoke the condition are of material significance to the bidder in the context of the offer and the Takeover Panel has given its consent for that condition to be invoked. The availability of finance would not normally be permitted to be a condition to a cash offer. In addition, bids cannot be conditional on completion of due diligence.

A bidder may also announce its intention to make a takeover offer (by way of an offer or a scheme) on a preconditional basis. This involves the bidder stating in its firm offer announcement that the making of the offer (ie, the publication of the formal offer document or scheme document) is subject to one or more preconditions being satisfied before a long stop date. Preconditions can only be used if the Takeover Panel has been consulted in advance. Generally, preconditions are allowed when material official authorisations are needed or there are regulatory clearances required that relate to the offer and the Takeover Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the offer timetable.

The Takeover Code requires that it must be a term of an offer that it will lapse if the proposed merger is referred to Phase II either by the CMA or the European Commission before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is later (for an offer), or before the date of the shareholder meetings (for a scheme). It is for this reason that mergers that are considered likely to go to Phase II in the UK or Europe are often structured on a preconditional basis.

Financing

13 If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

It is a key feature of UK public takeovers that the bidder has 'certain funds' at the time of the firm offer announcement in order to enable it to satisfy any cash element of the offer consideration in full. The firm offer announcement and the offer document must include a statement to this effect from an appropriate third party (usually the bidder's lead financial adviser); this is the 'cash confirmation statement'. The person giving the confirmation could be required to fund any shortfall if funds are not available to the bidder at the relevant time and the Panel concludes that the cash confirmer did not act responsibly and take all reasonable steps to assure themselves that the cash was available.

A description of how the offer is being financed and the source of finance (including the repayment terms and names of lenders, etc) must be included in the offer document.

Minority squeeze-out

14 May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In a takeover offer, a bidder that acquires not less than 90 per cent of the relevant shares to which the takeover offer relates and 90 per cent of the voting rights carried by those shares is entitled to compulsorily purchase the remainder of the shares using the statutory squeeze-out process under the Companies Act 2006. In order to do this, the bidder must give notice to the minority shareholders, provided that:

- notice is given before the expiry of a three-month period, beginning with the day after the last day on which the takeover offer can be accepted; and
- the other procedural requirements of the Companies Act 2006 are complied with.

In addition to a successful bidder's squeeze-out rights, once the relevant 90 per cent thresholds are achieved, the remaining minority shareholders can exercise 'sell-out' rights requiring the successful bidder to purchase their shares.

Once a scheme becomes effective it binds all shareholders and a bidder will automatically acquire 100 per cent of the target's shares.

Cross-border transactions

15 How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Currently, UK public companies may combine with other EEA businesses using the European merger procedures provided by the Companies (Cross-Border Mergers) Regulations 2007 (the Cross-Border Mergers Regulations), which implements the EU Cross-Border Mergers Directive. However, this structure has rarely been used to implement a takeover of a UK listed company, and, in any event, this structure will cease to be available following Brexit, the UK's exit from the European Union.

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Waiting or notification periods

16 Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

Other than the minority squeeze-out provisions described above and particular requirements applicable to the businesses of specific industries, there are no waiting or notification periods generally applicable.

The Takeover Code, however, prescribes a fixed timetable relating to the timing of takeover offers as follows:

- an offer document must normally be sent to the target's shareholders and other required recipients within 28 days of the firm announcement of an offer (and the bidder needs the target's consent if it wants to publish within the first 14 days);
- an offer must be open for acceptance for at least 21 days after it is sent;
- the target's directors must advise shareholders of their views on an offer within 14 days of the offer being made;
- any material new information to be published by the target must be published no later than 39 days after publication of the offer document;
- an offer may not normally be increased later than 46 days after it is made or less than 14 days from its final closing date;
- an offer must normally remain open for acceptance for an additional 14 days after it has become unconditional as to acceptances;
- an offer may not be extended beyond 60 days of it being made unless it has become unconditional as to acceptances at the time;
- all offer conditions must be fulfilled within 21 days of the first closing date for acceptances or, if later, when it becomes unconditional as to acceptances; and
- the consideration must be settled within 14 days of the first closing date for acceptances or, if later, when the offer becomes wholly unconditional.

The timetable for a scheme is largely determined by the court process. However, the Takeover Code does impose certain constraints on the timetable for the scheme, in particular:

- the scheme document must be sent to the target's shareholders and other required recipients within 28 days of the firm offer announcement;
- the scheme circular must set out the expected timetable for the scheme;
- the shareholder meetings must normally be convened for a date no sooner than 21 days following the date of the scheme circular;
- revisions to the scheme should be made no later than 14 days before the relevant shareholder meetings or will require consent of the Takeover Panel; and
- consideration must be sent to the target's shareholders within 14 days of the scheme becoming effective.

OTHER CONSIDERATIONS

Sector-specific rules

17 Are companies in specific industries subject to additional regulations and statutes?

Water and sewerage sector

Mergers in the water and sewerage sectors are subject to special rules on referral to the CMA, if certain minimum turnover thresholds are met.

Financial services sector

Mergers and acquisitions in the financial services industry, whereby a target or its subsidiary is regulated by the FCA or Prudential Regulation Authority (PRA), are likely to require change of control approval from the one or both of the FCA and PRA (as applicable), a process for which the assessment period is typically 60 working days.

Tax issues

18 What are the basic tax issues involved in business combinations or acquisitions involving public companies?

One UK tax issue that will arise is the need for the bidder to pay SDRT. On the assumption that the shares in the UK target company are held in dematerialised form, with transfers settled through CREST, SDRT will generally be payable by the bidder at a rate of 0.5 per cent of the consideration paid for the shares. Under recently introduced legislation, if the bidder is a company and it purchases the shares from a related party, SDRT will instead be charged at 0.5 per cent of the market value of the shares transferred. If the UK target company's shares are admitted to trading on certain recognised growth markets, including the London Stock Exchange's AIM and High Growth Segment (and not listed on certain stock exchanges), an exemption from SDRT will apply.

The acquisition of shares is exempt from UK value added tax, although other indirect taxes could apply outside the UK, depending on local rules in the jurisdictions of the purchaser or the selling shareholders if they are outside the UK, or both.

The tax attributes of the selling shareholders may influence certain aspects of how the acquisition is best structured. For example, sellers may prefer consideration in the form of shares in, or loan notes of, the bidder. Depending on the tax rules of a seller's jurisdiction of tax residence, consideration in that form may allow the seller to (i) rollover its tax base cost in the UK public company's shares into the consideration securities without triggering a gain on the disposal; or (ii) hold over any latent gain at the time of the disposal so that it is deferred until a subsequent sale or redemption of the consideration securities. For UK tax resident sellers, reliefs of this kind may be available, provided certain conditions are met.

One potential issue from a bidder's perspective, is the availability of tax deductions for interest and other expenses of any borrowing used to acquire the UK target company. Many jurisdictions, including the UK, have rules which may limit the ability of borrowers to obtain deductions. For example, deductions may be limited under (i) thin capitalisation rules, if debt funding, in comparison to equity funding, is excessive; (ii) transfer pricing rules, if there is related party debt which bears a non-arm's length interest rate; and (iii) hybrid mismatch rules, if there is a hybrid instrument (ie, an instrument that is treated as debt in one jurisdiction and equity in another) or hybrid entity (ie, an entity that is recognised as a taxable person in one jurisdiction, but not in another) anywhere in the financing structure. In addition, in response to the Organisation for Economic Cooperation and Development's Base Erosion and Profit Shifting initiative, many jurisdictions have introduced further restrictions on interest deductibility, based on fixed ratios. For UK resident borrowers, permissible net interest deductions are limited, very broadly speaking and subject to a de minimis rule, to a fixed ratio of the EBITDA of the borrower entity or its group, up to a cap based on the borrower and its group's worldwide external financing expense.

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Labour and employee benefits

19 | What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

Takeover Code requirements

During the course of an offer, announcements and documents must be made available to the target's employee representatives (or if the target does not have employee representatives, the employees themselves). The Takeover Code does not impose any consultation obligations on the bidder or the target, but employee representatives have a right to prepare a separate opinion on the effects of an offer on employment. They must be informed of this right when the target company distributes the possible or firm offer announcement, or summary circular. The target is responsible for the costs of employee representatives obtaining advice to verify the opinion, and must attach the opinion to its own circular upon receipt. If there is insufficient time to attach the opinion to the circular, the opinion must be published by the target on a website and announced via an RIS. There are also a number of employment-related disclosure requirements within the Takeover Code. The bidder must disclose in the firm offer announcement and offer document or scheme document:

- its intentions regarding the future business of the target, including its plans for any research and development functions of the target;
- its intentions involving the continued employment of employees and management, including with regard to any material change in the balance of their skills or functions;
- a statement of intention regarding employer contributions into the target company's pension scheme, the accrual of benefits for existing members and the admission of new members into the scheme; and
- its strategic plans for the two companies, in particular the likely repercussions on employment and locations of business, including in respect of the location of the target's headquarters.

Impact of acquisition on employees

Share options

The treatment of share options in the target group is predominantly governed by the terms of the individual scheme rules. In the case of a takeover offer or scheme, it is likely that change of control provisions in the share option scheme rules will trigger some or all of the options to be exercisable for a limited period after the change of control.

To the extent that employees of the target hold share options or other rights over shares in the target company, under the Takeover Code the bidder is required to make them an 'appropriate' offer along with any other optionholders. It is common for employees to enter into arrangements where share scheme awards in the target are exchanged for awards in the bidder company. Frequent alternatives are the bidder (i) allowing employee awards to be exercised according to the takeover clauses of the share scheme and enabling shares to be purchased on the same terms as other shareholders; or (ii) making cash cancellation payments that buy out employee share award rights. Employees who hold shares are treated in the same manner as other shareholders.

Pensions

The bidder, in acquiring ownership of the target company, also acquires the target's liabilities to its employees in respect of pensions.

With respect to any defined benefit pension scheme, the Takeover Code requires the same information and documentation to be provided by the bidder and target to the pension scheme trustees as to employee representatives. Trustees must also similarly be informed of their right to have an opinion on the effect of the offer on the pension scheme appended to the target board's circular. Bidders thus often seek to have discussions with trustees of defined benefit pension schemes prior to making a firm offer announcement. There is no requirement for the target to pay any of the costs incurred by the trustees in obtaining advice on the opinion.

The UK Pensions Regulator is expected to play a more active role in takeover transactions given recent proposals. In June 2018, the Department for Work and Pensions launched a consultation to explore improvements to the Pensions Regulator and pension trustees' roles in scrutinising corporate transactions. Following the conclusion of this consultation, the Department for Work and Pensions' intends to introduce a requirement for a 'Declaration of Intent' to be made on the sale of a controlling interest in a sponsoring employer. This declaration will disclose party intentions in relation to defined benefit pension schemes and will be shared with both the trustee board and the Pensions Regulator.

Restructuring, bankruptcy or receivership

20 | What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

While it is not particularly unusual for target companies to be in financial difficulty before the announcement of a bid (and this may be one reason for the bidder's interest in the first place), it is very rare for a target company to be insolvent or in administration at the outset of the offer period or for the target company to become insolvent or be placed into administration during the course of the bid. Where administrators are appointed, however, it can be very difficult for the Takeover Panel, the bidder or other market participants to enforce the rules of the Takeover Code against the target company and the administrator – whose primary responsibility at that stage will be protecting the interests of the target's creditors, rather than its shareholders – even though the rules will be enforced against the bidder in the normal way, unless it can obtain bespoke dispensations from the Takeover Panel.

One example of a transaction involving a target company in financial difficulty, which placed itself into administration during the course of the bid, is Hailiang Group Co, Ltd's (Hailiang) hostile offer for ASA Resource Group Plc (ASA). Notwithstanding that ASA was placed into administration after Hailiang had posted its offer document, Hailiang elected not to lapse its offer (even though the Takeover Panel confirmed publicly that Hailiang had the right to do so) and eventually declared its offer wholly unconditional at approximately 53 per cent acceptances. It was notable that, during the course of the bid, the Takeover Panel granted Hailiang certain unusual dispensations from the Takeover Code to reflect the unusual circumstances of the transaction (eg, a preemptive dispensation from the rules around making an offer within the 12 months after a current offer has lapsed).

Anti-corruption and sanctions

21 | What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

There are no anti-corruption, anti-bribery or economic sanctions considerations that apply specifically to public M&A transactions in the UK (as opposed to M&A transactions generally). In the normal way, the bidder would ordinarily consider these issues as part of its due diligence on the target company (where these issues are considered to be a significant risk).

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UPDATE AND TRENDS

Current trends and proposals for reform

22 What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

Public M&A activity in 2018 was down from 2017 by number of deals announced, in part owing to continued political and economic uncertainties including the UK's planned exit from the European Union. During 2018, 23 firm offers were announced for Main Market companies (down from 25 in 2017 and 26 in 2o16) and 19 firm offers were announced for AIM companies (down from 21 in 2017 and 25 in 2016). However, overall public M&A deal value significantly increased from £44.3 billion in 2017 to £120.4 billion in 2018. There were 16 offers with a value of over £1 billion, up from 12 offers in 2017. Continuing the trend seen in previous years, schemes of arrangement were more popular than takeover offers, comprising 31 of the 42 firm bids announced in 2018. The remaining 11 (of 42) firm bids were contractual offers, of which seven were initially hostile. Additionally, there were two competing bids in 2018 compared to one in 2017.

Sectoral activity

2018 saw an increase in activity in the technology sector: nine of the firm offers announced in 2018 were for target companies in this sector, up from four in 2017. Other sectors that saw significant activity included the pharmaceuticals, biotechnology and healthcare sector (seven offers); support services sector (four offers); mining, metals and engineering sector (four offers); and financial sector (four offers).

Brexit

The UK's withdrawal from the EU, which is currently expected to take place on 29 March 2019, is not expected to result in significant changes to the legislative framework applying to takeovers of publicly listed companies in UK. The current expectation is that much of EU law relevant to public takeovers will simply be transposed into UK domestic law without material substantive changes.

In October 2018, a draft of the Takeovers (Amendment) (EU Exit) Regulations 2019 was published and will make the necessary changes required to Part 28 of the Companies Act 2006 to enable the UK takeovers regime to operate outside the framework of the Takeovers Directive in the event of a no deal Brexit. The draft instrument received legislative approval in January 2019.

In November 2018, consultation paper PCP 2018/2 was published by the Code Committee of the Takeover Panel reflecting proposed changes to the Code relating to Brexit. The changes include the proposal for the UK to withdraw from the 'shared jurisdiction' regime under the Takeovers Directive (with the effect that, from the effective date of the UK's withdrawal from the European Union (following any transitional period) the Takeover Panel will cease entirely to regulate takeovers of companies registered outside of the UK, the Channel Islands and the Isle of Man. The final amendments to the Takeover Code proposed by the Code Committee are expected to be published prior to 29 March 2019.

Following Brexit, the UK will no longer be precluded from investigating mergers under national rules that would currently fall within the exclusive jurisdiction of the European Commission under the EUMR.

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Regulatory intervention

In October 2017, the Department for Business, Energy and Industrial strategy published proposals to increase government scrutiny of foreign investment for national security purposes and, in June 2018, introduced the first set of those measures. The government was keen, however, to reiterate that the UK remains open to foreign investment in all sectors and that 'scrutiny does not mean making any part of the UK's economy off-limits to foreign investment'.

In July 2018, the UK government published a White Paper addressing its further longer term proposals for a significantly revised regime of foreign investment into the UK, including a new national security review process for mergers and acquisitions. Consultation on these measures has now closed but, at the date of writing, the government has not yet announced how (or when) it intends to proceed.

Changes to the Takeover Code

In a consultation paper published on 17 October 2018, the Code Committee of the Takeover Panel proposed certain changes to the Takeover Code. This paper proposes to amend Rule 29 of the Takeover Code, which relates to asset valuations, in order to provide clarity and codify ongoing practices. The consultation period in respect of these changes closed in December 2018.

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