United Kingdom Mergers & Acquisitions Legal Guide

2018

Dechert LLP

United Kingdom
Mergers & Acquisitions Legal Guide

Dechert partnered with *The Legal 500* and *The In-House Lawyer* on their Global Mergers & Acquisitions ("M&A") Comparative Guide. The guide provides an overview of M&A law and regulations in more than 30 jurisdictions around the world, from firms ranked within *The Legal 500*.

The Comparative Guide covers a wide range of M&A-related topics including, governing law, regulatory authorities, due diligence, deal protection, public disclosure and director duties. It also offers insight into some of the key factors likely to influence M&A deal activity in the coming years. M&A experts from Dechert's Corporate practice in London provided the UK content which is in Q&A format and is reproduced below.

Please click here to access the Global Mergers & Acquisitions Comparative Guide.

1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

The Companies Act 2006 and the common law of contract provide the basis for the sale and purchase of companies and other corporate entities in the United Kingdom. For public company takeovers in the United Kingdom, the City Code on Takeovers and Mergers (the "Code") will apply. The Code is a set of principles and rules with statutory force, administered by the UK Panel on Takeovers and Mergers (the "Panel") which provides an orderly framework within which takeovers are conducted. The Code is designed principally to ensure that shareholders in a target company to which the Code relates are treated fairly and equally and are not denied an opportunity to decide on the merits of a takeover. The Code covers companies and Societas Europaea which have their registered offices in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market in the United Kingdom or a multilateral trading facility in the United Kingdom (for example, AIM) or on any stock exchange in the Channel Islands or the Isle of Man. Offers for public companies who have their registered offices in the United Kingdom, the Channel Islands or the Isle of Man but which do not have securities admitted to trading on a regulated market or multilateral trading facility are also covered if the Panel considers them resident in the United Kingdom, the Channel Islands or the Isle of Man. Private limited companies who were public companies covered by the Code in the prior ten years may also be subject to the Code.

The Code is made up of 6 general principles and 38 rules and the spirit, as well as the language, of the Code is required to be observed.

The other UK legislation that is likely to be relevant for an M&A transaction is the Financial Services and Markets Act 2000 (which provides an overarching framework for financial services legislation and regulation in the UK and covers public offers of securities, listing and invitations to enter into securities transactions), the Criminal Justice Act 1993 (which along with the Market Abuse Regulation covers restrictions on insider dealing and provisions to prevent market abuse in relation to the securities of publicly traded companies) and the Financial Services Act 2012.

The Listing Rules and the Prospectus Rules could also be relevant where a listed bidder is seeking to offer its securities as consideration in an acquisition and will regulate the information that the bidder will need to prepare and provide in connection with an offer of those securities. In addition, depending on the size of the transaction in question, the Listing Rules may require certain approvals to be sought and provided (e.g. shareholder consent).

If the M&A transaction gives rise to a merger situation that requires investigation, the Enterprise Act 2002 could apply, as could the EU Merger Control regime or applicable merger control regimes in other relevant jurisdictions.

2. What is the current state of the market?

The outlook for outbound deals from the UK looks bright and UK markets reached new highs in the first weeks of 2018 and cash piles have grown, with firms under pressure to deploy funds or face returning funds to investors in the private equity sector. Companies have earmarked M&A as their number one priority for deployment of cash reserves in 2018 as they depart from a focus on organic growth. This should result in intensified competition between companies looking to make strategic acquisitions and private equity, which raised more capital in 2017 than any other year since the financial crisis.

UK dealmakers have appeared to put Brexit fears behind them and despite uncertainties over the UK's status as a financial hub and its trading relations with its EU neighbours, the UK was the most targeted country in Europe in 2017. A total of 675 deals worth US$127.23 billion targeted UK entities during that year. The consensus is that 2018 should turn out to be an even better and busier year.

3. Which market sectors have been particularly active recently?

The financial services and consumer discretionary sectors were the most active in 2017, followed by real estate, industrials and information technology. Healthcare, materials and the energy sectors were also active but not to the same level as the financial services, consumer discretionary, real estate, industrials and IT sectors.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

The three most significant factors, we believe, will be Brexit, availability of finance (particularly in the private equity space) and an increased focus on privacy and cybersecurity diligence.

Brexit continues to loom large and whilst the EU and the UK government leaders have approved moving to Phase 2 of the Brexit negotiations, much of the detail still remains to be worked through and agreed upon. Foreign investment and interest in the UK continues and whilst much is still to be determined, the UK M&A market has proven resilient and the outlook for 2018 remains largely positive.

Private Equity funds have a substantial amount of cash available to be deployed and that, coupled with favourable debt markets contributed to an active year in 2017 for private equity M&A. This momentum is expected to continue in 2018 although an increase in interest rates may have an adverse effect on these areas.

With data breaches and cyber-attacks occurring with increasing regularity, we expect these areas to become much more important in UK M&A transactions in the next couple of years. Consequently, approaches to diligence and to seeking contractual protection in these areas, we believe, will increase.

5. What are the key means of effecting the acquisition of a publicly traded company?

There are two main means of effecting the acquisition of a UK publicly traded company: by way of a takeover offer and by way of a court approved scheme of arrangement. Both of these are governed by the Code as well as certain provisions of the Companies Act 2006.

A takeover offer is a contractual offer to all the shareholders of a target company to acquire their shares. The Code governs the making of a takeover offer and sets out how an offer is required to be made and the information that must be delivered to the target company's shareholders. The offer must comply with the timetable set out in the Code and the Code regulates the behaviour of the bidding entity and the target entity during an offer period and provides, among other things, when an announcement of an offer is required, the contents of the offer document to target shareholders and what conditions to an offer are permitted (with the minimum acceptance condition being a simple majority of the shares of the target company). A takeover offer can be used in both a recommended situation (where the target company's directors recommend to the target shareholders that they accept an offer) and a hostile situation.

A scheme of arrangement (a "Scheme") is a court sanctioned procedure governed by specific provisions set out in the Companies Act 2006. The provisions of the Code apply to an offer by way of a Scheme (there is a specific Appendix (Appendix 7) to the Code that covers Schemes). A Scheme must be approved by a majority in number of the target shareholders holding in aggregate at least 75% of the target company's shares and the Scheme must be approved by the High Court. The thresholds in each case are calculated by reference to those shareholders who actually vote (whether in person or by proxy) on the Scheme rather than the target's shareholders as a whole. Once approved, the Scheme will be binding on the target company and all of its shareholders. The documentation provided to the target shareholders in a Scheme is effectively prepared by the target company as it is the target company's scheme of arrangement and, therefore, a Scheme is usually used only in a recommended offer situation.

In addition, UK companies (including UK public companies) formed and registered under the Companies Act 2006 can merge with companies governed by the law of an EEA state other than the UK under the Companies (Cross-Border Mergers) Regulations 2007. There are three types of cross-border merger: merger by absorption (where an existing company absorbs one or more other merging companies), merger by absorption of a wholly-owned subsidiary and merger by formation of a new company (where two or more companies merge to form a new company). The Panel's Practice Statement No.18 sets out when a cross-border merger will be subject to the Code.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

For private companies, certain information is required to be filed publicly with the UK registrar of companies (known as Companies House), for example its constitutional documents (i.e. its memorandum and articles of association), and key information on its directors, registered office, shareholders and share capital and private companies are also required to file their statutory accounts. This information will, by its very nature, be historic.

Publicly traded companies are required to notify without delay any non-public information which could be expected to have a significant effect on the price of its financial instruments to the market and which a reasonable investor would be likely to use as part of the basis for its investment decisions. Disclosure of this information can be delayed in limited circumstances where immediate disclosure is likely to prejudice the company's legitimate interests (for example, where there are ongoing negotiations or a company is buying or selling a major holding), delay is not likely to mislead the public and the company can ensure the confidentiality of the information.

In addition, listed companies are subject to certain continuing disclosure obligations to, among other things, notify changes to capital, its board, lock-ups and shareholder resolutions (other than ordinary business passed at an AGM) as well as periodic financial reports (both annual and half-yearly, although some companies voluntarily disclose quarterly reports as well). Where a listed company is seeking to raise money through the capital markets, it will often be required to produce a prospectus which will be publicly available and will contain information relating to the company's business and operations. Companies will also publish information on their websites which can usually be accessed by the public.

Listed companies are also required to include in their annual reports and accounts, statements concerning their compliance with the UK Corporate Governance Code and statements concerning board independence and their controlling shareholders.

7. To what level of detail is due diligence customarily undertaken?

In private M&A transactions, it is common for a detailed diligence exercise to be undertaken where the selling shareholders or selling company will provide answers and information in response to a due diligence request list provided by the buyer and its advisors. In an auction situation, it is often the case that a due diligence report is provided by the seller(s) as part of the auction process which contains information on the target company or business. Sellers typically offer the buyer or interested parties in an auction process, access to an electronic data room containing information on the target company or business and the sellers will run a Q&A process in conjunction with the data room review to answer questions raised by the buyer or interested parties. There may also be target company or business management presentation sessions that are organized by the seller.

In a public M&A transaction, the amount of diligence information provided by the target company will in large part depend on whether the transaction is recommended or hostile. In a hostile bid situation, it is unlikely that a bidder will receive anything more than the information that is publicly available. In a recommended deal, target company management are likely to be made available to the bidder team and there may be further information provided in addition to that which is publicly available. However, even in a recommended bid situation, the amount of information provided is unlikely to be the same (and to the same level of detail) as in a private M&A transaction. One reason for this is because the Code provides that any information given to one bidder must be made available to any other bona fide bidders (however unwelcome those other bidders may be). For this reason, a target company in a recommended bid situation will, in most circumstances, look to limit the scope and/or timing of the disclosure of valuable, proprietary commercial information that may be of interest to a competitor.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

In both public and private M&A transactions, the board of directors of the target company is the key decision making body and the directors must have regard to their fiduciary duties and act in the best interests of the company and its shareholders as a whole. In public M&A transactions, the Code sets out a number of requirements in relation to the responsibilities and conduct of the target company's directors. All directors, not just the executive directors are responsible for the target company's compliance with the Code and if the target board have delegated the day-to-day conduct of an offer to a committee or small number of directors, the board must make sure it is in a position effectively to monitor the target company's compliance with the Code. All target directors are required to take responsibility for the documents published in connection with a takeover bid, except for any separate opinion of the employee representatives of the target company or the trustees of the target company's pension scheme.

Shareholders in a public M&A transaction will either be given the opportunity to vote on whether to sanction a scheme of arrangement or will have the opportunity to decide whether to accept a takeover offer in respect of their shares. Significant shareholders may also be consulted by the target board shortly before a deal is announced (provided the shareholders in question have agreed to become "insiders") in the context of the board determining whether or not to recommend a bid.

Where the transaction in question is of a particular size (broadly speaking, if the deal is 25% or more of the size of the listed company), under the UK Listing Rules, the listed bidder will need to obtain the approval of its shareholders to any such transaction. Similarly, if the transaction is with a related party, the listed bidder will need to obtain the approval of its shareholders to the proposed transaction.

In a private M&A transaction, selling shareholders will ultimately decide whether to sell their shares or not. In terms of approval rights, there may be specific shareholder approval rights contained in a company's articles of association and/or in a shareholders' agreement which may be triggered by a particular transaction contemplated by a private UK company. Absent this, and if the transaction is not one that the UK legislation specifically requires shareholder approval (for example, the sale to or purchase from a director of the company of a substantial asset which does require shareholder approval), specific shareholder approval in a private M&A transaction is not typically required.

9. What are the duties of the directors and controlling shareholders of a target company?

The duties of directors of a UK target company are set out in the Companies Act 2006, which replaced the common law rules relating to directors' duties. Regard to the common law rules still needs to be had however.

There are seven general directors' duties and, in the context of an M&A transaction, the following duties are likely to be the most relevant:

- Duty to act within powers (section 171): a director must act in accordance with the company's constitution and must only exercise his or her powers for their proper purpose;

- Duty to promote the success of the company (section 172);
- Duty to exercise independent judgment (section 173);
- Duty to avoid conflicts (section 175); and
- Duty to exercise reasonable care, skill and diligence.

The duties are owed to the company and not the shareholders and only the company can enforce the duties. There is case law, however, that supports the proposition that in the context of a takeover, some duties are owed directly to shareholders, particularly with respect to the supplying of information to shareholders regarding a takeover offer and in expressing a view whether to accept the offer or not.

In the context of a public M&A transaction, and as highlighted in question 8 above, the Code sets out a number of requirements in relation to the target directors' responsibilities. These include responsibility for the documentation published by the target company, obligations to obtain competent independent advice and the obligations set out in the General Principles of the Code relating to ensuring equal treatment of all shareholders.

Shareholders do not owe fiduciary duties to other shareholders whether majority or controlling shareholders or otherwise. Whilst minority shareholders do not, per se, have any right to challenge the majority, there are exceptions to this general rule which are limited in nature. These include a claim for unfair prejudice where the affairs of the company have been, or are being or will be conducted in a way that is unfairly prejudicial to some of its shareholders (including the shareholder bringing the unfair prejudice action).

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

One of the areas of concern on an M&A transaction, particularly in the context of a takeover is whether the target company has a defined benefit pension plan that is in deficit. It may be necessary to agree a course of action with the UK's statutory Pensions Regulator, which could include funding, or at least guaranteeing some or all of the deficit.

Generally speaking, employees do not have approval or consultation rights in general in UK M&A transactions (but care should always be taken in the context of an acquisition of a target with operations in several jurisdictions). However, the treatment of employees in an acquisition of a business (as opposed to the acquisition of a company by way of a share acquisition) will give rise to certain considerations under the Transfer of Undertakings (Protection of Employment) Regulations including certain consultation and information provision obligations and the preservation of the terms and conditions of employees of the business being transferred with the employees in question transferring automatically to the buying company with the business being acquired. In addition, in the context of a public M&A transaction, if an employee representative has been appointed or there are pension trustees, the Code provides that they have the right to receive certain documentation relating to the takeover bid and also the right to have their written opinion on the proposed takeover bid included in the information distributed to target shareholders.

In addition, where the requisite thresholds are met, M&A transactions, whether private or public, may require merger control approval from the Competition and Markets Authority in the UK (the "CMA") or the European Commission (the "Commission") under the EU Merger Regulation.

11. To what degree is conditionality an accepted market feature on acquisitions?

Under the Code, a takeover bid may include conditions or pre-conditions which need to be satisfied before an offer may proceed. "Pre-conditions" are conditions that need to be satisfied or waived before the offer documentation is sent to target shareholders and these pre-conditions must be discussed with the Panel prior to being included and described in detail in the initial announcement of a firm intention to make a bid. "Conditions" apply after the offer documentation has been sent to target shareholders and are contained in the offer documentation.

Conditions and pre-conditions which are solely subjective are not usually permitted, although an element of subjectivity may be acceptable to the Panel. Except with the consent of the Panel, an offer must not be announced subject to a pre-condition unless the pre-condition relates to no reference or initiation of proceedings or referral to the CMA or the Commission, or involves another material official authorization or regulatory clearance and the offer in question is either a recommended bid or the Panel is satisfied that the authorization or clearance cannot be obtained within the prescribed bid timetable. Financing conditions or pre-conditions are not permitted except in very limited circumstances and the Panel must be consulted in advance. A "no material adverse change" condition is often included but for a bidder to rely on this condition and withdraw its offer it must demonstrate to the Panel that the material adverse change could not have been reasonably foreseen by the bidder and is of an exceptional nature.

With the exception of the condition as to the level of acceptances to be received in respect of a takeover offer (which cannot be lower than a simple majority of the target company's shares), a bidder can only rely on a condition or pre-condition where the circumstances in question are of material significance to the bidder in the context of the offer. The Code makes it clear that following the announcement of a firm intention to make an offer, a bidder should use all reasonable efforts to ensure that any conditions or pre-conditions are satisfied.

In private M&A transactions, conditions are a matter of negotiation between the parties and will be driven by the commercial requirements of both parties. If regulatory consents are required in order for completion to be able to occur, these must be included in the acquisition documents.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

In public M&A transactions, the Code prohibits a bidder (and any person acting in concert with it) and a target company entering into any "offer-related arrangement" including break fee arrangements (see the response to question 13 below). Examples of agreements, arrangements and commitments that are considered to be prohibited offer-related arrangements include the target company agreeing (i) not to engage in discussions with a competing bidder, (ii) not to provide information to competing bidders over and above the level of information required to be provided to competing bidders under the Code, (iii) to notify the bidder of receipt of a competing offer, and (iv) to provide the bidder with the opportunity to match the competing bid or increase its bid beyond the competing bid before the target board recommend the competing bid.

What is permitted however, is a commitment to provide assistance or cooperation in relation to the obtaining of regulatory approvals, a commitment by the target company to maintain the confidentiality of information (provided it does not agree to any prohibited "offer-related arrangement") and a commitment not to solicit a bidder's employees, customers and suppliers. What is also permitted is obtaining irrevocable undertakings from directors who hold interests in target shares and from a limited number of shareholders of the target company under which such directors and shareholders agree to vote in favour of and/or accept the offer when it is made. Bidders are also able to enter into letters of intent with shareholders under which shareholders provide a confirmation of their intent to vote in favour of and/or accept the offer. These letters of intent are a lesser commitment than an irrevocable undertaking but can be useful for a bidder to demonstrate the level of support of its bid for the target company. In a Scheme, a bidder may consider acquiring shares in the market (after the offer is announced) to seek to build a stake in excess of 25% of the target company's shares in order to make a competing Scheme unlikely to succeed. This would not preclude a bidder making a competing takeover offer however.

In private M&A transactions, companies are broadly free to agree whatever deal protection measures they wish and it is not uncommon to see companies in these deals entering into exclusivity agreements and break fee arrangements.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Break fees are sometimes seen in UK cross border private M&A transactions but remain relatively uncommon. A break fee must be within the target company's express or implied powers and not be ultra vires. The directors of the company agreeing to the break fee will need to consider their fiduciary duties and comply with such duties in determining whether to agree to the break fee arrangement or not. The common law on penalties should also be considered as if the break fee is considered to be penal it will likely be unenforceable.

For deals covered by the Code, there is a general prohibition on break fees and other deal protection measures. Under the Code, and as mentioned at question 12 above, the target company (or any person acting in concert with it) may not enter into any offer-related arrangement with the bidder (or any person acting in concert with it), except with the consent of the Panel. Inducement fees arrangements (including break fees) would fall into this category.

There are two limited dispensations from the general prohibition (with the Panel's consent) namely, (i) where a bidder has made a firm announcement to make an offer which has not been recommended, the target company can agree an inducement fee with one or more competing bidders; and (ii) where a target board launches a formal sale process, the target company will normally be allowed to enter into an inducement fee arrangement with one bidder at the end of the auction process when the preferred bidder makes its announcement of a firm intention to make an offer for the target company. The Panel will also normally consent to a target company entering into an inducement fee arrangement with a "white knight" bidder where the target is already the subject of a hostile bid from another bidder. In these circumstances, the value of the inducement fee must be no more than 1% of the value of the target company and be payable only if an offer becomes or is declared wholly unconditional. The legal position on financial assistance will also need to be considered (see question 19 below).

Reverse break fees (where a bidder agrees to pay a fee to a target if its offer fails to proceed for specified reasons, for example a failure to obtain bidder shareholder consent or where required regulatory approval is not delivered) are permitted but it is not acceptable for a bidder to use the reverse break fee to include conditions that, in effect, impose restrictions on the target that amount to deal protection measures (such as a restriction to engage in discussions with other bidders, a restriction on providing confidential information to competing bidders and giving the bidder matching rights or rights of first refusal in respect of a competing offer).

14. Which forms of consideration are most commonly used?

In public M&A transactions consideration is commonly cash, shares in the bidder or a combination of the two. The Code stipulates that certain consideration must be used in certain circumstances.

The Code requires a bidder to offer cash (or include a cash alternative) where the bidder or any person acting in concert with it has acquired for cash an interest in 10% or more of the shares of that class of the target company during the offer period or the 12 months prior to the commencement of the offer. The offer will also need to be a cash offer (or include a cash alternative) where the bidder (or any person acting in concert with it) acquires shares for cash within the three month period prior to the commencement of the offer period (or during the offer period if the target shares are bought at a price in excess of the offer price). In both cases, the cash offer must be at a value not less than the highest price paid by the bidder (or the person acting in concert with it) during the relevant period. Great care should, therefore, be taken by a potential bidder when considering whether to acquire shares in a potential target company before or during the offer period. The Panel may also require an offer to be for cash (or include a cash alternative) if it feels it is necessary to give effect to the general principle that target shareholders be treated equally.

The Code requires a bidder to offer securities as consideration in an offer where interests in target company shares representing 10% or more of the shares of that class have been acquired by a bidder (or any person acting in concert with it) in exchange for securities in the bidder in the 3 month period prior to or during the offer period.

In private M&A transactions, cash is the usual consideration offered by a buyer but buyers also offer share consideration as well although this is less attractive where the buyer's shares are not publicly traded. For tax reasons, a buyer may offer loan notes to target shareholders.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Once a person holds more than 3% of the voting rights of a UK company whose shares are admitted to trading on a UK regulated market or a prescribed market (e.g. AIM) whether as a shareholder or through direct or indirect holding of financial instruments, that person is required under the Disclosure Guidance and Transparency Rules to disclose that interest. Disclosure is also required if the holding in question increases or decreases through each whole percentage point over 3%. The notification thresholds for a person holding an interest in a non-UK company (whose shares are admitted to trading on a regulated market and whose home state is the UK) are 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. Notification must be made on the standard form which can be obtained from the website of the Financial Conduct Authority (the UK regulatory for these purposes) within 2 trading days in respect of UK companies and 4 trading days in respect of non-UK companies.

In the context of a public takeover, once an offer period has commenced interests and dealings in "relevant securities" need to be disclosed under the Code. Relevant securities include, among other things, target securities subject to the offer and carrying voting rights, target equity share capital and securities convertible into or having subscription rights into either of these. Options in respect of and derivatives referenced to these securities or shares are also relevant securities.

Persons subject to the Code's disclosure regime and persons with interests in 1% or more of any class of relevant securities of the target company are required to disclose details of their interests or short positions in, or rights to subscribe for, any relevant securities of the target company. The disclosure must be made no later than 12 noon on the tenth business day after the commencement of the offer period.

Disclosure of dealings in relevant securities of the target company must be made by the bidder no later than 12 noon on the business day following the date of the relevant dealing. The procurement of an irrevocable undertaking to vote in favour of an offer by the bidder and a shareholder will not amount to a dealing provided certain criteria are satisfied (although if an irrevocable undertaking is entered into prior to the commencement of the offer period this must be disclosed and is usually done so in the announcement of an firm intention to make an offer).

16. At what stage of negotiation is public disclosure required or customary?

In a public takeover situation, the Code makes it clear that secrecy is paramount, information should be shared on a "need to know" basis and that all parties must conduct themselves so as to minimize the chances of a leak of information.

There are certain circumstances under the Code where an announcement is required:

- When a firm intention to make an offer has been notified to the target board by or on behalf of a bidder;
- When an acquisition of an interest in shares in a public target company gives rise to an obligation to make a mandatory bid;
- When, following an approach by or on behalf of a bidder to the target board, the target has become subject to rumour and speculation or there is an untoward movement in its share price (see below);
- When, after a bidder first actively considers an offer but before an approach to the target board, the target is the subject of rumour and speculation or there is an untoward movement in the target share price and there are reasonable grounds for concluding that it is the activity of the potential bidder which has led to the situation (see below).

The announcement of a firm intention to make an offer must contain information specified in the Code and will be a detailed announcement setting out the main terms of the offer and information about the bidder, where the offer is for cash or includes an element of cash, confirmation from an appropriate third party that cash resources are available to satisfy full acceptance of the offer and the rationale for making the offer, among other things.

Where there has been rumour and speculation or an untoward movement in the share price of the target company, the Code requires an announcement be made. An untoward movement is described as a movement of 10% or more compared with the lowest price for the target company shares since the time of the approach to the target board or an abrupt increase of a smaller percentage (for example, 5% in a single day). Care must be taken with respect to the contents of an announcement (including a leak announcement) made prior to the announcement of a firm intention to make an offer as bidders may be held to statements made in such announcements. The Panel monitor dealings in shares and movements in the target company's share price closely and the target company's financial adviser(s) will be in regular contact with the Panel where there are movements in the target company's share price or if there is unusual trading activity.

Bidders may also make a statement of an intention not to make an offer. The Code requires these be as clear and unambiguous as possible and the consequence of making such an announcement is that the bidder (and any person acting in concert with it) will not be able to make another bid for the target or acquire shares which could lead to a mandatory offer being made for the target company for 6 months. Failure to do so could lead to the extension of the 6 month period. A bidder may be able to make another bid for the target company within the prescribed period if certain circumstances have arisen (e.g. a third party has made a bid for the target company) provided that this was contemplated in the announcement of the bidder.

17. Is there any maximum time period for negotiations or due diligence?

In private M&A transactions, there are no time limits for negotiation or due diligence unless imposed by the parties themselves. In an auction situation the target company's directors and shareholders may seek to impose certain timetable requirements as part of the auction process but these will depend on the specific dynamics of the transaction in question.

For public M&A transactions, whilst there are not specific time periods specified for negotiations or due diligence per se, the Code does impose a strict timetable on the actual takeover process. The offer document must be sent within 28 days of the date of the announcement of a firm intention to make an offer but not earlier than 14 days after that announcement unless the target board consents otherwise. An offer must remain open for 21 days after the date the offer document is published and there are dates on which the level of acceptances must be announced. There are key dates relating to the release of new material information and revisions to the offer which are relevant for hostile offers. The last day an offer can become unconditional as to acceptances or lapse is the 60th day after the publication of the offer document and the remaining conditions to the offer must be satisfied by the 81st day after publication. Consideration must be posted to target shareholders by the 95th day after the publication of the offer document. An offer using the scheme of arrangement process will have a different timetable driven by the High Court process.

The Code also contains provisions pursuant to which the Panel can compel a bidder to make an announcement of a firm intention to make an offer or announce that it is not going to make an offer, in which case it will be subject to the restrictions discussed in question 16 above.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

In a private M&A transaction, the consideration payable is a commercial matter for the parties.

In a public M&A transaction, there are certain circumstances where the Code imposes minimum levels of consideration that must be offered to the target company's shareholders.

If acquisitions of interests in shares are made during the 3 month period prior to an offer period, or between the commencement of the offer period and the bidder's announcement of a firm intention to make an offer, the offer must not be on less favourable terms. If a bidder has acquired for cash interests representing, generally, 10% or more of any class of the target company's shares in issue during the offer period and the preceding 12 month period, or interests in any shares of any class of the target company have been acquired for cash during the offer period, the offer for that class of shares must be in cash (or include a cash alternative) at not less than the highest price paid. Where interests in shares of any class representing 10% or more of the shares of that class in issue have been acquired in exchange for securities during the offer period and the preceding 3 months, such securities will normally be required to be offered to all other holders of shares of that class.

In addition, where a bidder is required to make a mandatory offer, such an offer must be for cash or include a full cash alternative (see question 25 below).

Save for the circumstances set out above, an offer does not have to be in cash, but any securities offered as consideration must, at the date of announcement of the offer, have a value equal to or higher than the highest relevant purchase price.

19. Is it possible for target companies to provide financial assistance?

Under the Companies Act 2006, it is generally unlawful for a UK public company whose shares are being, or have been, acquired (or for any of that company's subsidiaries) to give financial assistance for the purpose of that acquisition except in certain limited circumstances. Financial assistance given to reduce or discharge any liability incurred by the buyer or any other person for the purpose of the acquisition is also prohibited.

The prohibition also extends to the giving of financial assistance by a UK public subsidiary for the purpose of an acquisition of shares in its private holding company except in certain limited circumstances. Similarly, any post-acquisition financial assistance given by the public subsidiary to reduce or discharge any liability incurred by the buyer or any other person for the purpose of the acquisition is also prohibited.

The prohibition on financial assistance is not limited in time and it does not matter how long the time period is between the acquisition and the giving of financial assistance. Financial assistance is not defined in the Companies Act 2006 but examples are gifts, loans, guarantees, security or indemnities (but not in respect of the indemnifier's own default), release or waiver.

Private companies (other than private subsidiaries of public companies which would be prohibited from giving financial assistance for the acquisition of the public company) are generally not prohibited from giving financial assistance for the acquisition of its own shares whether directly or indirectly. However, directors of a private company contemplating giving financial assistance should consider whether the company has the power to do so in its constitutional documents and should be aware of and comply with their fiduciary duties as well as insolvency issues.

Public companies may re-register as a private company in order to provide financial assistance but the assistance must only be given after the re-registration has been completed.

20. Which governing law is customarily used on acquisitions?

The law customarily used on UK acquisitions is English law. Where the transaction is a Scottish transaction, Scottish law can be the governing law.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

Where the takeover bid is being made by way of an offer to all target shareholders, the key documentation to be produced by a bidder will be:

- The various announcements that the Code requires (see question 16);
- The offer document, the contents of which are prescribed by the Code and which will normally contain (in addition to the specific requirements of the Code) a letter from the bidder setting out the offer and, if recommended, a letter from the Chairman of the target company as well as the long term commercial rationale for the offer and the bidder's intention with respect to business, the employees and pension schemes of the target company;
- A form of acceptance to be used by target shareholders who hold their shares in certificated form to accept the offer; and
- If a listed bidder is offering shares as consideration, or is conducting a share issue in order to raise cash to fund the offer, then an FCA approved prospectus and/or bidder shareholder circular may also be required.

If the bidder is offering target shareholders cash or a cash alternative, the announcement of a firm intention to make an offer and the offer document itself must each contain, among other things, a statement from an appropriate third party (usually the bidder's financial adviser) confirming that the bidder has sufficient cash to complete the transaction. If the bidder fails to honour its cash commitment, and it can be shown that the third party providing the confirmation has not acted responsibly and taken all responsible steps to assure itself that the cash is available, then the third party making the cash confirmation statement will be required to provide the cash necessary to complete the offer. Given this sanction, the cash confirmation exercise is a detailed exercise carried out by the appropriate third party prior to satisfying itself it can make the statement.

If the takeover offer is being made by way of a scheme of arrangement, a scheme circular will be produced for target shareholders. Although it is the target company's scheme of arrangement, the bidder will be heavily involved in the production of this document which, in effect, replaces the offer document. Its contents are prescribed by the Code.

All documents must be prepared with the highest standards of care and the information in them must be adequately and fairly presented and made equally available to all target shareholders.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

In a private M&A deal the parties will enter into a sale and purchase agreement. For public M&A transactions the offer document and form of acceptance or the scheme of arrangement will be used but in the case of both public and private transactions, transfers of title to shares in a company incorporated in England and Wales must be made using a stock transfer form unless the shares in question are held in uncertificated form through the electronic CREST system.

The stock transfer form used is usually the form prescribed by the Stock Transfer Act 1963 but a company's articles may permit the directors to approve any form of transfer. Where a transfer is effected through the electronic CREST system, this is achieved through a transfer instruction being submitted through the electronic CREST system.

A stock transfer form will need to be stamped by, and stamp duty paid to, HMRC before the transfer of shares can be registered in the books of the target company. Due to the requirement to submit stock transfer forms to HMRC for stamping, there will typically be a time gap between completion of the transaction and the date on which the buyer is registered as the legal owner of the shares acquired. Stamp duty applies on the transfer of certificated shares unless the consideration for the transfer is £1,000 or less, or another exemption applies (for example, companies whose shares are listed on a recognised growth market like AIM). Stamp duty is currently payable at the rate 0.5% of the consideration paid for the shares, rounded up to the nearest multiple of £5.

23. Are hostile acquisitions a common feature?

Hostile acquisitions are not common in the UK market. Bids that start out hostile quite often end up becoming a recommended bid but there have been hostile bids that have continued as such.

Schemes of arrangement, because they require the cooperation of the target company are not commenced on a hostile basis.

24. What protections do directors of a target company have against a hostile approach?

Target directors need to act in compliance with their fiduciary duties in the best interests of the company and its shareholders (see question 9 above) and the Code prohibits a target board from taking action to frustrate an offer or which denies the target shareholders the opportunity to decide on the merits of an offer without shareholder approval during the course of an offer or prior to an offer if the directors have reason to believe a bona fide offer is imminent or do certain other things prohibited by the Code (including issuing shares, granting options in respect of unissued shares, creating or issuing securities carrying rights of conversion or subscription for shares, selling or acquiring assets of a material amount or entering into contracts other than in the ordinary course of business). Paying an interim dividend otherwise than in the normal course, during an offer could effectively frustrate an offer and the target company must consult the Panel in advance. If the target company is seeking shareholder approval for a proposed action, the board must obtain competent independent advice as to whether the financial terms of the proposed action are fair and reasonable, and provide shareholders certain details about the proposed transaction as well as the substance of the independent advice.

What a board can do is essentially say "no" to the hostile offer and urge shareholders to reject the offer on the basis that it undervalues the target company and may take other action to defend the target company against a hostile bid (whilst complying with its fiduciary duties under the Companies Act 2006 and the Code requirements) including disclosing new information (whether that is presenting profit forecasts, asset valuations and providing preliminary or final results). Poison pills, which are common in the context of US public deals, are not typically seen in UK deals, even if they would be possible taking into account the Code and the Companies Act 2006 requirements as institutional investors in UK public companies do not favour defensive measures and are unlikely to vote in favour of them.

The other protection afforded to target boards in a hostile takeover situation is the so called "put up or shut up" regime. This regime under the Code requires any publicly named potential bidder, no later than 5.00 pm on the 28th day following the date of the announcement in which it is first identified, to either make an announcement of a firm intention to make an offer or announce that it will not make an offer. If the bidder makes the latter announcement it will be precluded from making an offer within six months of making the announcement (see question 16 above).

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

In a private M&A transaction there are no requirements to make a mandatory offer unless such an obligation is contained in the articles of association of the target company or a shareholders' agreement.

In public M&A transactions, where a person (including persons acting in concert with it) acquires (whether in one or a series of transactions) interests in shares of a target company carrying voting rights in excess of 30%, or where a person (including persons acting in concert with it) who holds interests in shares of a target company carrying more than 30% but not more than 50% of the voting rights acquires an interest in any other shares of the target company that increases its percentage of the voting rights, that person must make an offer to acquire all of the shares of the target company.

The consideration for such an offer must be in cash (or accompanied by a full cash alternative) at the highest price paid for the shares by the mandatory bidder in the previous 12 months. The only permitted condition for such a mandatory offer is that the bidder receive acceptances to its offer from shareholders holding shares carrying more than 50% of the voting rights of the target company.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

The Companies Act 2006 and the common law provide a number of protections to minority shareholders. Under the Companies Act, shareholders may petition the courts for relief where it believes it has been unfairly prejudiced. These actions are not common however as the court will take the view that (absent the terms of the offer being manifestly unfair or improper conduct) that a fair offer has been made to all shareholders.

In addition, minority shareholders may have negative control at certain shareholding percentage thresholds (5%, 10% and 25% in particular) by reason of their ability to take certain actions or, where a minority shareholder holds in excess of 25%, the ability to block the passing of special resolutions of the company.

27. Is a mechanism available to compulsorily acquire minority stakes?

Where a bidder has acquired or unconditionally contracted to acquire both 90% of the shares to which the offer relates and 90% of the voting rights in the company to which the offer relates it is permitted under the Companies Act 2006 to acquire the remaining shares on the same terms as those set out in its offer. In addition, a minority shareholder has the right to require the bidder to buy its shares at the offer price if the bidder has obtained 90%

of both the issued shares and the voting rights in the company. These procedures are only available where there is a takeover offer.

The Companies Act 2006 sets out the procedure for compulsorily acquiring the minority shares in the target company and the timetable for doing so. Upon acquisition of the shares those shareholders who do not accept the compulsory acquisition offer will have their shares transferred to the bidder by operation of law and the consideration that they are entitled to is held on trust by the target company for their benefit.

Where a takeover is carried out by way of a Scheme, if the scheme is approved by the necessary majorities of target shareholders (see question 5) and sanctioned by the court, it applies to all target shares and the compulsory acquisition procedure will not be necessary or relevant.

In the context of a private M&A transaction, a shareholders' agreement or the company's articles of association may contain drag and tag rights under which a majority shareholder (or shareholders) can force the sale by the minority shareholders to a third party where the majority shareholder(s) is/are selling out or, alternatively, the minority shareholders can force an acquisition of their shares by the third party where the majority shareholder(s) is/are selling out. The operation of these provisions will be particular to the shareholders agreement (or articles of association, as the case may be) and will be (or will have been) negotiated by the shareholders in the private company.

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Dechert's M&A Practice

Overview

Dechert's Corporate practice is known as a legal adviser of choice for complex domestic and international lower and upper mid-market private and public M&A. We regularly represent buyers, sellers, and advisers in planning, negotiating, and executing complex transactions and around the globe, handling transactions of all sizes, from a few million dollars to more than US$30 billion, across the entire industry spectrum.

Recent Transactions

Examples of recent transactions on which Dechert advised include:

- **Albéa S.A.** on its proposed US$1.5 billion sale to PAI Partners by an affiliate of Sun European Partners (the European advisor to U.S.-based private equity firm Sun Capital Partners).
- **Chrysaor**, the UK oil and gas independent, on its acquisition of a package of assets in the UK North Sea from Shell UK Limited and its affiliates for more than US$3.8 billion.
- **CIT Group** on the sale of its Paris-based European rail leasing subsidiary group Nacco to German-based VTG Aktiengesellschaft for US$1.05 billion.
- **Crown Holdings** on its proposed US$3.91 billion acquisition of Signode Industrial Group LLC, a global provider of transit packaging systems and solutions, from The Carlyle Group.
- **Shanghai Shenda Co.**, Ltd. in connection with the formation of Auria Solutions, a global joint venture with International Automotive Components Group, to supply soft trim and acoustical products for the automotive industry.
- **SK hynix Inc.** as part of a consortium in connection with the US$18 billion acquisition of Japanese-based Toshiba Corporation's NAND flash memory and solid-state drive business, representing one of the largest deals in Asia.

Awards and Recognition

IFLR1000	Ranked among the top law firms for M&A. (2018)
CHAMBERS AND PARTNERS	Recognised among the top law firms for Corporate/M&A in London, the United States, France, Germany and Russia (2017)
The LEGAL 500	Recognised among the top law firms for M&A in London, the United States, Belgium, China, France, Latin America, Luxembourg and Russia. (2017)
Bloomberg	Ranked among the top law firms for total number of announced M&A deals. Also ranked among the top law firms for total volume of global announced deals. (2017)
THOMSON REUTERS	Ranked among the leading law firms for the total value of announced M&A deals worldwide. Also ranked among the leading law firms for the total value and total number of announced deals. (2017)

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Focused on sectors with the greatest complexities, legal intricacies and the highest regulatory demands, we excel at delivering practical commercial judgment and deep legal expertise for high-stakes matters.

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Dechert practices as a limited liability partnership or limited liability company other than in Dublin and Hong Kong.

Dechert lawyers acted on the matters listed in this presentation either at Dechert or prior to joining the firm.

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