HERBERT
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CORPORATE

UK TAKEOVERS

LEGAL GUIDE

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TABLE OF CONTENTS

GUIDE TO UK TAKEOVERS

This guide provides an introduction to certain of the UK legal and regulatory requirements which would apply to a takeover of a UK incorporated and listed public company (the "**Target**") by a third party (the "**Bidder**"). It is divided into three parts:

(A) Part I provides a brief overview of some of the key requirements of the City Code on Takeovers and Mergers which the directors should bear in mind at all times;

(B) Part II sets out an overview of the bid process and the legal and regulatory framework surrounding takeover offers in the UK; and

(C) Part III focuses on a director's responsibilities in the context of a takeover.

Please remember that this note is an introduction to the large body of law and practice and by its nature cannot be exhaustive. Accordingly, it is not a substitute for seeking specific advice in any particular situation and is not advice in respect of any specific transaction or set of circumstances. There are other legal and regulatory issues which must be considered and are not covered by this memorandum, including for example tax, anti-trust and pensions issues.

PART I
KEY POINTS TO REMEMBER

Without attempting to summarise the guide which follows, set out below are some high-level key points relating to takeovers which directors should keep in mind at all times.

- **Secrecy** is of vital importance, particularly before a public announcement of a takeover bid. Any leak, or discussion of the bid with more than a very restricted number of persons without Panel consent, could trigger an announcement obligation resulting in the Target being in an offer period and the Bidder being named and becoming subject to a 28 day deadline to clarify its intentions.
- All statements made in relation to the takeover bid should be **accurate, fairly presented and not misleading**. All documentation (including announcements) relating to the takeover must be prepared with the highest standards of care and accuracy.
- **New information** relating to the takeover bid should only be released through circulars or announcements which are made available to all Target shareholders.
- **Avoid statements** relating to future profits and forecasts, asset valuations, synergies and earnings enhancement statements.
- Directors and employees must not answer **queries from the press or release statements on the company's social account (including tweeting, re-tweeting or linking to statements)**, which should instead be referred to a member of a designated communications team.
- Directors and employees **must not deal** in either Bidder or Target shares (or options or derivatives relating to shares) when in possession of inside information (such as knowledge of an impending takeover bid).
- There must be no **special deals** with certain Target shareholders – all shareholders of the Target must be treated equally.
- The Target must not enter into any **offer-related arrangements** with the Bidder during an offer period or when an offer is reasonably in contemplation, subject to certain limited exceptions.
- Once a takeover bid is imminent, Target directors must not take any **frustrating action** which would thwart the offer and deny the Target shareholders the opportunity to decide on the bid on its merits (except with shareholder approval).
- Once a takeover bid is proposed or in contemplation and throughout the offer period, the directors of the Target must disregard personal interests and **consider the interests of Target shareholders as a whole** when advising on the takeover. Target directors must also continue to comply with their statutory duties including their duty to act in the way that they consider is most likely to promote the success of the Target.
- If a director has a potential **conflict of interest** which may prevent him from properly being involved in considering and advising shareholders about the takeover bid, he must notify the board and its advisers straight away.
- Each director has a responsibility to ensure, so far as he is reasonably able, that the **Takeover Code is complied with** during the course of a takeover bid.

PART II
INTRODUCTION TO TAKEOVERS IN THE UK

1. THE TAKEOVER CODE AND THE PANEL

1.1 Application of the Takeover Code

The City Code on Takeovers and Mergers (the **"Takeover Code"** or the **"Code"**) governs the conduct of mergers and takeovers in the UK and applies where there is an acquisition or consolidation of control (whether by contractual offer or by scheme of arrangement) of:

- a public company incorporated in the UK, Channel Islands or Isle of Man which has any securities admitted to a regulated market in the UK (such as the Main Market of the London Stock Exchange), to a multilateral trading facility in the UK (such as AIM) or to any stock exchange in the Channel Islands or Isle of Man; or
- any other public company (for example, a company whose shares are not traded at all) which is incorporated in the UK, Channel Islands or Isle of Man and which also has its place of **central management and control** in the UK.

It is the status of Target that determines whether or not the Takeover Code applies, rather than that of the Bidder.

1.2 The Takeover Panel

The Takeover Code is administered by the Takeover Panel (the **"Panel"**), with day to day decisions as to enforcement and interpretation of the Rules being taken by the Panel Executive (which is a full time body composed largely of secondees from various City institutions). The Code is not written in a legalistic style and it is the spirit rather than the letter of the Code which must be observed. For this reason, the Panel Executive is available at short notice to give guidance or rulings on matters arising under the Takeover Code and must be consulted whenever there is any doubt as to the application of the General Principles or Rules of the Code. The Panel Executive is an "active" regulator and frequent contact between the Panel Executive and the advisers to the Bidder and Target is common in UK takeovers. As the Code itself makes clear, taking legal advice on the interpretation or application of the Code is not an appropriate alternative to obtaining a ruling from the Executive.

The Panel has statutory powers to regulate and supervise takeover bids. The sanctions available to the Panel include private censure, public criticism of a party or their actions, compensation orders to compensate shareholders, restraining directions, reporting a party to another regulator (e.g. the FCA, who could consider delisting an entity or revoking an adviser's authorisation under the Financial Services and Markets Act 2000 (**"FSMA"**), or the Department for Business, Innovation and Skills, who could declare that an individual is unfit to be a director of a public company) or a "cold shoulder" ruling (ie requiring financial advisers to refuse to deal with any person who disobeys a Panel ruling). The Panel can apply to the courts to enforce any of its rulings.

2. GENERAL PRINCIPLES

The Takeover Code contains six **"General Principles"** for the good conduct of takeover offers. In particular, the General Principles underline the need for fairness in all situations involving a takeover or a possible takeover, for example by ensuring that all shareholders are treated equally. The General Principles are set out in full in Schedule 1 to this note.

The detailed Rules in the Takeover Code expand on the General Principles and cover areas such as:

- restrictions on, and requirements for disclosure of, acquisitions of shares and interests in shares;
- when an announcement of a possible offer must be made;
- the terms of the offer; and

- the contents requirements for the documentation produced by the Bidder and the Target.

The Code not only applies to the conduct of the Bidder and the Target, but many of its Rules also apply to and regulate the actions and conduct of others involved in a takeover. In particular, many Rules apply to those who are deemed to be "acting in concert" with either the Bidder or the Target (ie co-operating whether formally or informally to consolidate control of a company), known as **"concert parties"** under the Takeover Code. For example, share purchases by a Bidder's concert parties will be treated as if made by the Bidder for the purposes of the Code.

3. PRELIMINARY STEPS: BEFORE ANNOUNCEMENT

3.1 Secrecy

Absolute secrecy must be preserved before the public announcement of an offer. The directors must ensure that everybody who receives confidential information (including secretaries) is made aware of the need for secrecy and only passes it on to another person on a need to know basis. Breach of this obligation of secrecy could constitute insider dealing or market abuse. If information is provided to more than a very limited circle of insiders (other than the advisers to the parties involved) the Panel may require a public announcement of the fact that there is a possible bid. In addition, as described in paragraph 4 below, any rumour or leak in relation to the possible offer will also trigger the requirement to make a public announcement relating to the possible offer, naming the potential Bidder.

3.2 The approach / nature of bid

The Takeover Code applies to (i) the Target from the moment of an approach by a potential Bidder and (ii) a potential Bidder as soon as it actively considers an offer, even if its approach has not yet been made. The Panel interprets the term "approach" broadly and will usually consider an approach to have been made when a representative of the Bidder informs a director or representative or adviser of the Target that it is considering the possibility of an offer. This may be at a very preliminary stage in the Bidder's preparations and there is no requirement for the approach to be in writing or for an indicative offer price or any terms or conditions to be specified.

A bid may be either recommended or hostile. If an offer is to be recommended (i.e. recommended by the Target board), the Bidder will need to approach the board of directors of the Target to seek their approval for the offer. The Bidder will need to consider the timing for the approach carefully because, as described below, once an approach has been made, the Target board may make an announcement about the possible offer, triggering a 28 day deadline for the Bidder to clarify its intentions. Assuming the Target board is receptive to the bid, there is then typically a period of negotiation between the two boards and their advisers to settle the terms of the offer. The Bidder may also seek information from the Target in order to carry out its due diligence exercise. If the takeover is recommended, the Target will usually provide the Bidder with certain financial and other key information. However, this will typically be far less detailed than the information disclosed in a private company acquisition.

Even if the Bidder has determined that the offer will be hostile from the outset, the Code states that the Bidder must put forward the offer in the first instance to the Target board. This could be satisfied by a short telephone call to the Target just before the hostile bid is announced.

3.3 Timetable for negotiations

The timetable for negotiations in a recommended offer will depend on whether or not a public announcement has been made naming the Bidder. Such an announcement commences an offer period and automatically triggers a 28 day deadline by which the Bidder must clarify its intentions, known as a 'put up or shut up' deadline (see paragraph 4.8 below). The Target is not required to make such an announcement unless there is a

leak but it may choose to do so voluntarily. The Bidder cannot prevent the Target from making an announcement at any point after an approach has been made. The Target (but not the Bidder) may ask the Panel to extend the 28 day deadline. Therefore, on a recommended offer, it is likely that more time will be available to the Bidder, whereas on a hostile offer the Target may insist on the strict 28 day deadline.

3.4 Determining which method to use to effect the takeover

The Bidder (and the Target on a recommended bid) must determine which is the most appropriate method of effecting the takeover.

There are two principal ways to effect a takeover of a UK public company. A takeover can be implemented by way of a contractual takeover offer (**"offer"** or **"takeover offer"**) by the Bidder for the shares of the Target. Alternatively, a takeover can be effected by a scheme of arrangement (**"scheme"**) under which the Court, using a statutory procedure, gives effect to the takeover. Schemes are often used for takeovers which are recommended by the Target board.

Which of the two routes is chosen will depend on a variety of different circumstances. Each route has its advantages and disadvantages.

4. ANNOUNCEMENT OF POSSIBLE OFFER

4.1 When is an announcement required?

The parties will normally want to avoid making a public announcement until a definite decision to make the offer has been made and terms have been agreed, hence the importance of absolute secrecy pre-announcement. However, the Panel is concerned to ensure that an announcement of an offer or possible offer is made at the earliest moment if there is any risk of a leak (which would give rise to insider dealing or market abuse). Rule 2 of the Takeover Code sets out a number of circumstances when an offer announcement will be required; it also specifies whose responsibility it is to make the announcement.

Note that while there is no automatic requirement for the Target or Bidder to make an announcement at the point of the initial approach, an announcement will be required in the following circumstances:

- when, once a Bidder has **actively started considering** (see paragraph 4.6 below) an offer but **pre-approach**, the Target is the subject of rumour and speculation or there is an untoward movement in its share price and there is reason to believe the Bidder's actions have caused this (Rule 2.2(d));
- when, **after an approach** has been made by, or on behalf of, the Bidder, the Target is the subject of rumour and speculation (regardless of how disseminated and even if not specific, i.e. it is not possible to disregard speculation simply because it does not name the parties) or there is an untoward movement in its share price (Rule 2.2 (c));
- **extension of discussions** relating to a possible offer beyond a very restricted number of people (Rule 2.2(e));
- when a **firm intention** to make an offer is notified to the board of the Target by or on behalf of the Bidder (Rule 2.2(a));
- when a party buys through 30% and therefore triggers a **mandatory bid** under Rule 9 (Rule 2.2(b)); and
- when a **purchaser is being sought for a stake of 30% or more in Target or when offers generally for Target are being sought** and either there is speculation around the Target or untoward movements in its share price or more than a very restricted number of purchasers/offerors are to be approached (Rule 2.2(f)).

The financial advisers involved in the takeover offer will closely monitor both the Target's share price and sources of information relating to offers (such as newspapers and

newswires). The Panel must be consulted whenever there is a significant movement in share price over the relevant period or rumour and speculation about the possibility of an offer, so that it can determine whether an announcement should be made.

4.2 **Responsibility for making the announcement**

Prior to an approach to the Target, the responsibility for making an announcement of a possible offer lies with the Bidder. However, once the board of the Target has received an approach (even in very general terms) which may or may not lead to an offer, the primary responsibility for making an announcement passes to the board of the Target. If the Target unequivocally rejects the approach, the responsibility for making an announcement will generally revert to the Bidder.

4.3 **Target's ability to make an announcement at any time post approach**

In addition to the circumstances outlined above where an announcement is required under the Code, the Target may choose to voluntarily make an announcement relating to a possible offer or publicly identify the potential Bidder at any time the Target board considers appropriate after an approach has been made and, under the Code, the Bidder must not attempt to prevent the Target board from doing so.

4.4 **Bidder's ability to "down tools" to avoid being named**

The Panel may grant a dispensation from the requirement to make an announcement naming a potential Bidder if it is satisfied that the potential Bidder has ceased actively to consider making an offer for the Target.

Where such dispensation has been granted to the sole potential Bidder or all potential Bidders, the Panel may nevertheless require an announcement to be made by the Target to prevent false rumours, although this will not normally be required to identify a former potential Bidder, unless it has been specifically named in rumour and speculation.

Any Bidder wishing to avail itself of the "down tools" exemption to avoid being named should indicate its intention to do so to the Panel at the time it first makes an approach to the Target. A Bidder is not permitted to make it a term of the approach that it will be withdrawn if a requirement to make an announcement naming the Bidder is triggered (see paragraph 4.5 below).

A potential Bidder who is given a down tools dispensation will be subject to the restrictions under Rule 2.8 of the Code (as if it had made a public statement of intention not to make an offer) for six months and will not be able to actively consider making an offer, make an approach to the Target board or acquire shares in the Target for three months, except where the Panel grants a dispensation. Dispensations will only be granted after the first three months have elapsed. This is to prevent very short "down tools" periods being used simply to avoid Bidders being named, only for discussions to resume shortly after the relevant announcement.

A Bidder may also of course inform the Target at a certain point that it is no longer considering an offer and that its previous approach has ended. If there is a subsequent leak in these circumstances, whether an announcement will be required naming that Bidder will depend on whether the approach can be regarded as having been unequivocally rejected or alternatively whether the Panel thinks that sufficient time has elapsed since the discussions terminated to enable it to no longer be treated as an approach for Rule 2 purposes (it is likely that the Panel would require a period of months rather than weeks for this purpose).

4.5 **No "exploding approach"**

A Bidder cannot specify when it makes an approach that it will be withdrawn automatically in the event that: (i) the Target does not engage with it within a specified period of time; (ii) a requirement to make an announcement under Rule 2.2 is triggered; or (iii) the Target receives an approach from a third party. The Panel considers this would be a breach of

the ability of the Target to choose whether to identify potential Bidders at any time it chooses to do so. If the Target is presented with such a provision it should notify the Panel.

4.6 **When does the Panel need to be consulted?**

The Panel needs to be consulted in the following situations:

4.6.1 Rumour and speculation

(A) If the Target becomes the subject of any rumour and speculation:

(1) after the time when an offer is first actively considered by the Bidder;

(2) once an approach has been made; or

(3) once a potential selling shareholder, or the Target board, starts to seek potential purchasers/offerors;

(B) If an offer was being considered but is subsequently decided against, the Panel should be consulted since they may require a clarificatory announcement to prevent a false market;

(C) If the approach is rejected or the Bidder wishes to withdraw it, the Panel should be consulted and may require a clarificatory announcement to prevent a false market;

4.6.2 Share price movements

(A) In order to determine if a movement in share price is "untoward";

(B) If there is a material or abrupt movement in the Target's share price:

(1) after the time when an offer is first actively considered by the Bidder; or

(2) once a potential selling shareholder, or the Target board, starts to seek potential purchasers;

(C) If an offer *was* being considered but is subsequently decided against, the Panel should be consulted since they may require a clarificatory announcement to prevent a false market); or

4.6.3 Extension of discussions

If the Bidder or Target wish to extend discussions relating to a possible offer to more than a very restricted number of people (unless an announcement is to be made).

The Panel recognises that Bidders continually assess potential acquisition Targets but interprets active consideration as drawing a distinction between that and an increase in the intensity of a Bidder's assessment to a level where it is being given more serious consideration. Active consideration will therefore depend on the circumstances of a particular case and the Panel will take all relevant factors into account including whether the possible offer has been considered by the senior management or board of the Bidder, whether work is being undertaken by external advisers, and if external parties have been approached (e.g. finance providers, Target shareholders etc).

Note that consultation will not necessarily lead to a requirement to make an announcement; parties often cite this as a concern and as an excuse for not consulting the Panel. However, the Panel will not automatically require an announcement to be made

and is likely to be critical of parties (and their advisers) who fail to consult with them when they should.

4.7 **First announcement and naming of potential Bidders**

The first announcement of an offer or possible offer (whether made voluntarily by the Target or Bidder or required by the Panel in response to a leak) will commence the **"offer period"**, which runs until the offer has become unconditional as to acceptances (or the scheme has become effective) or the offer (or scheme) has lapsed.

Any such announcement made by the Target must name the Bidder and any other potential Bidders with which it is in talks, or from which it has received an approach which has not been unequivocally rejected, regardless of whether there has been a leak about that particular Bidder's interest.

If a new potential Bidder approaches the Target after such an announcement has been made, there is no requirement for the Target to announce the existence and identity of that new Bidder unless there is a leak which specifically identifies that potential Bidder. If, however, the Target refers to the existence of a subsequent potential Bidder in an announcement, it must also be named.

The Panel may grant a dispensation from the requirement for an announcement following rumour or speculation if any potential Bidder has ceased to actively consider the bid (this is known as 'downing tools'). It will then be precluded from bidding for the Target for six months from the date of the dispensation (although the Panel may consent to this 'lock-out' period being reduced to three months with the consent of the Target), see paragraph 4.4 above.

4.8 **28 day 'Put Up or Shut Up' deadline**

Once a Bidder is named in a possible offer announcement, it is automatically subject to a 28 day deadline by which it has to either announce a firm intention to make an offer or announce that it is not going to make an offer. This is known as a 'put up or shut up' or 'PUSU' deadline. If a Bidder announces at the end of the period that it does not intend to make an offer it will then be precluded from bidding for a period of six months (unless the Target agrees to a new bid, within a shorter period, with the consent of the Panel).

The Panel has said that it will normally consent to an extension of the 28 day deadline at the request of the Target board, after taking into account all relevant factors including the status of negotiations and anticipated timetable for completion. Any extension will usually be given shortly before the expiry of the deadline.

Once an announcement of a firm intention to make an offer has been made by any Bidder, all 28 day deadlines imposed on other potential Bidders fall away and no new 28 day deadlines are imposed. In addition, a previous Bidder, which has previously been precluded from bidding as a result of the expiry of its 28 day deadline or because it has 'downed tools', has another chance to make a bid.

4.9 **Terms of announcement by Bidder**

The Panel must be consulted before a Bidder releases a possible offer announcement which refers to the terms on which an offer may be made (and the Bidder will generally be held to those terms). The Panel must also be consulted if a Bidder intends to announce any offer, or possible offer, which is subject to a pre-condition.

4.10 **Disclosures during offer period**

One of the key consequences of being in an offer period is that the parties to the offer (and their concert parties) and anyone with interests in 1% or more of the Target's shares must make an "opening position disclosure" disclosing their interests in the Target's shares (and, on a securities exchange offer, the Bidder's shares). In addition, going forward they are required to disclose to the market dealings in Target shares (and, on a securities exchange offer, the Bidder's shares). These are known as **"Rule 8 disclosures"**.

4.11 **Role of the Target board – whether to recommend**

Most Bidders will wish to seek the agreement and recommendation of the Target board to the offer, i.e. make a **"recommended"** rather than a **"hostile"** offer. The benefits of Target co-operation are that it facilitates due diligence, thus reducing risk for the Bidder; it also reduces the chance of Target shareholder rejection of the takeover offer and (to a lesser extent) a competing offer being made by a third party. As described above, the Target board has the power to approach the Panel to request an extension to the Bidder's 28 day put up or shut up deadline, which it is likely to exercise if it is recommending the offer, which would allow the Bidder more time to prepare its offer. The support of the Target also usually facilitates a smoother handover of management.

As stated above, the Bidder will therefore typically approach the Target in advance of the expected takeover offer announcement. The timing for the approach will depend on a number of factors, including the level of due diligence the Bidder is seeking to undertake, how prepared it is to meet the 28 day deadline that could be imposed by an announcement following an approach if the Target is not willing to recommend the offer, and if it is prepared to make a hostile offer if a recommendation is not forthcoming.

It is then up to the Target board to decide whether to recommend the offer or reject it (based on, amongst other things, whether they accept the Bidder's valuation of the company). In reaching their decision, the Target directors must act in the interests of the company as a whole and not deny the shareholders the opportunity to decide on the merits of a bid. Rule 3 of the Code requires that the Target board must obtain from a financial adviser competent independent advice on any offer and make that advice known to its shareholders. The Target directors must also, separately, consider their duties under the Companies Act 2006 and, in particular, whether the offer would be most likely to promote the success of the company.

If the Target board does not recommend the offer (i.e. the offer is hostile), the directors of the Target will publish a **"defence document"** outlining the reasons why shareholders should reject the offer.

4.12 **Offer-related arrangements**

The Code prohibits any **"offer-related arrangements"** between the Bidder and any of its concert parties and the Target and any of its concert parties. This includes break fees, implementation agreements and any deal protection measures, such as exclusivity agreements. It also includes any other offer-related agreement or arrangement entered into between the Bidder and Target, or their concert parties, during an offer period, or at any time when an offer is in contemplation.

There are limited exceptions for confidentiality agreements, non-solicitation agreements (regarding employees, customers and suppliers), commitments to assist in obtaining regulatory clearances, irrevocable commitments by Target directors to accept the offer, and proposals to be made in relation to employee incentive arrangements and agreements between a Bidder and the trustees of the Target pension scheme(s) in relation to future funding of the pension scheme. Agreements which only impose obligations on a Bidder are also permitted (except in the case of a reverse takeover).

There is a limited exception for break fees in connection with a formal sale process or in a 'white knight' situation, where a hostile offer has been announced and a preferred competing Bidder emerges and makes a recommended offer. A break fee of 1% may be permitted with one or more recommended Bidders provided that the aggregate amount capable of being paid by the Target is capped at 1% of the value of the offer and the fee is only payable in the event a competing offer becomes wholly unconditional.

The same deal protection prohibition applies to offers structured as schemes of arrangement. However, in recognition of the fact that a scheme is a Court process controlled by the Target and that the Bidder will want a degree of certainty in relation to its implementation, the Code requires the Target to publish a scheme circular within 28 days of the Bidder's announcement of a firm intention to make an offer and the circular must

include an expected timetable for the scheme, which the Target must implement, provided it continues to recommend the bid. A Bidder may also include, as conditions to the scheme, specific dates by which certain stages of the scheme must be completed.

The directors of the Target are treated as concert parties of the Target and therefore the ban on offer-related arrangements applies to any arrangements with the Target directors. They can provide irrevocable undertakings to accept the offer or vote in favour of the scheme in their capacity as shareholders, but these must not contain any other undertakings from them.

Deal protection arrangements between a Bidder and Target shareholders fall outside the scope of the restriction on offer-related arrangements save for circumstances where a shareholder holds 20% or more of the equity share capital of the Target, in which case such a shareholder will be deemed to be acting in concert with the Target and will therefore in theory be subject to the same restrictions on deal protection (so an undertaking to accept an offer or to vote in favour of the scheme is permitted, but no other undertakings). In practice however, a shareholder holding 20% or more of the equity share capital of the Target may be permitted by the Panel to agree to pay a break fee.

4.13 Formal sale process

When, prior to the Bidder having announced a firm intention to make an offer, the Target announces it is seeking one or more potential Bidders through a "formal sale process" (namely, an auction), the Panel will normally grant a dispensation from both the requirement to name the potential Bidders and the automatic PUSU deadline. The dispensation will also only be available when the Target board is genuinely putting the company up for sale and will not be available where a Target has announced a strategic review of its business.

In a formal sale process, the Target will also normally be granted a dispensation from the prohibition on inducement fees and be permitted to agree an inducement fee with one Bidder, who had participated in the auction, at the time of that Bidder's announcement of its firm intention to make an offer. The inducement fee payable by the Target must not exceed 1% of the value of the Target, calculated by reference to the offer price and must only be capable of becoming payable if an offer becomes or is declared wholly unconditional. The Panel has also said that, in exceptional circumstances, it may be prepared to permit the Target to enter into other offer related arrangements with that Bidder.

4.14 Statements in relation to takeover bids

In general, a person making statements in relation to a takeover bid or potential bid will be bound by their statements unless they are promptly clarified or withdrawn. In particular:

- a statement that a person does not intend to make a bid will normally bind that person for six months;
- a statement that a bid will not be increased or extended will be binding;
- a Bidder cannot say that it may improve its bid unless it commits itself to the improvements and says what they are.

See also paragraph 8.4 below for the implications of any party making statements of intention or belief during an offer period.

4.15 Employee and Target pension trustee rights

Both the employee representatives and the trustees of any of the Target's defined benefit pension schemes have rights under the Takeover Code to have information about the offer made readily available to them. This includes the announcement that commences the offer period, the announcement of a firm intention to make an offer or a copy of the circular summarising the terms of the offer, and the offer document itself. There is also a specific right for employee representatives and pension scheme trustees of the Target to have their views on the effects of the offer on employment and pension scheme (respectively)

published, by the inclusion of an opinion in the offer document (or Target circular if it is a hostile offer). These rights apply to all employee representatives in the group irrespective of where they are located and to trustees of any defined benefit pension scheme, whether or not in the UK.

Where the Target has employees within the EU, consultation obligations may (but do not always) arise under the law of the relevant Member State, in relation to either or both of the prospective offer and the possibility of job losses.

5. FRUSTRATING ACTION/DEFENSIVE MEASURES BY THE TARGET

From the time when it has reason to believe that a bona fide offer may be imminent (irrespective of whether that offer is welcomed by the Target or not), the Target may not take any action which could result in that offer being frustrated or in shareholders being denied an opportunity to decide the offer on its merits.

This rule does not apply where the action is either: (i) pursuant to a pre-existing contract (i.e. one which was entered into at a time when the Target board did not have any reason to believe a genuine offer was imminent); or (ii) approved by Target shareholders.

Frustrating action could include the issue of shares or convertibles, a share buy-back, the issue or grant of options, agreeing to sell, dispose of or acquire material assets or entering into contracts outside the ordinary course of business. If there is a pre-existing obligation to take any such action, the Panel must be consulted. The payment of abnormal interim dividends and improvements in the terms of service of the directors may also be caught by this rule.

This prohibition on frustrating action does not stop the Target board from encouraging shareholders not to accept the offer if it believes that the offer should be on more favourable terms.

6. MAKING THE OFFER

6.1 Announcement of firm intention to make an offer – Bidder's commitment to proceed

The formal announcement of an intention to make an offer contains details of the principal terms of the offer and the conditions to which it will be subject. The offer will be subject to a number of conditions, including the Bidder receiving a specified level of acceptances (the **"acceptance condition"**) and, if relevant, competition clearance. The Code does not permit subjective conditions or those whose fulfilment is in the hands of the Bidder.

Once an offer is formally announced, the Bidder is committed to proceed. Scope to withdraw by invoking the conditions to the offer is very limited (even if there is, for example, a significant change in the Target's financial position or prospects). The only exceptions are the failure to satisfy UK or EU merger clearance conditions or the acceptance condition (or to obtain the approval of Target shareholders in the case of a scheme).

As a result, the Bidder should only make an announcement of a firm intention to make an offer after careful and responsible consideration and having ensured that it will be able to satisfy the offer consideration. This means that the financing for the offer must be fully committed when the announcement of the firm intention to make an offer is made and the announcement must contain a statement by the Bidder's financial adviser confirming that sufficient resources are available to the Bidder to satisfy full acceptance of the cash element of the offer consideration. The financial adviser will require certain procedures to be followed and checks to be made (known as a **"cash confirmation"** exercise) before making this statement, since if it turns out that the Bidder does not have sufficient resources, and the financial adviser has not taken all reasonable steps to confirm resources were available, it will be called upon to provide the necessary funds itself.

Once the Bidder has made a formal announcement of an intention to make an offer, it is bound to make the offer by publishing a formal offer document (or, if the takeover is by scheme, a scheme circular) within 28 days.

6.2 **When a mandatory or Rule 9 offer is required**

Where a person or concert party (see paragraph 2 above on concert parties) acquires an interest in shares of a UK public company (including put/call options over Target shares and long derivatives referenced to Target shares) carrying 30% or more of the voting rights, it will trigger an obligation to make a general offer to acquire the remainder of the shares, known as a **"mandatory offer"** or a **"Rule 9 offer"**. A mandatory offer is also required when a person (or a concert party) who is interested in shares which carry between 30% and 50% of the voting rights of the Target increases its percentage interest. Once a person is interested in more than 50% of the voting rights of the Target, no mandatory offer will be triggered in relation to any subsequent increase in that interest because that person already has control of the Target. The requirement to make a mandatory offer can be triggered during the course of an offer.

Triggering a mandatory offer is generally avoided where possible, largely because mandatory offers may only have a 50% acceptance condition (that is the offer must become unconditional as to acceptances when the Bidder holds more than 50% of the voting rights and cannot become unconditional as to acceptances at less than 50%), no other condition to the offer will be permitted and the mandatory offer must be in cash (or include a full cash alternative) at a value not less than the highest price paid by the Bidder for any interest in shares during the offer period and in the 12 months prior to the announcement of that offer.

6.3 **Choice of consideration**

Generally, the Bidder is free to choose what type of consideration it offers. Cash, loan notes or shares in the Bidder (or a combination of these) are the most common. However, the overriding principle is that all Target shareholders must be treated equally in relation to the consideration being offered. To give effect to this principle, the Code contains rules which provide that acquisitions of interests in Target shares may put a floor under the amount of consideration per share being offered and may determine whether the consideration offered comprises shares or cash:

- If the Bidder acquires interests in Target shares during the three months preceding the start of an offer period, or during the offer period, the Code requires the value of the offer to match the highest price paid by the Bidder during that period.
- The Bidder must offer cash, or make a cash alternative available alongside a share offer, if (i) during the 12 months prior to an offer period, the Bidder and its concert parties acquire over 10% of the Target's voting share capital for cash or (ii) if they acquire any shares for cash during the offer period. In either case, the cash offer or cash alternative must be no less than the highest price paid by the Bidder or its concert parties.
- Conversely, the Bidder may be required to make a securities offer where, during the offer period or the preceding three months, the Bidder and its concert parties acquire over 10% of the Target's voting share capital in exchange for securities.

If the Bidder is proposing to offer securities as consideration, the Takeover Code requirements for the offer document will also need to include details of the securities being offered and all known material changes in the financial or trading position of the Bidder since the last published audited accounts. If such securities are unlisted, the offer document must include an estimate of their value by an appropriate financial adviser. In addition to these extra offer document requirements, the Bidder will need to prepare a prospectus (or an equivalent document) unless an exemption under the Prospectus Rules applies (or an AIM admission document, as applicable).

6.4 Equal treatment of shareholders

The Bidder cannot make special deals with certain Target shareholders, including the Target directors, unless it has the consent of the Panel. Any special arrangements also have to be approved by the Target's shareholders.

7. OBTAINING CONTROL OF THE TARGET

Set out below is a broad overview of the key steps involved in taking control of the Target. In this respect, there are some key differences for a takeover by way of scheme, which are described in paragraph 7.5 below.

Schedule 2 of this guide contains an outline timetable with the key dates for a typical offer. The detailed time line will vary according to the specific circumstances.

7.1 Market purchases

Market purchases enable a Bidder to build up a stake in the Target and make it easier for a Bidder to obtain majority control of the Target. They are also seen as evidencing commitment to the deal as a whole. However they do not always make it easier to obtain 100% control over the Target. Share purchases prior to the despatch of the offer document do not count towards the 90% acceptance level required in order to squeeze out the remaining minority shareholders (discussed further in paragraph 7.3 below).

If a scheme of arrangement is used, then any shares held by the Bidder at the time of the meeting cannot be voted in favour of the scheme. In both cases, this means that the purchase of shares by the Bidder may make it harder to achieve 100% control.

7.2 Irrevocable undertakings and letters of intent

In order to improve the chances of the takeover offer succeeding, it is helpful if the Bidder can obtain irrevocable undertakings to accept the offer from some of the shareholders in the Target before it announces the offer, particularly if these undertakings are "hard" irrevocable undertakings, i.e. they bind the giver even in the event of a higher competing offer being made.

In practice, if an offer is recommended by the Target's board, Target directors will typically each give an irrevocable undertaking to accept the offer. Irrevocable undertakings constitute a specific exception from the general prohibition on offer-related arrangements in favour of the Bidder. However, as described in paragraph 4.12 above, the undertaking must not include commitments other than an undertaking to accept the offer or vote in favour of the scheme.

The advantage of irrevocable undertakings is that, provided that they are structured correctly, on an offer the Bidder can count acceptances received pursuant to irrevocable undertakings towards the 90% acceptance level required for squeeze-out purposes, in contrast to purchases in the market before the offer is made; also, they do not trigger the obligation to make a mandatory offer in the same way that actual purchases do.

In the case of a takeover by scheme, the Bidder may seek irrevocable undertakings or letters of intent from Target shareholders to vote in favour of the scheme. In contrast to actual purchases by the Bidder, these will (in most circumstances) count towards the 75% in value and majority in number required to approve a scheme (see paragraph 7.5 below).

The Bidder will need to consult the Panel in advance if it intends to seek irrevocable undertakings from individuals, or small corporate shareholders, or if it wishes to approach more than six people before the bid is announced.

7.3 Declaring the offer unconditional as to acceptances

It is up to the Bidder to choose what level of acceptances it wishes to receive before its bid can be declared unconditional as to acceptances (unless it is a mandatory offer, as discussed in paragraph 6.2); however, the Code prohibits an offer from being declared unconditional as to acceptances unless the Bidder has acquired over 50% of the voting

rights in the Target. If the Bidder fails to secure that basic level of acceptances, the offer will lapse: if this happens, the Takeover Code prevents the Bidder from making another offer for 12 months (save with the consent of the Panel).

In practice, most Bidders will aim to receive acceptances in respect of at least 90% of the Target's voting share capital not already owned by the Bidder when it makes the offer. This is because if the Bidder reaches this level of acceptances, it will then be entitled to acquire any remaining shares from those minority Target shareholders who have not accepted the offer under the squeeze-out procedure in the Companies Act 2006. Since minority shareholders frequently accept an offer when they can see that the ability to control the Target board has passed to the Bidder, the Bidder will sometimes (depending on the requirements of its funding and its knowledge of the Target shareholder base) be prepared to declare its offer unconditional when acceptances are over 50% but have not reached 90%, in the expectation that the 90% level will ultimately be reached. In particular, the fact that acquiring 75% will generally enable a Bidder to delist the Target's shares is a powerful incentive for recalcitrant Target shareholders to accept the offer.

Under the Takeover Code, all contractual offers must be open for acceptance for at least 21 days after publication of the offer document. At Day 21, the Bidder will announce the level of acceptances it has received and may extend the offer if it has not by then obtained the minimum level of acceptances (but it is under no obligation to do so). The Bidder has a maximum of 60 days after the offer document is published to receive sufficient acceptances to satisfy its acceptance condition.

7.4 Declaring the offer wholly unconditional

After the offer has become unconditional as to acceptances, all other conditions must be fulfilled within 21 days. It is only once the offer has become wholly unconditional that the contract between the Bidder and those Target shareholders who have accepted the offer is binding and the Target will become a subsidiary of the Bidder. However, it will not become a wholly-owned subsidiary unless and until the 90% acceptance level is reached and the squeeze-out procedure is completed, which takes another few weeks.

7.5 Obtaining control if a scheme of arrangement is used

Where a scheme is being used to effect a takeover, the 50% acceptance level tests and the 90% squeeze-out tests are not relevant. Instead, in order for the scheme to go ahead, it must be approved at a meeting of the shareholders of the Target by a majority in number, representing 75% in value, of those voting. Once the resolutions are passed, Court approval for the scheme is sought a few days later.

Once Court approval has been obtained, the Court order will be filed at Companies House: it is at this point the scheme becomes effective and 100% ownership and control of the Target passes to the Bidder.

The length of time before majority control of a company is acquired on a scheme may be longer than on a contractual takeover offer because majority control will not pass until the end of the process when the scheme becomes effective. However, the length of time before 100% ownership of the company is acquired may be shorter than on a contractual offer, because the Court order will bind all Target shareholders once filed. In contrast, on a contractual offer the squeeze-out provisions in the Companies Act 2006 have to be used (once the acceptance level has reached 90% or more) in order to obtain 100% control.

7.6 Delisting the Target shares

Where the Target is a premium listed company and the takeover is structured as a contractual takeover offer, under the Listing Rules a Bidder must, by virtue of its shareholdings and acceptances of its takeover offer, acquire or agree to acquire shares carrying 75% of the voting rights of the Target before it can cancel the Target's listing.

Where the Bidder is interested in more than 50% of the voting rights in the Target when it announces its offer, in addition to reaching the 75% acceptances threshold, the Bidder

must obtain acceptances or acquire shares from independent shareholders that represent a majority of the votes held by independent shareholders before the Target can be delisted.

Where the takeover is by way of a scheme of arrangement, the Listing Rules do not impose any additional rules as regards shareholder approval or the level of acceptances required before the Target can be delisted, as the scheme procedure provides sufficient protection for shareholders.

7.7 Payment for Target shares

Payment for the Target shares must under the Code be made within 14 days of the offer becoming wholly unconditional, or in the case of a scheme within 14 days of the scheme becoming effective. On an offer, shareholders who accept after the offer is wholly unconditional must be paid within 14 days of acceptance.

8. TAKEOVER DOCUMENTATION – STANDARDS REQUIRED

The Code sets out detailed contents requirements for statements made and documents issued in connection with or in response to a takeover. As a general rule, the Panel does not actually review announcements or documents or approve them prior to their publication. Parties may consult the Panel to clarify content requirements or to seek a derogation from such requirements.

8.1 Standards of care and accuracy

Rule 19.1 of the Takeover Code requires that:

> "Each document, announcement or other information published, or statement made, during the course of an offer must be prepared with the highest standards of care and accuracy. The language used must clearly and concisely reflect the position being described. These requirements apply whether the documents, announcements or other information is published, or the statement is made, by the party directly or by an adviser on its behalf."

In particular, sources for facts which are material to an argument must be clearly stated. Additional requirements apply in respect of any quantified financial benefits statements or profit forecasts (see paragraph 8.3) and particular care must be taken with statements made during interviews or discussions with the media.

8.2 Responsibility for information

As discussed in paragraph 5.5 of Part III, the Code requires that directors expressly accept responsibility for information contained in documents or advertisements issued to shareholders in connection with an offer and a statement to that effect must be included in all offer documentation.

8.3 Profit forecasts and quantified financial benefits statements

Certain statements are seen by the Panel as being inherently problematic in the offer context, usually because they involve some finely-balanced judgements (e.g. as to future performance).

Accordingly, where a party to an offer publishes a profit forecast during an offer period, the forecast will have to be included in the offer document or target board circular along with reports from that party's accountants and financial adviser on its compilation.

Where a profit forecast has been published prior to the start of the offer period, the directors may instead just have to confirm the statement is still valid or explain why it is no longer valid.

Similarly, when making quantified financial benefits (or synergies) statements during an offer period, the party will have to publish the bases of belief supporting the statement along with reports from its accountants and financial adviser on its compilation.

Statements by a bidder which is only offering cash are exempt.

8.4 Statements of intention or belief

There is a specific requirement for the Bidder to state its intentions in relation to the Target's employees, locations of business and fixed assets in the offer document. If the Bidder has no plans in relation to them, it is required to make a negative statement in the offer document.

Any statement of intention or belief in takeover offer documentation must be prepared with the highest standards of care and accuracy.

Where a bidder or target makes a statement about action they intend to take after the end of the offer period, they can choose to make either a post-offer undertaking, which will be treated as a binding commitment, or a post-offer intention statement, which is not binding. Different requirements apply to the different types of statement.

Where a party elects to make a post-offer undertaking (or POU), it must comply with it. The party must specify any qualifications or conditions to the POU and will only be excused from compliance if one of the qualifications or conditions applies. General carve-outs relating to a material change in circumstances, force majeure or directors' fiduciary duties are not permitted, though a party can qualify a POU by providing that the undertaking will no longer apply where the Panel determines that the party is unable to comply with it as a result of an event beyond the party's control.

By contrast, a post-offer intention statement is not binding. However, it must be:

- an accurate statement of the party’s intention at the time it is made; and
- made on reasonable grounds.

If the party subsequently wants to take a different course of action, the Panel will wish to understand the reasons for doing so and be satisfied that, at the time the statement was made, it was reasonable and accurate.

PART III
DIRECTORS' RESPONSIBILITIES AND LIABILITIES

1. INTRODUCTION

In addition to the general common law and statutory duties of directors, which continue as normal during an offer period, there are additional responsibilities for directors in relation to a potential or actual takeover or merger transaction. These responsibilities arise primarily from:

- the Takeover Code;
- the Listing, Disclosure and Transparency Rules published by the UKLA or equivalent requirements of the AIM Rules published by the London Stock Exchange;
- the insider dealing legislation, which is contained in Part V of the Criminal Justice Act 1993 (**"CJA"**); and
- the market abuse regime contained in the EU Market Abuse Regulation (**"MAR"**) (and the implementing measures under it).

2. DIRECTORS AND THE TAKEOVER CODE

2.1 Responsibility of all directors

The Code provides that each director has a responsibility to ensure, so far as he is reasonably able, that the Code is complied with during the course of a takeover bid. In practice, it is recognised that the day to day conduct of a takeover bid is delegated to individual directors or to a committee, but the board as a whole must ensure that proper arrangements are in place to enable it to monitor what is done. Specifically, the Code requires arrangements to be in place to ensure that:

- the board is promptly provided with copies of all documents and announcements issued on behalf of the company relating to the bid; details of all dealings in relevant securities by the company or any person acting in concert with it; and details of any agreements, understandings or obligations relating to the offer;
- the directors with day to day responsibility for the takeover bid are in a position to justify to the board all of their actions and proposed courses of action; and
- the opinions of advisers are available to the board where appropriate – it is important that directors should, where practicable, hear such advice first hand.

The Code also requires that directors expressly accept responsibility for information contained in documents or advertisements issued to shareholders in connection with the offer.

Directors must co-operate with the Panel in relation to any enquiries, including the provision of any information to the Panel.

2.2 Conflict of interest

If a director has a potential conflict of interest, or any new conflict or potential conflict of interest arises, which may prevent him from properly being involved in considering and advising shareholders about the takeover bid, he should notify the board and its advisers straight away. A conflict of interest may arise, for example, where a director has a different interest in the outcome of the bid because of his current or future interest in the Bidder.

2.3 Independent advice

The board of the Target is required to obtain independent advice on any takeover bid and the substance of such advice must be made known to its shareholders. The board of the Bidder must also obtain independent advice if the takeover bid is a reverse takeover or when the directors have a conflict of interest.

2.4 The General Principles of the Takeover Code

The Takeover Code contains six "General Principles" for the good conduct of takeover offers. In particular, the General Principles underline the need for fairness in situations involving a takeover or a possible takeover, for example by ensuring that all shareholders are treated equally. The General Principles are set out in full in Schedule 1 of this memorandum.

3. DIRECTORS DUTIES UNDER THE COMPANIES ACT 2006

As mentioned above, the directors' general duties will continue during an offer period.

The Companies Act 2006 contains a statutory statement of directors' duties.

3.1 Statutory duties

The seven statutory duties set out in the Companies Act 2006 are:

- a duty to act within the powers conferred by the company's constitution;
- a duty to promote the success of the company for the benefit of its members as a whole;
- a duty to exercise independent judgement;
- a duty to exercise reasonable care, skill and diligence;
- a duty to avoid conflicts of interest;
- a duty not to accept benefits from third parties; and
- a duty to disclose an interest in a proposed transaction with the company.

3.2 Case law principles

The following principles can be determined from the case law on directors' duties in the context of takeovers (which pre-dates the codification of the duties in the Companies Act 2006 but is still applicable):

- there is no duty to recommend an offer if it undervalues a company;
- a takeover offer is by its nature an offer to just the current shareholders and it is those shareholders to whom the directors are required to provide their recommendation and the advice of their financial advisers. This will involve the directors weighing up the potential future benefits to shareholders of the company remaining independent against the immediate benefits of the offer;
- where directors have determined that the company should be sold and there are two or more Bidders, then the duty is to obtain the highest price;
- directors have a duty to give shareholders sufficient clear and not misleading information and advice to enable them to make an informed decision as to how to vote at a shareholder meeting.

4. INTERESTS AND DEALINGS IN SHARES

The interests and dealings in Target and Bidder shares by directors (and connected persons) of the Target and the Bidder immediately before and during an offer period will be the subject of close scrutiny. Each director must ensure that the board, any bid committee and the company's advisers are informed in advance of that director's interests in shares and of any dealings. The interests and dealings of directors include for these purposes the interests and dealings of their spouses, civil partners, and any children and step-children under the age of 18.

4.1 Restrictions on dealing

The Takeover Code prohibits any dealings in the Target's securities by any person (excluding the Bidder) who is privy to price sensitive information about a takeover bid or

potential bid (and the provisions of MAR have the same effect (see paragraph 6.3 below)). Additional restrictions apply to directors on a takeover by way of scheme.

The Takeover Code restricts the sale of securities in the Target by the Bidder and persons acting in concert with it. Sales are only permitted with Panel consent and after twenty-four hours' prior public notice that such sales might be made. Sales below the value of the bid will not be permitted. After such notice, neither the Bidder nor its concert parties may acquire securities in the Target or any interest in Target securities and only in exceptional circumstances may the bid be revised.

4.2 Disclosure of interests and dealings

Under the Takeover Code, the Target, the Bidder (once it has been identified as such), any person with an interest of 1% or more in the securities of any party to the offer and certain other persons must disclose their interests in Target securities (and, in the case of a securities exchange offer, Bidder securities) within ten business days of the commencement of an offer period. In the case of a securities exchange offer where the Bidder is not identified at the start of the offer period, opening position disclosures in respect of Bidder securities must be made within ten business days of the announcement which first identifies the Bidder. The Bidder and Target must also disclose any opening positions held by their concert parties.

Dealings in Target securities (and Bidder securities if it is a securities exchange bid) during the offer period by the Bidder, the Target and their respective directors and concert parties must also be disclosed by 12 noon on the business day following the dealing. In addition, dealings in securities of any party to the offer by persons who are interested (including through options and derivatives) in 1% or more of the Bidder's or Target's shares are required to be disclosed to the market by 3.30 pm on the next business day.

MAR, the Transparency Rules and EU Short Selling Regulation (No. 236/2012), and disclosure obligations under the AIM Rules (as applicable) will also continue to apply, including to dealings by directors, members of their families and certain employees, and to dealings by substantial holders of shares and interests in shares.

Interests of the Bidder and the Target directors in Target securities (and, on a securities exchange bid, Bidder securities), will be disclosed in the offer document (and any defence document), as will dealings by Target directors during the offer period and by Bidder directors during the twelve months prior to and during the offer period.

5. SUPPLY OF INFORMATION

5.1 Potential Bidders

To ensure equality of treatment, where information is disclosed or access to management is granted to one potential Bidder, the Takeover Code requires that it is also disclosed or granted to a rival Bidder or potential Bidder (even where that bid may be unwelcome). This may act as a constraint on a Target who wishes to provide information to the friendly Bidder even if no competing hostile Bidder has yet emerged. There are insider dealing implications for any Bidder which receives confidential price-sensitive information about the Target and it is also important to avoid any allegation of market abuse.

5.2 Target shareholders

General Principle 1 provides that Target shareholders must be afforded equivalent treatment – in practice, this means that information must not be disclosed to some Target shareholders but not others. The bid announcement, offer documentation and any revised document must be sent to all Target shareholders (subject to a limited exception in respect of shareholders situated outside the EEA). Because of the need for equality of information, care must be taken in conducting meetings with shareholders: no material new information and no significant new opinions may be aired which are not then given to all shareholders (and the company's financial advisers must be present at such meetings and will be required to confirm to the Panel by noon the following day that these restrictions have been

observed). If material new information or opinions do emerge at a meeting with shareholders, an announcement giving details must be made as soon as possible and the Panel may require a document to be sent to all Target shareholders, persons with information rights, employee representatives and target pension scheme trustees.

5.3 Employees and Target pension trustees

Copies of offer announcements and documentation must be made available to employee representatives and trustees of any defined benefit pension scheme, both of whom must also be informed of their right to have their opinion annexed to the Target board's circular (see paragraph 4.15 of Part II above).

5.4 The press and social media

Care must be taken in talking to journalists or repeating, linking to or tweeting/re-tweeting statements released in social media by the parties or other commentators, as it is very difficult after publication to alter an impression given or a view or remark attributed to a particular person. In appropriate circumstances, the Panel may require a statement of retraction. Particular areas of sensitivity include future profits and prospects, asset values and the likelihood of the revision of an offer or of a rival offer arising. Statements should not be made about the level of shareholder support unless these are current and verifiable.

It is recommended that only a very limited number of individuals should be authorised to speak to the press or to release statements on the parties' social media accounts and ideally enquiries should be redirected to the financial adviser.

A company can only repeat or link to (e.g. tweet or re-tweet) statements it has made on its social media account if the statements repeated/linked to are consistent with, and substantially the same as, formal press releases. Statements released in social media by other commentators should not be repeated, linked to, tweeted or re-tweeted by the company as this will be regarded as information released by the company itself.

5.5 Responsibility for information

The Code requires that directors expressly accept responsibility for information contained in documents or advertisements issued to shareholders in connection with the offer. This includes any statement about intentions.

Accordingly, a statement must be included in the offer documentation to the effect that the directors of the company accept responsibility for the information contained in it and that to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case) the information contained in the document or advertisement is in accordance with the facts and does not omit anything likely to affect the import of such information.

Each director will be asked to sign a form of authority drawing his attention to this requirement and authorising the board or a duly appointed committee of the board to approve the release of documents containing such a responsibility statement. Arrangements must be put in place to enable the directors to review all offer documents before issue. However, if this is not possible in any particular case, the committee will nevertheless be able to issue a document containing a responsibility statement by the director who has not been able to see the document. Signing responsibility statements does not get rid of the need for a verification process to ensure that statements made in offer announcements and documents are accurate and not misleading in any way.

5.6 Liability for inaccurate or misleading statements

If statements are published which are inaccurate or misleading (including by omission):

- the Takeover Panel may take action for breach of the Code and impose one or more of the sanctions available to it for breach of the Code including issuing a private or public censure or a compensation order;
- in the case of a bid by an offer (but not a scheme) for a Target listed on a regulated market, if the takeover documentation does not comply with certain contents

requirements in the Code, the directors of the Bidder and the Target could be guilty of a criminal offence if they knew that the documentation did not comply (or were reckless as to whether it complied), with the requirements and failed to take all reasonable steps to ensure that it did comply (under section 953 of the Companies Act 2006);

- any director who has not taken all reasonable care may be responsible to persons who suffer loss as a result (including under general contract law by way of breach of specific terms of the offer document or under tort principles if they make any misstatement (both negligently or fraudulently));
- for listed companies, the company may have statutory liability under the FSMA to investors if a director or other person discharging managerial responsibilities knew or was reckless as to whether a statement released via an RIS was untrue or misleading or omitted information and that omission was a dishonest concealment of material facts (and the directors may in turn be liable to the company);
- where the document is a prospectus, there is also potential statutory liability for the company and the directors under the FSMA if it is false or misleading;
- the directors may be found to have committed the civil offence of market abuse under MAR if they disseminate information which gives a false or misleading impression as to the supply, demand or price of shares;
- the directors may be found to have committed a criminal offence under the Financial Services Act 2012 (the **"FS Act 2012"**) if they have made a statement, promise or forecast which they know is (or are reckless as to whether it is) misleading, false or deceptive for the purpose of inducing (or being reckless as to whether it may induce) a person to offer or agree to acquire shares; and
- in serious cases, if a takeover document contains a false statement or omitted some information and the inclusion or omission was dishonest in nature, the relevant company and its directors could also be prosecuted under the Fraud Act 2006.

The offences of market abuse, making false or misleading statements and under the Fraud Act are discussed in more detail in paragraph **Error! Reference source not found.** below.

6. MARKET ABUSE AND INSIDER DEALING

In addition to their duties and obligations outlined above, the directors should also bear in mind their obligations under the regimes aimed at preventing the manipulation or abuse of financial markets. Compliance with these rules is particularly crucial in the context of a takeover offer. These obligations are summarised briefly in the paragraphs below.

6.1 Insider dealing under the Criminal Justice Act 1993

If the Bidder has received confidential information from the Target then it may be prohibited from making certain types of share purchases under the insider dealing legislation, contained in Part V of the CJA.

Section 52 (1) of the CJA states that an individual (which would include a company's directors, but not the company itself) who has price sensitive information as an insider is guilty of the criminal offence of insider dealing if he:

- discloses the inside information to another person who may deal in the price-affected securities:
- encourages another person to deal in those securities;
- causes another person (including a company) to deal in those securities; or
- deals directly in the price-affected securities.

This would prevent pre-bid stakebuilding in circumstances in which the Bidder has received price sensitive information about the Target. There is, however, a safe harbour for pre-bid

stakebuilding where the Bidder purchases shares in knowledge of its imminent bid, provided the Bidder does not have any other inside information about the Target.

6.2 **Misleading statements – sections 89 and 90 of the FS Act 2012**

It is a criminal offence (section 89 of FS Act 2012) for a person:

- to make a statement which they know to be materially false or misleading;
- to dishonestly conceal any material facts; or
- to recklessly make (dishonestly or otherwise) a statement which is materially false or misleading,

for the purpose of inducing (or being reckless as to whether it may induce) a person to make an investment decision or exercise any rights relating to investments.

It is also a criminal offence (section 90 of the FS Act 2012) if a person intends to (1) create a false or misleading impression and (2):

- induces another person to make an investment decision or exercise any rights conferred by those investments; or
- produce a gain, or a create a loss to another, or is aware that creating the impression is likely to produce those results.

The offence is punishable with imprisonment up to seven years or an unlimited fine, or both. A body corporate can be convicted of the offence as well as an individual.

6.3 **Market abuse**

The market abuse regime under MAR contains a number of additional civil offences which can affect a public M&A transaction. The offences most likely to apply on a takeover are insider dealing and unlawful disclosure.

Insider dealing

Under MAR it is an offence to deal, or attempt to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question.

There is a presumption that a person who deals while in possession of inside information has used that information as part of the basis for the dealing. There are safe harbours from the offence of insider dealing which disapply this presumption:

- where inside information is used for the purpose of an offer (but this safe harbour does not apply to stakebuilding); and
- where the inside information is a person's own knowledge that it has decided to acquire or dispose of financial instruments.

If the Bidder wishes to deal in Target shares (including obtaining irrevocable undertakings to accept an offer), it will have to consider whether it may commit the offence of insider dealing in doing so and whether a safe harbour is available, as well as ensuring it does not breach the provisions of the Code relating to share dealing (discussed in paragraph 4.1 above).

Unlawful disclosure

It is an offence to disclose inside information other than in the normal exercise of an employment, profession or duties. The recipient must also owe a duty of confidentiality. A Bidder who wishes to sound out Target shareholders will have to follow the detailed procedures and record keeping requirements for "market soundings" under MAR.

The directors should always consult with their advisers in relation to any proposed activities in the course of the takeover offer which would involve dealing in shares, or which may have an impact on the market or relate to confidential information, so that advice can be given on whether there is any risk of market abuse.

6.4 **Fraud**

A criminal offence punishable with up to 10 years' imprisonment or on unlimited fine (or both) is committed under the Fraud Act 2006 if a person holds a privileged position such that he would be expected to safeguard the victim's financial interests and that person dishonestly abuses that position. The relationship between a company and its directors can be expected to give rise to such a duty. Consequently, it is possible that a director who fails to act in the best financial interests of the company (for example, by profiting from confidential company information for his own benefit by dealing in securities while in possession of confidential information) may be prosecuted for fraud as well as insider dealing.

The Fraud Act contains two other main offences which should also be borne in mind in connection with making announcements during an offer or the contents of the offer document: making a false representation either knowing that the representation is false or misleading, or being aware that it might be, and failing to disclose information where there is a legal duty to do so (for example, statutory, contractual, custom from a trade or market, or a fiduciary relationship).

SCHEDULE 1: TAKEOVER CODE GENERAL PRINCIPLES

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

SCHEDULE 2: TIMETABLE

SUMMARY TAKEOVER OFFER TIMETABLE

DATE	EVENT	CODE RULE
Beginning of offer period	Announcement of possible offer by Target or Bidder, whether voluntarily or required by the Panel in response to a leak or otherwise, names Bidder and all other potential bidders and automatically triggers 28 day 'put up or shut up' deadline. Target, and Bidder unless offer is solely in cash, obliged to announce details of relevant securities in issue (not including treasury shares).	2.10/ 2.4
Within 10 days of start of offer period	Target and Bidder to make opening position disclosures.	8.1 / 8.2
Within 28 days after start of offer period	Bidder named in announcement required to either announce a firm intention to make an offer or announce that it does not intend to make an offer (unless Panel consents to extension at request of Target).	2.6
Impact Day	Bidder makes announcement of firm intention to make an offer (and opening position disclosure if not already made).	2.7 / 8.1
I+1/2	Target obliged to publish a copy of the announcement to its shareholders, other relevant persons and the Panel promptly.	2.12
	Bidder and Target to make announcement available to their employee representatives (or employees, where there are no employee representatives) and Target must also make the announcement available to the trustees of any defined benefit pension scheme it has.	2.12
D Day (I+28)	Offer Document published - must be within 28 days of 1 Day.	24.1
D+14	Last day for Target to advise shareholders of its view of the bid (First Defence Document).	25.1
D+21	First permitted closing date for offer.	31.1
D+35	First date for offer to close if offer declared unconditional as to acceptances on or before D+21.	31.4
	Last day for settlement of consideration for acceptances received on or prior to D+21 if offer wholly unconditional on D+21.	31.8
D+39	Last day on which Target may announce any material new information (including trading results, profit or dividend forecasts, asset valuations and proposals for dividend payments or for any material acquisition or disposal).	31.9
D+42	Acceptors able to withdraw acceptances of offer if offer not unconditional as to acceptances.	34.1
	Last day for fulfilment of other conditions if first closing date was D+21 and offer unconditional as to acceptances on or before D+21.	31.7
D+46	Last day on which revised offer may be sent.	32.1
	Last day for incurring obligation to make a Rule 9 offer.	32.1
	If offer is a share offer, last day on which Bidder may announce trading results, profit or dividend forecasts, asset valuations, quantified financial benefits statements or proposals for dividend payments.	32.1

DATE	EVENT	CODE RULE
D+60	1.00 p.m: Last time for Bidder to take acceptances or purchases of shares into account for the purpose of the acceptance condition in the offer.	31.6(c)
	By 5.00 p.m: Bidder must normally announce whether offer is unconditional as to acceptances or has lapsed (but offer will not automatically lapse if announcement not made).	31.6(d)
	Midnight: Last time for offer to become unconditional as to acceptances, or offer will lapse.	31.6(a)
D+81	If offer declared unconditional as to acceptances on D+60, all other conditions must be fulfilled by this date (offer must go wholly unconditional within 21 days of the later of the first closing date and the date the offer becomes unconditional as to acceptances).	31.7
D+95	Last day for settlement of consideration if offer wholly unconditional on D+81	31.8

NOTES: The above timetable assumes that the takeover will be implemented by a contractual offer; if the takeover proceeded by way of a scheme of arrangement, the timetable would be amended to take into account the court process.

If a competing offer is made for the Target, the original Bidder's timetable will cease to apply. Instead, both the original and new Bidder will work to the timetable established by the offer from the new Bidder.