Impact of UK Takeover Code Reform

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CLIFFORD CHANCE

Contents

1. UK Takeover Code Reform 3
2. Overview of Code Changes 5
3. Prohibition on break fees and deal protection measures 8
4. Protection for Targets against protracted bid uncertainty 10
5. Enhanced disclosure in offer documentation 13
6. Key considerations for Bidders and Targets 15
7. Contacts and Recent Deals 20
8. Worldwide Contact Information 21

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UK Takeover Code Reform - Overview

Important changes to the UK Takeover Code will take effect on 19 September 2011

The Panel is introducing various measures to address the tactical imbalance which had arisen between prospective bidders and targets in recent years. The measures are likely to have the Panel's desired effect of hampering opportunistic and unwelcome bidders and will provide protection against protracted so called "virtual bids".

At this stage, one can only speculate as to how the new regime will "play out" in live deal situations. The Panel recognises that the changes are significant and will be reviewing the new regime in a year or so to address any unintended consequences. A lack of deal flow in the period under review could, however, be an issue for the Panel's assessment. In this briefing, we explore the impact of the regulatory changes on UK public M&A deals.

Potential Impact on Public M&A Transactions – The Headlines

Stakebuilding likely to increase?

More up-front costs for bidders?

Smaller deal teams, more care over secrecy?

Greater execution risk may deter bidders?

More "success-based" fee-structures?

Fewer "fishing expeditions"?

Greater disclosure of financing terms

Irrevocables in higher demand?

UK Takeover Code Reform – Key Changes

The key changes to the UK takeovers regime are as follows:

- **Break fees** and other **deal protection** measures are prohibited (except in certain limited situations e.g. where there is a formal sale process, or in favour of a "white knight")
- Other offer-related commitments commonly found in **implementation agreements** are no longer permitted. Some target commitments still permitted, e.g. employee incentives arrangements, anti trust co-operation
- All known **potential bidders are required to be named** by the target at the outset (unless unequivocally rejected) where the target's announcement commences the offer period
- Potential bidders must **"put up or shut up"** (i.e. announce either a firm intention to bid or that it does not intend to bid) within 28 days of being publicly identified. This deadline is only extendable at the request of the target board
- **Greater transparency** is required on advisers' fees, bidder's financing arrangements and bidder's plans for the target company

The Code Changes

Overview of Code Changes

Under the new regime, the Panel is likely to achieve its objective of rebalancing the playing field, which was felt to have favoured hostile and opportunistic bidders.

The changes will protect targets against protracted so-called "virtual bids" (the increasingly common tactic where a bidder announces its intention to bid but without committing itself to doing so, resulting in a lengthy "phoney war" before its intentions are clarified). Target boards will have greater protection against unwelcome bid interest, including a requirement for potential bidders to clarify their intentions within a short time period. This comes with some loss of flexibility. Target boards will also have protection from bidder demands for deal protections, while they will retain the ability to offer break fees to "white knights" or the preferred bidder following a formal auction sale.

That said, many of the revisions will affect not only hostile bids, but also agreed and competitive transactions.

New features of UK regime	Summary of new Code provisions	Possible impact on Code transactions
General prohibition on break fees and other deal protection measures	■ Total ban on break and inducement fees (except on a formal auction sale or in favour of white knights after a firm intention announcement by hostile bidder) ■ General ban on other deal protection measures, including non-solicits of competing bidders ■ Ban on most other market-standard offer-related undertakings contained in implementation agreements	■ Stakebuilding likely to increase ■ Irrevocables will be in higher demand ■ Possible increased use of offer structure (fewer schemes) on cash bids? ■ More success-based fee arrangements with advisers

Overview of Code Changes

New features of UK regime	Summary of new Code provisions	Possible impact on Code transactions
Requirement to "name" potential bidders	■ Requirement for target to identify **all** known potential bidders in any announcement it makes to start the offer period (often a "leak" or "talks" announcement) ■ Formalised "down tools" regime where, following rumour or speculation, the Panel may allow the bidder to walk away to avoid being named. Bidder is then off-side for 6 months (or 3 months with target support)	■ Earlier engagement of advisers ■ More preparation and later approach to target - means more up-front cost for bidders ■ Smaller transaction teams and more emphasis on confidentiality ■ Greater transparency of potential bidders ■ Greater care to ensure no inadvertent approach is made ■ Bidders potentially deterred from approaching target where not confident of securing successful outcome ■ Potential bidders may prefer to down tools rather than be named
Automatic 28 day "put up or shut up" period (PUSU)	■ Automatic compulsory 28 day put up or shut up (PUSU) period will start to run from the public identification of each relevant bidder, within which the potential bidder must declare its intentions (i.e. launch its offer or walk away) ■ As before, extensions only granted by the Panel at the request of the target ■ Target may choose to extend deadline only for preferred bidder(s)	■ More preparatory work, particularly around financing, will need to be done pre-approach (subject to "6 person" rule) ■ On relatively large and highly leveraged bids, securing financing within the timeframe may be challenging ■ Pressure on targets from bidders (and major target shareholders) to seek extension(s)
Enhanced disclosure in offer documentation	■ Transparency in relation to offer-related advisers' fees, including those incurred in relation to bid financing ■ Increased disclosure requirements regarding financing arrangements, bidder's plans for the target, and other financial information in offer documentation	■ Increased documentary burden ■ Greater caution over making significant concrete plans for target ■ Possible change in fee structures? ■ Greater disclosure of funding arrangements (e.g. margin/key covenants etc.) – but not headroom – by all bidders regardless of bid structure

Prohibition on break fees and deal protection measures

This prohibition is a radical step to sweep away the standard 1% break fee and the growing range of other deal protection measures that have been increasingly commonly seen on recommended UK bids. The comprehensive ban will set the UK apart from the majority of other developed markets where such measures are generally permitted.

In an uncertain and volatile M&A environment, the absence of traditional deal protections may deter bidders from launching transactions at all – where they do, they are likely to consider stakebuilding and/or may demand protection by way of irrevocable undertakings from shareholders. This may result in a return to the increased use of the traditional offer structure where these forms of deal protection are more effective.

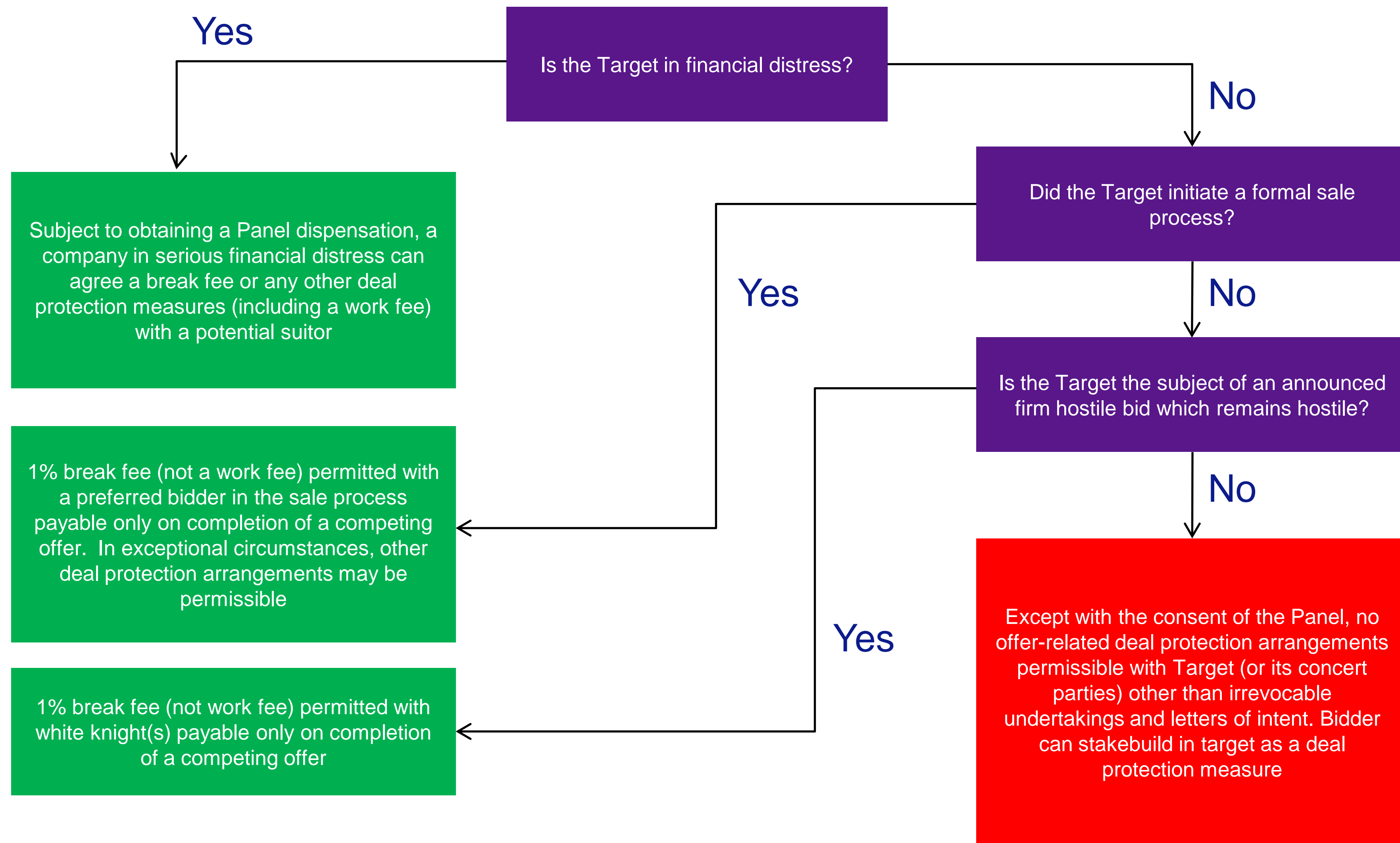
The rationale for the prohibition is to address the perceived detrimental impact of deal protection measures on targets and their shareholders, and in particular the deterrent effect on competing bidders.

Key points to note:

- ban is wide-ranging and has very limited exceptions
- implementation agreements (standard on schemes and increasingly seen on offers) will disappear; the agreed timetable for a scheme will need to be publicly disclosed
- prohibition is on undertakings and commitments provided by the target (or its concert parties) only; no restriction on bidder entering into these commitments (e.g. with target shareholders)
- ban applies to all transactions, including mergers of equals (where not always immediately obvious which party is the target)
- any commitments permitted by the new regime must be fully disclosed and put on display from time of firm intention to bid announcement
- management incentivisation arrangements are not caught by the prohibition but will require disclosure and may require shareholder approval

Prohibited measures	Permitted exceptions
X NO break fees, including: X break fees or inducement fees of any size X "work fees" X other arrangements that have similar effect, no matter how structured	Inducement fee can be agreed: ☑ with one or more "white knights" if a hostile offer has been made (in aggregate up to 1% of value of first "white knight" offer), but payable only if a competing offer is successful ☑ if target is in financial distress ☑ with preferred participant on a formal auction sale (up to 1% of value of bid)
X NO deal protection measures (or other offer-related commitments with target, target directors or other target concert parties) including: X matching rights X "no shops" and non-solicitation of competing bidders X restrictions on changing recommendation X restrictions on changing timetable X exclusivity arrangements X constraints on ability to supply information to competing bidders X business restrictions pending completion of offer	Target/target directors can agree to: ☑ confidentiality undertakings ☑ non-solicit of employees, customers and suppliers ☑ irrevocable commitments and letters of intent ☑ undertakings in relation to providing information and assistance for regulatory approvals ☑ agreements relating to exercise of discretions for existing employee incentive arrangements

Table 1: Deal Protections Route-map

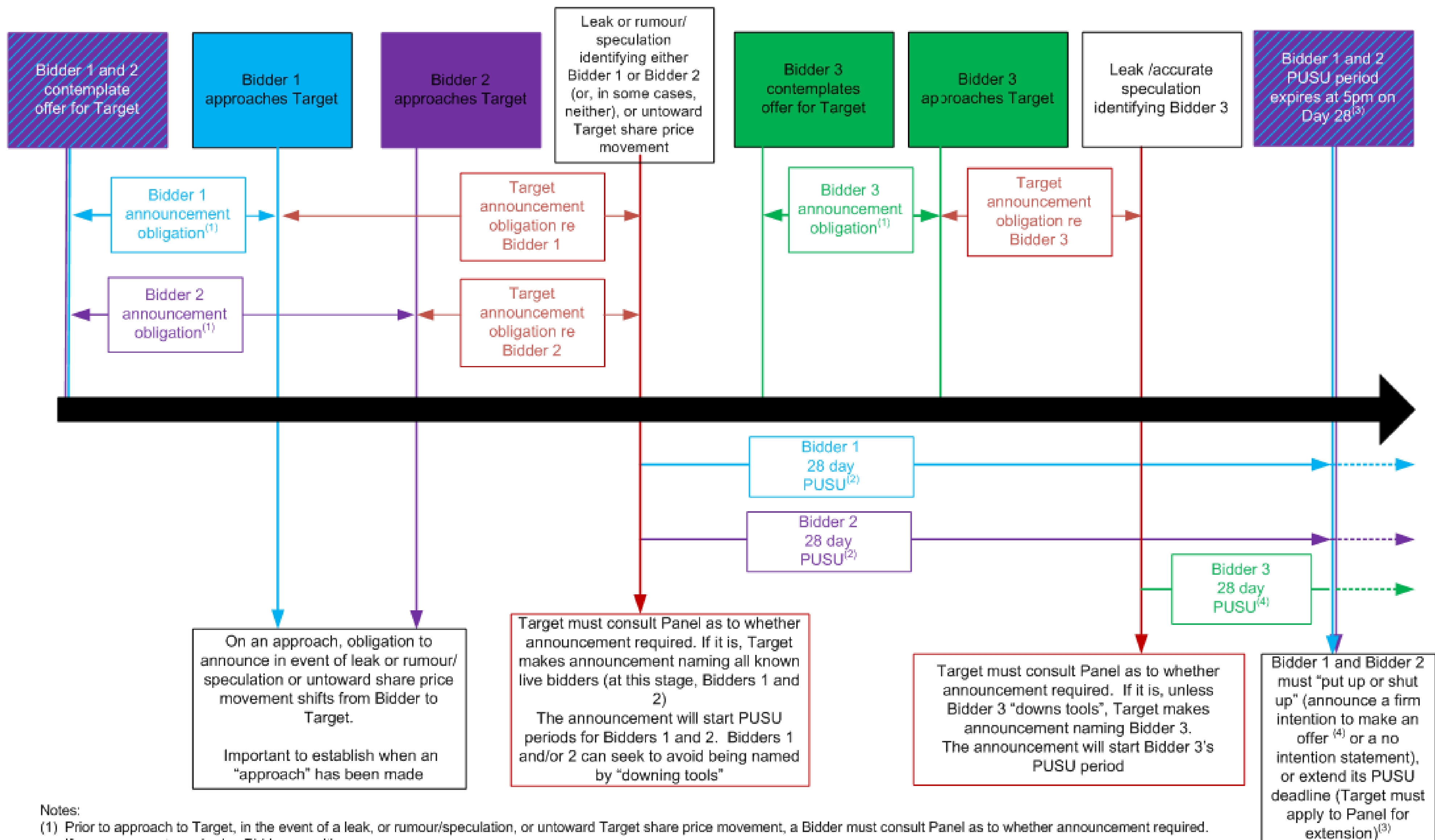


Protection for Targets against protracted bid uncertainty

Notwithstanding that two-thirds of respondents were opposed to both the up-front identification of all potential bidders and the 28 day fixed "put up or shut up" (PUSU) deadline, the Panel forged ahead and introduced these changes. This package of measures is aimed at reducing the period in which targets may find themselves "under siege", and the negative effects of protracted bids on target's business, negotiating position and shareholder base. However, the effect of this is also to remove some of the flexibility targets previously had over whether to name potential bidders and, if so, when, and may result in potential bidders preferring to "down tools" rather than be named

New Code provision	Key points to note
Requirement for up-front identification of all known potential bidders	■ ***All*** known potential bidders (unless unequivocally rejected) to be named by target if it makes an announcement commencing an offer period. (As currently, this will typically be relevant where Panel requires an announcement following an untoward price movement, market speculation /rumour etc, following an approach); Potential bidders must be named even if not identified in the rumour/speculation – the target has no flexibility on this ■ After start of offer period, subsequent approaches/talks do not need to be alerted to the market unless/until there is a relevant leak, price movement, market speculation/rumour etc. As a result, white knights or other latecomers can remain under the radar for so long as secrecy can be maintained ■ Subsequent announcements by target which refer to the existence of a new potential bidder must name them ■ The Panel will normally grant a dispensation from naming all potential bidders in context of a formal auction sale process instigated by the target (see Table 3). ■ If the offer period commences as a result of an announcement by a potential bidder then no requirement for target to identify other potential bidders which have approached it, unless there is a leak. If target chooses to identify a potential bidder, it must identify all current potential bidders.
A fixed PUSU deadline of 28 days from the public identification of each relevant bidder	■ From the time when a potential bidder is publicly identified it has 28 days in which to "put up or shut up" (i.e. to announce a firm offer or walk away) ■ A bidder that makes an approach after the start of the offer period will not be subject to a PUSU deadline unless/until it is publicly identified (e.g. as a result of rumour or speculation naming that bidder), in which event its PUSU deadline will be 28 days from being named ■ If multiple potential bidders are identified at different times, they will not have a common PUSU deadline ■ As before, extensions to be granted by the Panel only at request of target board. Extensions to be granted towards very end of existing PUSU period. Extensions of different durations for different bidders are possible, and/or target may request an extension for its preferred bidder(s) only ■ Target must announce details of an extension, commenting on timetable and status of negotiations ■ All live PUSU periods lapse if there is an announcement of a firm intention to make an offer for the target ■ Panel will normally grant a dispensation to the requirement for a PUSU in context of formal auction sale instigated by the target (see Table 3)
"Downing tools" regime	■ Rather than making a public "no bid" statement, potential bidders (pre and post approach to target) can generally avoid being publicly named if they privately agree with the Panel to "down tools" and stop active consideration of the offer ■ If bidder downs tools, it is then restricted from taking active steps in connection with the bid for 6 months (although re-engagement is possible after 3 months with target support) ■ Panel and/or other market regulators (e.g. UKLA) may still require announcement if the rumour or speculation continues, or they considers a false market may arise ■ The down tools regime is not new as such; but the previous informal practice is now being codified and the periods are arguably more stringent

Table 2: Indicative announcement and PUSU timeline



Notes:

(1) Prior to approach to Target, in the event of a leak, or rumour/speculation, or untoward Target share price movement, a Bidder must consult Panel as to whether announcement required. If announcement required, a Bidder can either:
- seek Panel consent to "down tools" to avoid announcement → Bidder will be off-side for up to 6 months
- announce possible offer → offer period will start and 28 day automatic PUSU will start to run

(2) The PUSU period is an automatic 28 day period starting from the announcement which names the relevant bidder

(3) At expiry of PUSU period, Bidders 1 and 2 must either:
- announce "no intention to bid" → Bidder will be off-side for up to 6 months
- announce firm intention to bid → offer timetable starts for the relevant Bidder and Bidder 3's PUSU is cancelled
- ask Target to request extension of its PUSU deadline → if any extension is granted, Bidder 3's PUSU will remain unchanged (it will not be aligned to Bidder 1 or Bidder 2's revised PUSU)

(4) Any firm intention announcement will cancel all current PUSU deadlines. All potential Bidders need to clarify their respective intentions by Day 50 of the firm Bidder's Code timetable

Table 3: Formal Auction Sales and White Knights

To assist target boards in seeking out better offers in the face of a hostile approach, special dispensations are available in the context of formal auction sales and white knight offers

Key points to note:

- Target can put itself up for sale after offer period has started
- Package of dispensations available in context of white knight offers and formal auction sales (see below)
- In context of an auction sale, targets will need to make it very clear that they are genuinely up for sale for dispensations to be available (e.g. an announcement of strategic review of business not sufficient – need to specify that it is seeking potential offers)
- "White knight" dispensations only available after firm intention announcement made by unwelcome bidder

Dispensations available:

Provisions/restriction	Auction sale	White knight
Naming of bidder in target announcement	☑ Not required	☑ Not required (unless identified in market speculation)
Automatic PUSU	☑ Not applicable	X Applies (but extendable at target's request)
Break fee (not work fee)	☑ Permitted with 1 bidder, with Panel consent	☑ Permitted with 1 or more white knights with Panel consent
Other deal protection measures	☑ Permitted with Panel consent	X Not permitted

Enhanced disclosure in offer documentation

New disclosure obligations are being introduced, designed to provide greater transparency in the areas of financial information, advisory fees, and the bidder's intentions for the target company and its employees

New requirements	Points to note
Disclosure of financing arrangements	■ Bidders required to include detailed summary of key terms of financing / refinancing arrangements - now applies to all transactions (whether cash or shares are being offered, and whether scheme or offer structure) ■ All financing documents must be on display on the internet shortly after the firm intention announcement; no redaction is permitted ■ Whilst the detailed terms of the bid financing arrangements (e.g. interest rates, refinancing obligations and key covenants) will be publicly available, headroom arrangements for increased offers need not be disclosed ■ Will require disclosure of bridge finance along with details of margin and step-up, but, in contrast, only general details of equity funding by private equity bidders etc. will be required
Disclosure of offer-related advisory fees	■ Bidders and targets required to include estimate of aggregate fees and expenses in relation to the bid, together with breakdown per category of adviser. There are 7 different categories of fees required, including financing, financial advisory, legal, PR, accounting, etc. ■ Estimate of financing fees and expenses to be included, although fees and margins in connection with hedging arrangements need not be disclosed ■ Variable and uncapped fees need to be disclosed (nature of arrangement and reasonable estimate of the likely fees, giving figure or range) ■ If actual fees/expenses exceed the indicated figure by 10% or more, private disclosure to Panel is required - Panel may require public announcement ■ May result in a trend towards fees being in line with disclosed market norms and there could be issues for banks where fees include elements of "catch-up" for previous work
Statements of intention	■ Statements of intention, including re bidder's intentions regarding the future of the target and its employees, are expected to hold true for a period of at least 12 months from completion of the offer (unless other time period is stated). Dispensation where there is a material change of circumstances ■ Bidder's intentions regarding future plans for the target and its employees must be disclosed (as under previous regime) – now must also include a negative statement where there are no plans regarding target's employees, locations of business and fixed assets ■ Hostile bidders who have not undertaken target-assisted due diligence may state that a review will be undertaken after control has passed. On recommended offers, statements of a general nature will not be acceptable
Disclosure of ratings/financial information	■ Bidders and targets are required to disclose summary details of ratings and outlooks in offer documents (i.e. short and long-term debt ratings and summary of any outlook) ■ Financial information on bidder and target required to be disclosed, regardless of whether cash or shares being offered and regardless of listed status

Key considerations for Bidders and Targets

Key considerations for potential Bidders

We think bidders may see dynamics changed in the following ways:

Secrecy is key – bidders risk being "outed"

Any rumour or leak will require the bidder to choose between downing tools to avoid being named, or being identified as a potential bidder to the market, thereby triggering a 28 day put up or shut up (PUSU) deadline. Therefore secrecy in the planning stages will be all the more essential for potential bidders under the new regime. As a result, transaction teams are likely to be kept small with a renewed emphasis on the importance of confidentiality when looking to arrange bid financing via a syndicate of banks.

Instances of bidders downing tools are likely to be more common. This may lead to more false starts for bidders and potentially bidders falling away where, under the old regime, they might have continued.

After the approach to the target, the obligation to announce may be triggered as a result of circumstances outside the bidder's control (e.g. leak or rumour surrounding any other potential bidders). Bidders may take greater care not to make an inadvertent approach and may delay any more formal approach until bid preparations are well advanced.

Timetable too short for highly leveraged and complex bids

The automatic 28 day PUSU may cause particular problems for highly leveraged bidders, those for which a deal is relatively large or those which use complex structures, as these bidders are more likely to find 28 days to be too short to be able to announce a firm intention to bid. As extensions will only be granted with target support, the bidder needs to persuade the target board to request an extension within the 28 day period; otherwise it will be forced to withdraw its interest.

This pressure on bidders to get target support (at least sufficiently so to request an extension), will result in a loss of bargaining power in the early stages of a bid, altering the dynamic between bidders and targets. However target boards may be pressurised by their own shareholders into seeking a PUSU extension.

The preferred route for hostile bidders in complex situations may be a pre-conditional bid, although the Panel has been clear that financing pre-conditions are generally not acceptable and therefore the race to secure financing within 28 days or soon afterwards will be the key timetable constraint.

Incomplete transparency re competing bidders

The package of measures is designed to ensure greater market transparency, including with respect to potential alternative bidders. However, there are situations where transparency is not complete because bidders will not always be disclosed. For example, where an offer period has already started, new bidders stay under the radar unless there is a leak/speculation causing them to be identified, or the target refers to their existence.

In addition, by privately downing tools, a bidder will be off-side for up to 6 months, but the market will generally not find out that they are off-side during this period.

Targets can assist a preferred bidder

In a competitive scenario, if a target prefers to proceed with one potential bidder, it can request a PUSU extension strategically just for that bidder, thereby causing any other potential bidder(s) to fail, unless they are in a position to announce a firm intention to bid within 28 days. This may disadvantage highly leveraged bidders, those for which a deal is relatively large and those with complex offer structures who will be "timed out" after 28 days unless they can secure support from the target to extend the deadline.

Price of getting deals done in uncertain markets?

The absence of all standard contractual deal protections, (e.g. break fees, non-solicitation undertakings, matching rights etc) will make it significantly easier for targets to seek out competing transactions, switch recommendations, change bid timetables, and pull out of deals, exposing bidders to significant deal execution risk. Corporate and private equity bidders alike may think twice before braving the market, particularly in the current volatile economic environment.

Stakebuilding and seeking irrevocable undertakings are likely to be the key to minimising execution risk.

Irrevocables – “harder” than before?

Irrevocable undertakings are likely to become an even more important tool for bidders, as they will be one of the only remaining ways for a bidder to secure certainty of deal execution. The letters of intent and typically “soft” undertakings which institutional shareholders are used to providing give only limited comfort to bidders. It will be interesting to see whether bidders will demand hard or semi-hard irrevocables going forward, as a pre-condition to announcing the deal, and whether the *quid pro quo* will be a higher bid price.

Will impact be greater on Corporates or on PE Bidders?

The Code changes may have a particular impact on private equity bidders, as they are typically leveraged, generally keen to receive break fees, conduct detailed due diligence and reticent to be named prematurely. This community of M&A participants has been clear in suggesting there may be fewer public bids as a result. In particular, the 28 day PUSU may have a disproportionate effect on PE bidders as they will more likely need to put in place acquisition facilities and arrangements with management.

However, the impact of being named at the outset of a bid is arguably even more acute for potential corporate bidders, who have listed shares and publicly-stated strategies. Corporates considering a bid will be concerned to avoid being associated with failed strategic moves or failed opportunistic departures from stated strategy; with the added risk of being put into play themselves if their head is “put above the parapet” by being outed at an early stage.

Ban on break fees and work fees means abort costs can no longer be covered

Private equity buyers, who typically use break fees to protect themselves from being out of pocket if a competing bidder intervenes, will have to find other solutions. Stakebuilding in target stock may become more prominent as a means of potentially securing some cost coverage as well as deal protection in the event of a higher competing offer (though there are insider dealing concerns where a bidder seeks an economic exposure rather than solely to obtain control). We may see an increase in success fee elements of fee arrangements to offload the costs of failed transactions onto the advisers.

Increased use of offer structure?

We may see more bids structured as takeover offers if, as anticipated, bidders increasingly seek deal protection through stakebuilding and irrevocables. These techniques are less useful on a scheme, and stakebuilding may even have the undesirable effect of strengthening the position of a difficult minority. The loss of implementation agreements will mean the bidder has arguably less control over the scheme process than under the previous regime. However, the stamp duty saving available on schemes will continue to be a significant factor to be taken into account when structuring large transactions. Furthermore, the certainty of 100% ownership that a successful scheme offers should not be under-estimated.

Any trend towards increased use of offer structures is likely to be more pronounced in respect of cash bids, as schemes will continue to offer significant benefits for many share exchange transactions. For example, bids structured as schemes are exempt from certain of the US securities laws applicable to share exchange transactions, and a scheme may obviate the need to produce a prospectus.

Key considerations for Targets

We think targets may experience the following effects of the Code changes:

Target in the driving seat?

Targets will be better protected against protracted bid uncertainty and pressure from the bidder to agree a package of deal protections which could deter potential counter-bidders, given the general ban on break fees and other deal protection measures, and given the consequences of the target releasing an announcement which starts an offer period. On the other hand, targets will ultimately lose the flexibility that they have under the current regime in deciding whether or not to name bidders in the event of a leak triggering the first announcement and might see potential bidders downing tools to avoid being named.

Targets will have the power to unequivocally reject an approach. Counter-intuitively, bidders may prefer to be unequivocally rejected (so reduced "outing" risk and no PUSU period).

On the face of it, a target board has complete discretion not to seek an extension of the PUSU deadline for any unwelcome bidder. However the reality is that there may be significant pressure from shareholders to extend the period in circumstances where a bidder may eventually arrive at an appropriate deal.

We may see targets seeking a series of short extensions, to keep up pressure on bidders. Also, in a competitive situation, the target board may seek extensions for one or more bidders and not for others, resulting in potential advantages for a preferred bidder. Less welcome bidders with highly leveraged or complex bids may be disadvantaged and, ultimately, timed out.

Formal auctions and white knight offers – dispensations

The ability to obtain dispensations from the fixed PUSU regime and from the prohibition on certain deal protection measures in the context of formal auctions and white knight offers means that targets will be able to grant special protections to their favoured bidder to the detriment of those less welcome. For example, targets could agree break fees with the white knight/preferred bidder which would be payable if their bid is trumped by another.

The dispensations available for "white knights" are only available after an unwelcome bidder has released its firm intention announcement, so targets should carefully consider the timing of seeking out white knights.

In the context of auction sales, targets will need to make it very clear that they are genuinely up for sale for the dispensations to be granted.

Fewer "fishing expeditions" - but critical that target well prepared

As an approach gives the bidder great exposure to being publicly identified (which would trigger the start of the PUSU period), "fishing expeditions" by potential bidders prior to the start of an offer period are likely to be less common. Where a tentative approach takes place after the first announcement, the potential bidder will only be required to be named if there is a leak/speculation identifying it or the target decides to disclose its existence.

The flip-side is that many bidders' preparations are likely to be more advanced at the time of their initial approach to the target as, should they become subject to a PUSU deadline, they will need to be able to proceed with a fully financed bid or persuade the target to seek an extension at the end of the 28 day period. Targets should ensure that their management is well briefed and their defence manuals are up-to-date so that they are in a position to deal promptly with any approach and are not caught off-guard.

Ban on deal protection measures – more competing offers?

The absence of deal protection measures, particularly break fees, matching rights and non-solicitation agreements, may encourage more competing offers.

In the absence of restrictions on soliciting offers, it may be the case that in some circumstances targets exploit the opportunity actively to seek higher offers. Indeed some Boards may consider their fiduciary duties require them to explore these opportunities - a *de facto* “go shop”.

Schemes – target back in control

The target is back in control of the scheme process. Targets are effectively free to manage the scheme as they see fit. This is a shift away from the practice of bidders having increasing levels of control over the implementation of schemes via contractual commitments from the target in implementation agreements.

One significant exception is the ability of bidders to include a condition such that they can walk away if target unilaterally (and significantly) delays the timetable. This prevents targets from effectively “locking-in” bidders for strategic purposes (i.e. while they facilitate or assess the merits of a potential competing bidder). If a bidder invokes such a condition then it will have to either switch to a conventional offer structure or lapse its offer

Increased participation by employee representatives?

Changes are designed to encourage employee representatives to make their views publicly known on an offer. The structure for this already existed under the previous regime, however the key changes are that, going forward (i) targets will be responsible for costs incurred by employee representatives in verifying and publishing their opinion, and (ii) targets must publish the opinion on the internet whenever it is received during the offer process.

It remains to be seen whether the changes will encourage employee representatives to play a more prominent role than is currently the case in UK takeovers.

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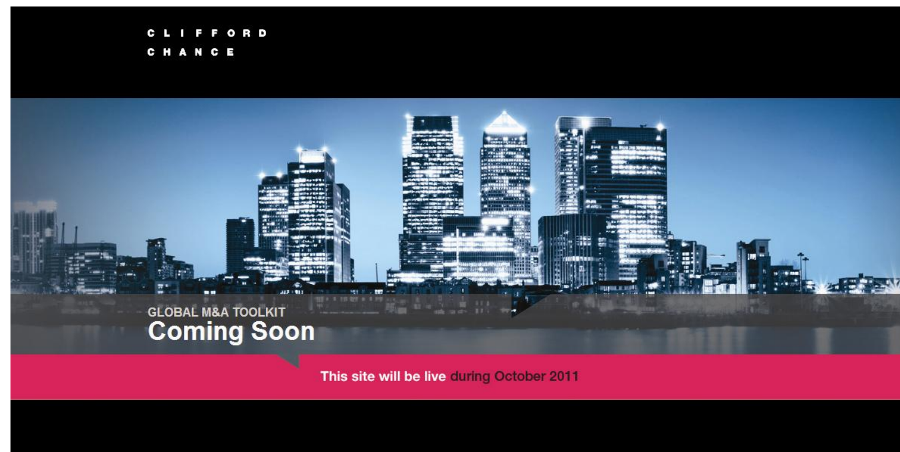

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