COUNTRY COMPARATIVE GUIDES 2024

The Legal 500 Country Comparative Guides

United Kingdom

MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
MERGERS & ACQUISITIONS

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

UK City Code on Takeovers and Mergers

The EU Takeover directive was implemented in the UK under the terms of part 28 of the Companies Act 2006 and within the City Code on Takeovers and Mergers (the "Code"). The Code provides the framework for public company takeovers in the UK and its objectives include ensuring that target shareholders are treated fairly and not denied the opportunity to consider the merits of a bid, and that they are afforded equivalent treatment by a bidder. The Code is administered by the Panel on Takeovers and Mergers (the "Panel") which has full jurisdiction to enforce the Code and place sanctions for non-compliance. The Panel regulates takeover bids and other merger transactions for companies with registered offices in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market or multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man. The Panel comprises of 36 members; 12 of whom are appointed by large financial and business organisations.

Changes to the Takeover Code

Changes were effected to the Code in February 2023 including when the Panel will presume parties are acting in concert, i.e co-operating to obtain control of a company. The Panel replaced the current presumptions with regards to circumstances where the Code presumes parties are acting in concert with new presumptions which have the effect that the threshold for a group to be acting in concert has been raised from 20% to 30%.

In October 2023 the Panel proposed widespread changes to Rule 21 Restrictions which came into effect on 11 December 2023 – see below 24.

Other Statutory Restrictions for Takeovers

Companies Act 2006 – Merger relief which prohibits unlawful financial assistance and provisions concerning a public company's right to investigate who has an interest in its shares;

Criminal Justice Act 1993 – Prohibits insider dealing;

Financial Services and Markets Act 2000;

Financial Services Act 2012;

Market Abuse Regulation (see 4.3)

Enterprise Act 2002.

National Security and Investment Act 2022

Draft Digital Markets, Competition and Consumers Bill – In April 2023, the UK Government introduced the Digital Markets, Competition and Consumers Bill ("DMCC Bill") which, when passed into law, will amend the CMA's jurisdiction to review mergers. The turnover test would be raised from £70m to £100m (to account for inflation). There would be a new "combined test" under which a merger could be subject to scrutiny if one of the merging businesses has a supply share of at least 33% of a particular category of goods or services or more than £350m of UK turnover. The de minimis exemption for a merger to fall outside of the UK merger control regime would be UK turnover of less than £10m. The DMCC Bill will also require certain acquisitions in the UK's digital markets to be notified in advance including undertakings of significant market power with a global turnover of over £25bn or UK turnover of more than £1bn.

The Economic Crime and Corporate Transparency Act 2023 (Financial Penalty) Regulations 2024 were placed before Parliament in February 2024. These are expected to be passed in May 2024 and will permit the Registrar of Companies to impose a penalty on a person if it is satisfied beyond treasonable doubt that they have committed an offence pursuant to the Companies Act 2006.

Other Relevant Regulatory Bodies

Financial Conduct Authority;

Competition and Markets Authority ("CMA"); The CMA announced reforms in November 2023 to its Phase 2 review process aimed at allowing merging parties to have more engagement with the decision makers. The finalised guidance is expected in the first quarter of 2024.

The European Commission – has exclusive jurisdiction where transactions concern the EU Merger Regulation (EUMR) which regulates M&A at EU level

Ministerial departments – may be involved when a transaction is of national interest; and

Specific industries (such as banks) may have their own regulatory body

2. What is the current state of the market?

M&A activity in 2023 was significantly reduced including in the private equity industry. The economic uncertainties of 2022 persisted during 2023 combined with the political uncertainties of the war between Israel and Gaza. Towards the end of 2023 M&A gained some momentum as confidence returned due to easing inflation and more stability in relation to interest rates. However, the market remains volatile and with 50% of the world's population due to vote on a change of government there will be a real sense of uncertainty amongst businesses resulting in some postponing investment decisions until 2025. 2024 may be the year that the long awaited impact of Covid-19 is felt.

3. Which market sectors have been particularly active recently?

Technology, whilst this slowed down from previous years it remained strong as AI and other emerging technologies continued to create interest in the sector. Oil & Gas, healthcare and insurance were also active sectors. ESG is a constant feature in deal making.

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

The global political unrest in Ukraine and Israel which directly impacts the global economy, followed closely by change of government policies (if the UK and indeed half the world has a change of government in 2024), especially policies around climate and infrastructure to achieve world carbon emission targets. These will directly impact deal making across a wide range of sectors including the energy sector. Digitalisation will continue to drive deals but increased Foreign Direct Investment scrutiny and merger control will impact M&A.

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

Public companies are acquired through the purchase of all or a substantial part of the shareholding. This can happen in two ways, namely; recommended (ie, with approval of the target board) or hostile where the management team has publicly advised the shareholders to reject the offer to prevent the takeover.

A takeover can be effected in two ways:

- A contractual takeover offer whereby the bidder makes an offer to the target shareholders which is subsequently accepted by over 50% of the voting shares. If 90% of the voting shares accept the offer the buyer may be able to acquire the remaining shares from the minority. This method is more flexible than a scheme (see below) and can be implemented in a shorter period of time.
- A scheme of arrangement whereby 75% of the voting shares agree to the take over which is also approved by the High Court. In these circumstances all of the shareholders will be bound. This method will generally be used to implement recommended bids and is a more efficient way of acquiring 100% control of the target company.

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

Constitutional information/documentation relating to private and public companies is available to the wider public at Companies House. There is no obligation on a target company to disclose due diligence **see 7 below**.

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

Generally, the due diligence (DD) conducted will fall into three main areas for a private limited company:

- Business – considering the boarder market issues such as competitors, business strengths and weaknesses, sales and marketing;

- Financial – identifying the financial risks and opportunities of the business; and
- General/legal – identifying any areas of risk to the buyer as well as providing the buyer with a more comprehensive view of the company in its entirety.

In contrast on a public acquisition due diligence in the first instance is limited to publicly available information.

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

The Board of directors is the key decision making organ within a target company and directors must have regard to their statutory fiduciary duties (**see 9 below**). Shareholders will have a right to approve a Scheme or accept a takeover offer.

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

Duty to Act Within Powers (Section 171)

If a director is allotting shares with the intention of preventing a takeover bid this is deemed to be acting outside of the confines of the powers and was successfully challenged in Hogg v Cramphorn Ltd [1967] Ch 254.

Duty to Promote the Success of the Company (Section 172)

When considering whether to recommend an offer or in the case of competing bids, the directors will need to consider whether a bid is in the best interest of the company. This involves taking a long-term view of the interests of the company. The court is unlikely to disturb a decision unless no reasonable director could possibly have concluded that such action would promote the success of the company.

Duty to Exercise Reasonable Care, Skill and Diligence (Section 174)

Generally a committee will be nominated to oversee the day-to-day responsibility of a takeover; the board are still under a duty to monitor the activities of the committee.

Duty to Avoid Conflicts of Interest and Conflicts of Duty (Section 175)

In a takeover, conflicts may arise where a director of the target also holds a position in the bidder company or vice versa or if a target director will have a continued role in the group following the transaction. Where a director does have an interest in an arrangement the director will be under a duty to disclose such interest (Section 177).

Shareholders do not owe fiduciary duties to the company in the same way as directors do. However, majority shareholders do have to conduct the affairs of the company in a manner which does not unfairly prejudice the rights of minority shareholders.

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

With an asset purchase of a private limited company a buyer must have regard to its obligations under TUPE. Where a relevant transfer is deemed to have taken place, anyone employed will be transferred to the buyer under their existing terms of employment.

Prior to completion of the purchase various steps must be taken in order to inform and consult with the employees in order to avoid any liability such as:

- under TUPE, any changes in the employees' terms of employment are void if the sole or principal reason for the change is the transfer itself, unless the reason for the variation is permitted under the contract or for an economic, technical or organisational reason; and
- dismissals will be automatically unfair if the sole or principal reason for the dismissal is the transfer, unless that reason is an economic, technical or organisational reason.

In respect of public takeovers, the Code sets out a number of obligations relating to employees. This includes providing the employees the following information:

- any possible offer announcement that commences an offer period;
- the offer announcement;
- the offer document;
- any circular sent to the shareholders containing the board's opinion on the offer;
- any post-offer undertaking made by a party to an offer; and
- any announcement (or document which includes the contents of the announcement) which the Panel determines.

The employees must also be notified of the offeror's intentions with regards to:

- the future business and safeguarding of the jobs of employees and management;
- any material changes in the conditions of employment; and
- strategic plans for the two companies and the likely impact on:
    a. employment; and
    b. places of business.

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

The Code permits an offeror to include conditions or indeed pre-conditions to an offer, however, there are constraints, primarily that such conditions must not be dependent on the subjective judgment of the offeror. Common conditions include:

- where consideration shares are going to be issued and such class of shares are already listed as consideration then a condition will be included such that the offer becomes unconditional only once the consideration shares are admitted to listing and to trading;
- that there will be no reference made to the Competition and Markets Authority or, where the takeover falls within the scope of EU Merger control, the European Commission;
- that all relevant authorisations/approvals for conducting the business are in full force and effect at completion;
- there being no material ligation or other disputes ongoing or pending against the target; and
- there being no material adverse changes in the target's financial or trading position other than those which have been made known to the offeror; however, a change in economic, industrial or political circumstances will not normally justify the withdrawal of an offer according to the Panel.

Amendment to the Code in July 2021 means that the acceptance condition can only be satisfied once all other conditions satisfied or waived (see below).

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

There is a general prohibition on "offer-related arrangements", between a bidder and target company on takeovers of UK companies to which the Code applies. To protect target shareholder value, the Code generally prohibits the bidder and target from entering into exclusivity agreements. However, the target can seek safeguards from the bidder which are not prohibited by the Code See 13 below.

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

Pursuant to Rule 21.2 of the Code, the target company may not enter into any "offer-related arrangement" with the bidder during an offer period or when an offer is reasonably in contemplation without the prior consent of the Panel.

This prohibition covers any agreement, arrangement or commitment in connection with an offer, including any inducement fee arrangement or break fees. Some break fees are permitted, however, where they do not exceed 1% of the offer value and the target's financial adviser has confirmed it is in the best interest of the shareholders.

The following are examples of safeguards permitted under the Code:

- confidentiality constraints;
- non-solicitation of employees, customers or suppliers;
- requirement for assistance for the purposes of obtaining any official authorisation or regulatory clearance;
- employee incentive arrangements; and
- agreement in relation to the future funding of any pension scheme.

14. Which forms of consideration are most commonly used?

Cash remains more commonly used in the UK.

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

There is an ongoing disclosure requirement under Chapter 5 of the Financial Conduct Authority's (FCA) Disclosure Guidance and Transparency Rules (DTR) which governs UK companies traded on either a regulated or prescribed market. This obligation is triggered by the percentages of voting rights held, whether directly or indirectly or whether through a

financial instrument.

A disclosure must be made when a holding's voting rights exceeds 3% of the total and then every time such voting rights increases or decreases by a whole 1% over 3%. The target must notify a Regulatory Information Service (RIS) as soon as possible and in any event by the end of the trading day following notification from the shareholder. The FCA can impose penalties for breach of the disclosure requirements which can result in penalties including the suspension of voting rights of the shares.

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

An announcement must be made where:

- there is a firm intention to make an offer notified to the target board, the Code governs the requirements for a firm offer announcement (Rule 2.7); or
- there is an acquisition of shares which results in an obligation to make a mandatory offer.

An announcement may have to be made subject to Panel consultation where:

- the target is subject to rumour and speculation; or
- the is unusual movement in the targets share price.

Once a takeover period has commenced the disclosure requirement under Rule 8 of the Code applies. Rule 8 sets out the circumstances in which Dealing Disclosures and/or Opening Position Disclosures are required to be made. There must then be a disclosure of dealings by parties to the takeover in writing on a daily basis to a RIS.

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

The timeline for completing a public takeover depends on whether by it is by way of an Offer or Scheme:

Takeover offer:

- within 28 days (and no earlier than 14 days without the target board's consent), of an announcement of a firm offer, the offer documents must be sent the shareholders (Offer Date);
- the Offer can be closed 21 days from the Offer Date;
- the offeror must announce the level of acceptances and will usually announce the next closing date 22 days after the Offer Date;
- an Offer will become unconditional as to acceptance 60 days after the Offer;
- on the basis the offer becomes unconditional as to acceptances on day 60, 81 days from the Offer Date is the last day for fulfilment of the other conditions. Thereafter 95 days after the Offer Date is the last date for consideration to be posted to the shareholders; and
- the offeror can complete compulsory acquisition procedure 100 days after the Offer Date.

Scheme of Arrangement:

- Within 28 days Bidder and target announce Scheme
- Within 21 days of the Scheme document a meeting of the shareholders to approve special resolution
- Within 40 days Court Sanction Hearing
- Day 41 the Court sanction is submitted to Companies House and Scheme takes effect
- Day 55 last day for payment of consideration

The above is to be read in light of the changes to the UK's Takeover Code (the Code) which came into effect in July 2021 and are the most key changes to the Code in many years. The changes relate to the conditions for regulation and merger control clearance and offer timetable. The Key offer timetable changes are:

- A single date for satisfaction of all conditions
- Acceptance condition can only be satisfied once all other conditions satisfied or waived
- A bidder is required to set a long stop date for the offer. The Code now states that all conditions to an offer must be satisfied by no later than Day 60 from publication.
- Acceleration statement – bidder can bring forward the unconditional date of an offer from Day 60
- Acceptance condition invocation notices – bidder must give shareholders at least 14 days' notice to invoke the acceptance condition to lapse its offer.
- An offer must remain open for 21 days. If a bidder wants to lapse an offer on or after Day 21 before the unconditional date it must give 14 days' notice to do this.
- Acceptance Levels – must be announced on Day 21 and every 7 days after that.
- Withdrawal rights – shareholder who have

accepted an offer can now withdraw their acceptance of an offer any time prior to the unconditional date.

The Code was also updated to reflect that EU law will no longer apply to the UK. The Takeovers (Amendment) (EU Exit) Regulations 2019 (SI 2019/217) made the changes required to Part 28 of the Companies Act 2006 to enable the UK takeovers regime to operate outside the EU framework of the Takeovers Directive.

The UK will be outside the EU Merger Regulation (EMUR) and merging parties may need to seek clearance from the UK authorities. Mergers whether UK or foreign businesses that meet the UK and EU thresholds will face a parallel review under both systems. UK turnover will no longer apply when assessing a merger which would fall under EMUR. As there are a large number of international businesses for whom a large part of their EU turnover is created in the UK, this will result in fewer mergers meeting the EUMR thresholds and instead of being reviewed by the European Commission being reliant on the relevant EU member states jurisdiction.

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

In public M&A the Code governs certain circumstances where a minimum price may be payable for the shares in a target company, namely where shares have been acquired in a three month period prior to the offer period, any offer must not be on less favorable terms.

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

UK public Companies are prohibited under the Companies Act 2006 from providing financial assistance. Private companies are permitted to provide financial assistance on the basis the directors fully comply with their codified duties.

20. Which governing law is customarily used on acquisitions?

See 1 above

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

Rule 2.7 of the Code sets out what needs to be included within an announcement, namely (not limited to) offer terms, identity of the offeror, details of any existing holding of shares, any conditions, details of any dealing arrangements, a list of documents which must be published on a website and, where there is a cash element involved in the offer, confirmation from the offerors financial adviser that there are sufficient resources to make the offer. Since January 2018, it is at this stage that an offeror must confirm its intentions with regards to the business, employees and pension scheme of target.

The announcement must be published via a Regulatory Information Service. If the announcement is submitted outside normal business hours, it must also be distributed to at least two national newspapers and two newswire services in the UK.

Alongside the main bid documents, a bidder must disclose to the public other material documents including irrevocable commitments, letters of intent, any offer related arrangements, funding details and any other material contracts related to the offer.

If a leak occurs, the announcement is governed by Rule 2.4. The Code was amended in June 2022 to provide that an offeror identified in an announcement under **Rule 2.4(c)** must disclose details of the minimum level or form of consideration that is offered. This is on the basis that this is material information for shareholders in target and other market participants hence should be disclosed as soon as possible after an offeror is publicly named.

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

The transfer of shares is documented between transferor and transferee in a Stock Transfer Form. The PSC information at Companies House will then be updated as part of the annual confirmation statement. The Transfer of shares will attract stamp duty if the consideration is over £1,000 at a rate of 0.5%.

23. Are hostile acquisitions a common feature?

Hostile tender offers are permitted in the UK and account for around 12% to 18% of bids, annually.

24. What protections do directors of a

target company have against a hostile approach?

The use of defensive measures is restricted by the Code. The Code will only apply once an approach has either been made or the board has reason to believe that a bona fide offer might be imminent. In such circumstances, under Rule 21.1(a) of the Code, the board cannot, without shareholder approval, take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits. The difference now in Rule 21.1 (a) following the reforms implemented by the Panel on 11 December 2023 is that action within the ordinary course of the target company's business will not be restricted.

The directors are also prevented from taking any action in so far as it puts them in breach of their director's duties owing to the target. The Code generally allows for target shareholders to decide the outcome of an offer and, provided directors comply with their duties, they are allowed to express their opposition to a bid. There are two main duties which are key when employing defensive measures. The first is the duty to act in a way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (s172 Companies Act 2006). Success is determined based on the directors' judgment, however, the act does provide several factors which must be considered including but not limited to:

- the likely consequences of any decision in the long term; and
- the interests of the company's employees

The second is that the directors must act within their powers (s171 Companies Act 2006) which requires the director to act within the confines of the company's constitution.

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

Rule 9 of the Code provides if a person acquires an interest in shares in the target which results in the person holding 30% or more of the voting shares of that company or person who already holds between 30% to 50% of the voting rights acquires an interest in any other voting shares, that person will be obliged to make an offer to acquire all of the equity and voting share capital of the target on the terms set out within Rule 9.

A new Rule 9.4(b) was introduced in June 2022 and restricts a mandatory offeror from acquiring additional interests in target's shares in the 14 days including the unconditional date of a mandatory offer and in the 14 days up to and including the acceptance condition notice.

Rule 9.5 clarifies the minimum price of a mandatory offer namely at not less than the highest price paid by the bidder for any interest in target shares in the 12 months before the announcement of the offer ("look-back period").

Rule 9.1 of the Code has been amended such that a mandatory offer can now be solely made on the basis of the "significant interest test" as the "significant purpose" test has been deleted.

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

The main protections a minority shareholder has pursuant to the Companies Act 2006 is to petition for relief on the basis the minority shareholder's interests are being unfairly prejudiced by the conduct of the majority shareholder (s).

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

An offeror can rely on Section 979 of the Companies Act 2006 in order to force minority shareholders into the transaction. This provision is subject to there being a "Takeover Offer" for the purchase of all of the shares in the target company (less the shares already held by the offeree). The offeror must also have acquired or agreed to acquire 90% of the shares which are not currently held by the offeror.

If the above conditions are met, the offeror can give a squeeze out notice under s981 (Companies Act 2006) within three months of the expiry of the original offer to the shareholder who did not accept the original offer ("Minority Shareholders"). The notice will obligate the offeror to acquire the shares from the Minority Shareholders on the same terms of the main takeover offer. The Minority Shareholders can apply to Court to contest the compulsory acquisition, however, the Court is likely to find that the offer the majority shareholder has not accepted is fair and reasonable.

Six weeks after serving the squeeze out notice the offeror must provide to the target company a copy of the entire squeeze out notices, a stock transfer form executed by a person nominated by the target in respect

of the Minority Shareholder and the consideration for the shares.

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