

UK SHAREHOLDER ACTIVISM

Briefing

The Mandatory Cash Bid Obligation

August 2014

The UK's City Code on Takeovers and Mergers (the 'Code'), administered by the Panel on Takeovers and Mergers (the 'Panel'), places an obligation on the acquirers of interests in shares in companies to which the Code relates which carry 30 percent or more of the voting rights of that company to make a mandatory cash offer for all of the remaining shares. Activists will need to be aware of these rules (and ensure that those potentially acting in concert with them are similarly aware) to avoid any possibility of being required to make such a mandatory cash offer.

Application of the Code

The Code applies to all offers for:

1. *Traded companies registered in the United Kingdom, the Channel Islands or the Isle of Man.* Companies and *Societas Europaea* (and, where appropriate, companies created by charter or under statute) which have their registered offices in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man; and
2. *Non-traded companies managed from the United Kingdom, Channel Islands or the Isle of Man.* For public and certain private companies (see below) and *Societas Europaea* (and, where appropriate, companies created by charter or under statute) which have their registered offices in the United Kingdom, the Channel Islands or the Isle of Man and which are considered by the Panel to have their central place of management and control in the United Kingdom, the Channel Islands or the Isle of Man, but where the company is a private company, only when any of its securities have been admitted to trading on a regulated market or a multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man at any time during the previous 10 years, where such company's shares have been marketed or traded in the past 10 years or where the company has filed a prospectus for the offer, admission to trading or issue of securities with the Registrar of Companies or any other relevant authority in the United Kingdom, the Channel Islands or the Isle of Man (but in the case of any other such authority only if the filing is on a public record) at any time during the past 10 years.

Triggering Threshold

The mandatory cash offer obligation arises where an acquisition constitutes:

- *The 30 percent threshold.* A person acquires, whether by a series of transactions over a period of time or not, an interest in shares which (taken together with shares in which persons acting in concert with him or her are interested) carry 30 percent or more of the voting rights of a company; or
- *Between 30 percent and majority control.* Any person, together with persons acting in concert with him, is interested in shares which in the aggregate carry not less than 30 percent of the voting rights of a company but does not hold shares carrying more than 50 percent of such voting rights, and such person, or any person acting in concert with him or her, acquires an interest in any other shares which increases the percentage of shares carrying voting rights in which he or she is interested.

Interests in shares are characterised by a long economic exposure, whether absolute or conditional, to changes in the price of shares. A person will be treated as having an interest in shares if he or she owns them, if he or she has the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to them or has general control of them, if (by virtue of any agreement to purchase, option or derivative) he or she has the right or option to acquire them or call for their delivery or is under an obligation to take delivery of them, or if he or she is party to any derivative whose value is determined by reference to their price and which results, or may result, in his or her having a long position in them. A person who only has a short position in shares will not be treated as interested in them for the purposes of the Code.

Triggering of Cash Offer Requirement

On a triggering event, the acquirer is required to make a cash offer to the holders of each class of equity share capital, whether voting or non-voting, and also to the holders of any other class of transferable securities carrying voting rights. That offer must be:

- Conditional only upon the offeror having received acceptances in respect of shares which, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and any person acting in concert with it holding shares carrying more than 50 percent of the voting rights; and
- In cash or be accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for any interest in shares of that class during the 12 months prior to the announcement of that offer.

Treatment of Concert Parties

The Code generally treats members of a concert party as one and the same person, and accordingly if there is a concert party, each member is exposed to the risk of having to make a mandatory cash offer if another member makes an acquisition that beaches the relevant threshold. Whilst the Panel places the prime responsibility on the member of the concert party making the triggering acquisition, the principal member of the concert party, and in some circumstances other members, may be held to the rule. The Panel will make a determination based on the circumstances of the case.

Definition of a Concert Party

Unfortunately the rules as to who is and who is presumed to be in concert with each other are complex, but the basic rule is that persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (see below) of a company or to frustrate the successful outcome of an offer for a company act in concert with one another. Similarly, a person and each of its affiliated persons will be deemed to be acting in concert all with each other.

The Panel will not normally regard the action of shareholders voting together on a particular resolution as action which in and of itself indicates that such parties are acting in concert. However, the Panel will normally presume shareholders who requisition (or threaten to requisition) the consideration of a board control-seeking proposal, in each case together with their supporters as of the date of the requisition or threat, to be acting in concert with each other and with the proposed directors.

The Panel, in recognition of the growing scope of activist activity in the United Kingdom, has issued [guidance](#) on the factors which are relevant in determining if and when an activist investor has formed a concert party for the purposes of the Code.

Steps for Activist Investors

It is unlikely that activists will themselves wish to invest sufficient funds into a target that the Code's mandatory bid rules would be triggered on their interests alone. However, the effective aggregation of all the interests held by members of a concert party warrants careful attention both to the creation of a potential concert party (particularly in the context of seeking board control) and, if there is one, to ensuring its members each take steps to avoid (either through their own action or that of their own affiliates, for instance) making a triggering acquisition.

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If you have any questions concerning this *Briefing*, please contact your attorney at Schulte Roth & Zabel or one of the following attorneys: [Eleazer Klein](#), [Jim McNally](#) or [Marc Weingarten](#).

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