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UK Public M&A Update

Q1 2016

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Overview

11 firm offers were announced during Q1 2016 with a combined offer value of over £23bn. This compares to 12 firm offers valued at over £8bn in Q1 2015 and 13 firm offers valued at over £77bn in Q4 2015. Ten of the 11 firm offers in Q1 were recommended at the time of the firm offer announcement, however, the recommendation was withdrawn on two deals following higher competing offers. Q1 saw the announcement of the merger of Deutsche Börse and the London Stock Exchange, a £20.3bn mega deal as well as the £1.2bn bid by J Sainsbury for Home Retail (on which Ashurst is advising Morgan Stanley and UBS as financial advisers to J Sainsbury). Ashurst also advised Vectura Group on its £441m merger with Skyepharma.

A summary of the key features of each announced offer is set out in a table in the Appendix.

Announced bids	11
Recommended	8
Schemes of arrangement	6
Average of bid premia (unweighted)	48.26%
Average of bid premia (weighted)	49.83%

The period saw the Panel publish, among other things: (i) consultation paper PCP 2016/1 on the communication and distribution of information during an offer; and (ii) Panel Statement 2016/4 – Home Retail Group plc - Ruling in relation to the deadline for potential bidders to either make a Rule 2.7 announcement or announce no intention to bid. The Takeover Appeal Board also published its Statement 2016/1 setting out the reasons for dismissing the appeal by Computer Sciences Corporation in connection with its bid for Xchanging (on which Ashurst was advising Xchanging). Further details of these and other developments in the field of public M&A are set out in the News Digest on pages 2 to 7 of this publication.

News digest

Panel Consultation Paper 2016/1 on the communication and distribution of information during an offer

On 15 February 2016, the Code Committee published PCP 2016/1 in relation to the communication and distribution of information during an offer. The Code Committee has undertaken a detailed review of the way the Takeover Code (**Code)** regulates the communication and distribution of information and opinions during an offer by, or on behalf of, the bidder or the target company. The proposals are intended to (i) codify certain existing practices; (ii) clarify the drafting of certain notes and rules; (iii) consolidate a number of provisions; (iv) delete outdated, unnecessary or inappropriate references in the Code; and (v) re-number certain provisions moving them to what the Code Committee considers is a more suitable location in the Code. The proposals involve a significant shake up of the Code and, as such, a table of origins and destinations has been provided in Appendix B to the consultation paper to assist in navigation. Responses to the consultation are requested by 15 April 2016.

Key amendments:

- Rule 20.1 is to be recast to provide that where any material new information or significant new opinions relating to an offer or bid party are (i) published by or on behalf of a bidder or target; (ii) provided to any shareholder or other relevant person (other than in a document sent to target shareholders); or (iii) provided to the media, the requirement for the information or opinions to be made equally available to all target shareholders as nearly as possible at the same time and in the same manner should be satisfied by the bidder or target (as appropriate) at the same time publishing the information or opinion in an announcement published via a RIS;
- Extension of Rule 20.1 to certain relevant materials, even if they do not contain any material new information or significant new opinion relating to the offer or a bid party, so that:
  - any presentation or other document relating to an offer or bid party provided to, or used in any meeting with, any shareholder or other relevant person must be published on a website promptly; and
  - any article, letter or other written communication relating to an offer or a bid party provided to the media must be published on a website promptly following its publication by the media.
- The replacement of Note 3 on Rule 20.1 with a new Rule 20.2 setting out the safeguards which must be satisfied in relation to meetings between representatives of the bidder and target company (or their advisers) and bidder or target shareholders, analysts, brokers or others engaged in investment management or advice. The Code Committee is proposing relaxing the chaperoning rules in circumstances where the Executive does not consider there to be a high risk of breaching the Code:
  - where the financial adviser to a bid party is the only person who attended the meeting or call on behalf of that bid party, no written confirmation will be required to be provided to the Panel;
  - subject to prior consultation with the Panel, following the announcement of a recommended firm offer (with no competitive situation), no chaperoning will be required although the financial adviser to the relevant bid party will be required to brief a senior representative of the bid party as to the requirements of new Rule 20.2 and the senior representative will be responsible for providing the Panel with written confirmation that no material new information or significant new opinion was provided during the meeting or call;

  - no chaperoning will be required for meetings or calls attended by only one or more advisers to the bidder or target (other than the financial adviser or corporate broker) and one or more "sell-side" analysts – a senior adviser who attends the meeting or call would then be required to provide the Panel with written confirmation that no material new information or significant new opinion has been provided during the meeting or call.
- New Rules 20.3 and 20.4 regulate the use of videos and social media by a bidder or target:
  - a video (comprising a director or senior executive reading a script or participating in a scripted interview) which disseminates information relating to an offer can only be published with the consent of the Panel and if consent is granted, the video must be published on the relevant bid party's website with a RIS announcement noting its publication and including a link to the relevant webpage;
  - there is a general prohibition on the use of social media to disseminate information relating to an offer other than the secondary publication of: (i) a RIS announcement; (ii) a document previously published on a bid party's website; or (iii) a notification of a link to the webpage on which such an announcement or document is published (which must comply with the website notification requirements – see the Note on the definition of website notification in the Code).
- Relocation of Rule 19.4 (advertisements) to Rule 20.5 and significant improvements in the drafting of the rule including the removal of outdated references;
- Amendment of Rule 19.2 (responsibility) removing the requirement to include a responsibility statement on an advertisement;
- Amendments to Rule 26 including a requirement to post documents on the bid party's website promptly after publication and not by noon on the following business day.

The full PCP can be viewed at:

http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201601.pdf

Takeover Appeal Board Statement 2016/1 - Reasons for dismissing the Appeal by Computer Sciences Corporation

On 15 January 2016, the Takeover Appeal Board (TAB) published a statement setting out its reasons for dismissing an appeal against the ruling of the Hearings Committee of the Takeover Panel on the interpretation of Rule 2.6(d) of the Code. The ruling is in relation to the competing bid by Computer Sciences Corporation (CSC) and Ebix, Inc. (Ebix) for Xchanging plc (advised by Ashurst). The statement also includes the reasons for the Hearings Committee's ruling.

Timeline

Date	Action
4 Oct 2015	• Xchanging announced that it had received approaches from Capita and Apollo Global Management: • 2 Nov 2015 - Capita and Apollo 28 day automatic PUSU deadline
14 Oct 2015	• Recommended firm offer announcement by Capita • Apollo's initial 28 day PUSU deadline falls away and replaced by Day 53 PUSU deadline (see 9 Dec 2015 below)
17 Oct 2015	Capita offer document posted to Xchanging shareholders
4 Nov 2015	Xchanging announced that Apollo no longer interested in making an offer (Apollo's Rule 2.8 no intention to bid statement)
12 Nov 2015	Xchanging announced it had received an approach from CSC
16 Nov 2015	Xchanging announced it had received an approach from Ebix
9 Dec 2015	• Initial Day 53 PUSU deadline • Recommended firm offer announcement by CSC • Panel Executive ruled that Ebix's PUSU deadline should be the 53rd day following publication of CSC's offer document • CSC requested that the Executive's ruling be reviewed by the Hearings Committee • Capita announced that it did not intend to revise its offer and that its offer would lapse on 16 Dec 2015 if its acceptance condition was not satisfied on that date
16 Dec 2015	Capita's offer lapsed
18 Dec 2015	• Hearings Committee of the Panel rejected the request of CSC and upheld the ruling of the Executive that Ebix's PUSU deadline should be the 53rd day following publication of CSC's offer document • CSC appealed to the TAB
6 Jan 2016	TAB dismissed CSC's appeal
31 Jan 2016	Ebix's Day 53 PUSU deadline

The principal issue on appeal related to the interpretation of Rule 2.6(d) of the Takeover Code which deals with the time by which a publicly identified potential bidder, which is in competition with an announced firm bidder, must clarify its intentions (referred to as "put up or shut up" or PUSU) in relation to the target.

Rule 2.6(d) states that:

"When an offeror has announced a firm intention to make an offer and it has been announced that a publicly identified potential offeror might make a competing offer (whether that announcement was made prior to or following the announcement of the first offer), the potential offeror must, by 5.00 pm on the 53rd day following the publication of the first offeror's initial offer document, either:

(i) announce a firm intention to make an offer in accordance with Rule 2.7; or

(ii) announce that it does not intend to make an offer, in which case the announcement will be treated as a statement to which Rule 2.8 applies."

The TAB also considered whether it was open to the Hearings Committee and/or the TAB to consider the alternative proposal put forward by Xchanging to set Ebix's PUSU deadline at seven days before the first closing date of CSC's offer.

In dismissing CSC's appeal in relation to the interpretation of Rule 2.6(d), the TAB noted that:

- the rationale for requiring clarification by a potential competing bidder of its intentions is to remove uncertainty in the later stages of the offer timetable as to whether a potential competing bidder would announce a firm offer, at a time when target shareholders were making their investment decisions. The TAB agreed with the Hearings Committee's view that the point of the rule is that target shareholders should not be deprived of the opportunity to receive an improved offer and should be able to reach a properly informed decision on an offer;
- it accepted the Executive's submission that, where there are two or more bidders, the phrases "first offer" and "the first offeror's initial offer document" in Rule 2.6(d) should be interpreted as referring back to the words "an offeror" in the first line of the rule, such that the rule is construed as applying to the bidder whose offer document has established the offer timetable, and not the bidder which first, historically, published an offer document.

The TAB therefore concluded that Ebix should be required to clarify its intentions by reference to the offer timetable established by the publication of CSC's offer document, rather than by reference to the previous offer timetable set by Capita's publication of its offer document.

The Executive did not address, formally, the issue raised by Xchanging's alternative proposal that 8 January 2016 (seven days before the first closing date of CSC's offer and therefore potentially the critical period to make an investment decision) should be the date of Ebix's PUSU deadline, as Xchanging's proposal was first raised in its submission to the Hearings Committee. The TAB commented that, although appeals are by way of a rehearing, the starting point will normally be a ruling of the Executive, and the Hearings Committee and the TAB are not intended to be treated as a substitute for the Executive. Accordingly, the TAB declined to rule on Xchanging's proposal for an earlier deadline as a formal ruling to that effect had not been sought from the Executive.

With hindsight, CSC's concerns regarding a potential competing bid by Ebix proved to be unwarranted as CSC announced on 18 January 2016 that its bid had become unconditional as to acceptances. On 5 February 2016, CSC announced that it had obtained consent from the Panel to extend the date by which its bid must be declared wholly unconditional to 16 May 2016 to allow CSC more time to obtain a number of merger control and regulatory clearances.

The full Takeover Appeal Board statement can be viewed at:

http://www.thetakeoverappealboard.org.uk/downloads/2016-01.pdf

Panel Statement 2016/4 – Home Retail Group plc - Ruling in relation to deadline for potential bidders to either make a Rule 2.7 announcement or announce no intention to bid

Following the Xchanging Day 53 decision, the Panel Executive published its ruling relating to two potential bidders (J Sainsbury and Steinhoff International Holdings) for Home Retail Group plc. The initial PUSU deadline was set for both bidders as 5 p.m. on 18 March 2016.

The Panel Executive ruled that in the event that by 7.30 a.m. on 18 March 2016 neither Sainsbury's nor Steinhoff had clarified its position, then if at any time between 7.30 a.m. and 5 p.m. on 18 March 2016 (referred to by the Panel as the **"Procedure Period"**) either Sainsbury's or Steinhoff announced a firm offer for Home Retail under Rule 2.7, the other potential bidder would continue to be treated as a potential competing bidder for Home Retail for the purposes of the Code. This would mean that the potential bidder would have until Day 53 following the publication of the firm bidder's initial offer document to clarify its position, whether or not that other potential bidder had previously made or subsequently made a no intention to bid statement during the Procedure Period.

If, during the Procedure Period, either Sainsbury's or Steinhoff had announced that it did not intend to make an offer for Home Retail, and by that time no announcement had been made by the other potential bidder, then that other potential bidder would have been required to clarify its position by no later than 5 p.m. on 18 March 2016.

In the event, on 18 March 2016, Steinhoff showed its hand first by confirming that it would not announce an offer for Home Retail in competition with Sainsbury's and that Steinhoff wished the announcement to be treated as having been made after any Sainsbury's firm offer announcement. The Panel agreed that, notwithstanding the provisions of Panel Statement 2016/4, Steinhoff was no longer to be treated by it as a potential competing bidder for Home Retail for the purposes of the Code and no further clarification announcement by Steinhoff would be required. Sainsbury's went on to publish its Rule 2.7 firm offer announcement valuing Home Retail at £1.2bn (without the special dividend to be paid by Home Retail) and £1.4bn (including the special dividend).

The full Panel Statement can be viewed at:

http://www.thetakeoverpanel.org.uk/wp-content/uploads/2015/12/2016-4.pdf

Amendments to the rules on cancellation of listing following a takeover

As reported in our UK Public M&A Update - Q3 2015 Review, the FCA proposed a number of modifications to the Listing Rules in consultation paper CP15/28 including an amendment aimed at resolving the disparity in terms of outcome with the procedures that apply in respect of a decision on cancellation by a premium listed issuer following a vote by shareholders and the requirements that apply following a takeover, in each case where the premium listed issuer has a 50%+ interest and the controlling shareholder wishes to delist the issuer.

The FCA proposed a number of options for resolving the disparity but favoured the deletion of the 80% control provision from LR5.2.11DR with consequential changes to LR5.2.11AR and LR5.2.11CR. This amendment took effect on 29 January 2016. This means that a controlling shareholder bidder must obtain acceptances of its offer from independent shareholders that represent a majority of voting rights held by independent shareholders in order to seek a cancellation of listing following a bid.

The FCA retains the ability, on a case-by-case basis, to initiate a de-listing where the remaining free float is too small to support adequate liquidity in the market.

The FCA has not included a transitional provision but advises any person who thinks that a transaction may be affected by the amendments to the cancellation provisions to contact the FCA to discuss their particular circumstances.

The FCA Handbook Notice can be viewed at:

http://www.fca.org.uk/static/documents/fca-handbook-notice-29.pdf

The Listing Rules and Disclosure and Transparency Rules (Miscellaneous Amendments) Instrument 2016 can be viewed at:

https://www.handbook.fca.org.uk/instrument/2016/FCA_2016_6.pdf

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Appendix: Announced* UK takeover bids (1 January to 31 March 2016)

Target (Market)	Bidder	Bid value	Bid premium**	Recommended	Hostile/No recommendation	Rule 9 offer	Cash	Shares	Other consideration	Mix and match	Offer***	Partial Offer	Scheme	Offer-related arrangements	Formal sale process	Non-solicit undertakings****	Matching/Topping rights****	Shareholder vote	Profit forecast/QFBS
KBC Advanced Technologies plc (AIM)	Aspen Technology, Inc.	£158m	49.2%		•[1]		•						•	◇[2]					
Tangent Communications PLC (AIM)	Portland Asset Management (UK) Limited, wholly owned by Michael Green who is the non-executive chairman of the Target	£11.91m	190.91%	•[3]		•	•				•[4]			◇[5]			•[6]		
KBC Advanced Technologies plc (AIM)	Yokogawa Electric Corporation	£180.2m	69%	•			•						•						

Key

* This table includes details of takeovers, set out in chronological order, in respect of which a firm intention to make an offer has been announced under Rule 2.7 of the Code during the period under review. It excludes offers by existing majority shareholders for minority positions

** Premium of the offer price over the target's share price immediately prior to the commencement of the relevant offer period

*** Standard 90% (waivable) acceptance condition, unless otherwise stated

**** In shareholders' irrevocables (unless indicated otherwise)

◇ Permitted agreements under Rule 21.2 of the Code

A AIM traded shares

C Co-operation agreement/bid conduct agreement

F Break fee given under formal sale process

L Listed shares

NP No premium given in offer documentation or nil premium

R Reverse break fee

S Standstill agreement

U Untraded shares

1. Initially recommended – recommendation withdrawn following higher competing offer by Yokogawa Electric Corporation.
2. Bidder and target entered into an open source audit agreement in relation to an Open Source Audit Report dated 31 December 2015 (Report) from Black Duck Software to KBC. Aspen irrevocably undertook to reimburse KBC in relation to all fees and expenses (subject to a limit of US$125,600) due and payable by KBC to Black Duck Software in connection with the Report, unless any third party offer or scheme is declared wholly unconditional or becomes effective.
3. Initially recommended – recommendation withdrawn following higher competing offer by Writtle Holdings Limited. Prior to the offer announcement, the bidder and its concert parties held approx. 33.28% of target. On 4 March 2016, in response to the higher competing offer, the bidder announced that it had agreed to acquire a further 5.69% of target triggering a mandatory bid under Rule 9 of the Code which was recommended by target's board.
4. 50% +1 acceptance condition.
5. A memorandum was adopted by bidder and target in relation to the intended treatment of options/awards under the target's share schemes and option schemes.
6. Topping rights in the irrevocable undertakings given by Oryx and Hargreave Hale. On 4 March 2016, bidder acquired, through market purchases, at the revised offer price of 4 pence per target share all of the target shares held by Hargreave Hale in respect of which Hargreave Hale had given an irrevocable commitment to accept the offer.

Appendix: Announced* UK takeover bids (1 January to 31 March 2016) Continued

Target (Market)	Bidder	Bid value	Bid premium**	Recommended	Hostile/No recommendation	Rule 9 offer	Cash	Shares (L/U/A)	Other consideration	Mix and match	Offer***	Partial Offer	Scheme	Offer-related arrangements	Formal sale process	Non-solicit undertakings****	Matching/Topping rights****	Shareholder vote	Profit forecast/QFBS
Tangent Communications PLC (AIM)	Writtle Holdings Limited	£8.75 m	117.39%		• 7		•				•			◊ 8					
Amara Mining plc (AIM)	Perseus Mining Limited	£68.3 m	42.2%[9]	• 10				• 11	• 12				•	□ ◊ C					
Baqus Group Limited (admission to AIM cancelled in 2011)	BFM Ventures Limited, a management buyout vehicle	£1.21 m	NP	•			•				•								
Penna Consulting Plc (AIM)	Adecco S.A.	£105.3 m	NP	•			•						•				• 13		
Skyepharma PLC (Main Market)	Vectura Group plc	£441.3 m	NP	•			• 14	• L					•	□ ◊ C		•	• 15	• 16	• 17
London Stock Exchange Group plc (Main Market)	Deutsche Börse AG	£20.3 b	NP	•				• L					• 18	□ ◊ C					• 19

7. Initially recommended – recommendation withdrawn following higher competing mandatory bid by Portland Asset Management (UK) Limited.
8. A memorandum was adopted by bidder and target in relation to the intended treatment of options/awards under the target's share schemes and option schemes.
9. Excluding the value of the warrants. The value of the warrants represents an additional premium of approximately 16.4 per cent.
10. Following the combination becoming effective, Perseus shareholders and Amara shareholders will own 55.2% and 44.8% respectively of the enlarged share capital of the combined group.
11. Consideration shares to be admitted to trading on the Toronto Stock Exchange and the Australian Stock Exchange.
12. 0.68 new Perseus shares and 0.34 warrants for each Amara share. Each warrant will entitle the holder to subscribe for one new Perseus share at an exercise price of AUD0.44 at any time during the 36 month period after their issue.
13. Topping rights in the irrevocable undertaking given by Jeremy Hosking, Susan Ackford, Helium Special Situations Fund and the Mumme Ackford Charitable Trust.
14. Partial cash alternative in a maximum aggregate amount of £70 million.
15. Matching rights in the irrevocable given by HBM Healthcare Investments (Cayman) Limited.
16. The offer is subject to bidder shareholder approval as it constitutes a Class 1 transaction under the Listing Rules.
17. A statement made at Vectura's 2015 interim results meeting is considered to be a profit forecast for the purposes of Rule 28 of the Code. The Rule 2.7 announcement contains the directors' confirmations as required by Rule 28.1(c)(i) of the Code. The Rule 2.7 announcement also contains a quantified financial benefits statement (QFBS) reported on by Deloitte, J.P. Morgan and Rothschild as required by Rule 28.1(a) of the Code.
18. The merger is to be implemented via the establishment of a new UK holding company (UK TopCo) which will acquire London Stock Exchange Group plc (LSEG) and Deustche Börse AG (DBAG). 0.4421 UK TopCo shares are offered for each LSEG share and 1 UK TopCo share is offered for each DBAG share.
19. Guidance contained in DBAG's preliminary results announcement dated 17 February 2016 is considered to be an ordinary course profit forecast for the purposes of Rule 28 of the Code. The Rule 2.7 announcement includes the directors' confirmations as required by Rule 28.1(c)(i) of the Code. The Rule 2.7 announcement also contains a QFBS reported on by Deloitte, Robey Warshaw, Barclays Bank, Goldman Sachs, J.P. Morgan, Perella Weinberg Partners and Deutsche Bank as required by Rule 28.1(a) of the Code.

Appendix: Announced* UK takeover bids (1 January to 31 March 2016) Continued

Target (Market)	Bidder	Bid value	Bid premium**	Recommended	Hostile/No recommendation	Rule 9 offer	Cash	Shares (L/U/A)	Other consideration	Mix and match	Offer***	Partial Offer	Scheme	Offer-related arrangements	Formal sale process	Non-solicit undertakings****	Matching/Topping rights****	Shareholder vote	Profit forecast/QFBS
Home Retail Group plc (Main Market)	J Sainsbury plc	£1.2 b[20]	47.32%[21]	•	• 22		•	• L	• 23	•	•			□◊ c[25]					• 24
Darty plc (Main Market)	Steinhoff International Holdings N.V.	£673 m	54.3%	•			•				•								

20. The bid value includes the offer consideration (shares and cash) but not the special dividend (for which see footnote 23 below). The bid value is £1.4bn including the special dividend.
21. The premium figure includes the offer consideration (shares and cash) but not the special dividend (see footnote 23 below); the premium figure is 75% including the special dividend.
22. Sainsbury's launched its firm offer without the recommendation of the Home Retail board.
23. The consideration comprises cash and shares and, in addition, Home Retail shareholders are expected to be entitled to receive a special dividend of 27.8 pence per Home Retail share, provided only that the Home Retail board resolves to pay the special dividend prior to the offer becoming or being declared unconditional in all respects.
24. A statement contained in Sainsbury's second quarter trading statement for the 16 weeks to 26 September 2015, announced on 30 September 2015, is considered to be a profit estimate for the purposes of Rule 28 of the Takeover Code. The Rule 2.7 announcement includes the Sainsbury's directors' confirmations as set out in Rule 28.1(c)(i) of the Code.
25. Steinhoff and Darty entered into a clean team agreement on 8 March 2016 in connection with the disclosure of competitively sensitive information for the purposes of the competition clearance analysis.

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