

ashurst

UK Public M&A Update

Q3 2017



Contents

Overview	1
News digest	2
Contacts	10
Appendix: Announced UK takeover bids (1 July to 31 September 2017)	11

Overview

10 firm offers were announced in Q3 2017 (compared to 18 in Q2 2017 and nine in Q1 2017), with a combined offer value of £13.53bn (an increase compared to £8.68bn in Q2 2017 and £10.75bn in Q1 2017). Of those 10 offers, eight were in cash and four were cash and shares.

In the last quarter, Ashurst mandates have included advising: (i) Credit Suisse and Fenchurch Advisory Partners as financial advisers to AXIS Capital Holdings on its £478m recommended cash offer for Novae Group plc; (ii) Cape plc on its recommended £332m acquisition by Altrad Investment Authority SAS; (iii) Credit Suisse as financial adviser to a Blackstone and CVC led consortium on its £2.96bn recommended cash offer for Paysafe Group plc; and (iv) Credit Suisse and Morgan Stanley as financial advisers to Vantiv on its £9.3bn merger with Worldpay.

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

Announced bids	10
Recommended on announcement	10
Schemes of arrangement	8
Average of bid premia (unweighted)	43.23%
Average of bid premia (weighted)	29.30%

During Q3, there were a number of regulatory developments, including the publication of two Panel consultation papers and new Practice Statement No 31. Further details of these developments are set out in the News Digest on pages 2 to 9 of this publication.

News digest

AMENDMENTS TO THE CODE

During Q3, The Takeover Panel (the **Panel**) made a number of amendments to the Takeover Code (the **Code**).

Practice Statement No 31: On 7 July, the Panel published Practice Statement No 31 (Strategic reviews, formal sale processes and other circumstances in which a company is seeking potential offerors). At the same time, the Panel withdrew Practice Statements Nos 3 and 6, because the relevant contents of those are incorporated into Practice Statement No 31. In addition, the Panel made consequential changes to Practice Statement No 20.

Practice Statement No 31 explains how the Panel Executive usually interprets and applies certain aspects of Rule 2 (secrecy before announcements; the timing and content of announcements), Rule 21.2 (inducement fees and other offer-related arrangements) and Rule 21.3 (equality of information to competing offerors) in a situation where a company intends to announce a strategic review, conduct a formal sale process or otherwise seek one or more potential offerors.

In circumstances where a company plans to conduct a formal sale process, Practice Statement No 31 confirms that the Panel Executive will usually grant a dispensation from (a) the prohibition on offer related arrangements under Rule 21.2 (per Note 2 to Rule 21.2) and (b) the requirements under Rules 2.4(a), 2.4(b) and 2.6(a) for any potential offeror to be publicly identified and be subject to the 28 day put up or shut up requirement (per Note 2 to Rule 2.6), provided that the board is genuinely putting the company up for sale. Practice Statement No 31 emphasises that the Panel Executive should be consulted at the earliest opportunity where the dispensations set out in Note 2 on Rule 2.6 are being sought and that the Panel Executive should be provided with a draft of the proposed announcement commencing the formal sale process (or the announcement of the strategic review that incorporates a formal sale process). Practice Statement No 31 sets out the information that should be included in that announcement.

In circumstances where a company has held private discussions with one or more potential offerors and decides that it wishes to announce a formal sale process, Practice Statement No 31 confirms that the Panel Executive will take into account all relevant factors in determining whether to grant the dispensations set out in Note 2 to Rule 2.6.

Practice Statement No 31 contains further detail on the above points and further requirements regarding the conduct of a formal sale process. Practice Statement No 31 can be viewed in full at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PDF-of-Practice-Statement-No.31.pdf>.

Instrument 2017/3: On 13 July, the Panel announced amendments to the Code, effective as of 12 July, pursuant to Instrument 2017/3. These are minor amendments to reflect changes to the bodies which appoint members to the Panel.

Additional checklists: On 29 September, the Panel published three new checklists to be completed and submitted to the Executive by the financial adviser to an offeror or an offeree company (as appropriate) where certain announcements are made and distributed. The checklists are as follows:

- Possible offer (Rule 2.4) announcement checklist;
- Rule 2.11 (Distribution of announcements) checklist for possible offer (Rule 2.4) announcement; and
- Rule 2.11 (Distribution of announcements) checklist for firm offer (Rule 2.7) announcement.

The new checklists should be used with immediate effect from their date of publication. They can be downloaded from the Checklists page of the Panel's website at: <http://www.thetakeoverpanel.org.uk/checklists>.

The Panel's website also contains information on how to complete the checklists and submit them to the Panel, which can be found at: <http://www.thetakeoverpanel.org.uk/checklists/how-to-complete>.

PANEL CONSULTATION PAPERS

During Q3, the Code Committee published two Panel Consultation Papers (PCP).

PCP 2017/1: On 12 July 2017, the Code Committee published PCP 2017/1 regarding asset sales in competition with an offer and other related matters. The PCP proposes a number of amendments to the Code and seeks views on those proposed amendments.

Key amendments:

Principally, the PCP was prompted by several cases in late 2016 where a target board sought to sell all of the assets of the company, return the proceeds to shareholders and then wind-up the company, rather than accepting a takeover bid for the company. The Code Committee proposes to make the following changes to the Code to address issues that arose on those transactions:

- Amend Rules 2.8 (Statements of intention not to make an offer), 12.2 (Competition reference periods) and 35.1 (Delay of 12 months) to introduce anti-avoidance measures. Potential bidders would be prevented from circumventing those Rules by acquiring, agreeing to acquire or making any statement which raises or confirms the possibility that it is interested in acquiring assets which are significant to the target company.
- Amend Rule 21.1 (Restrictions on frustrating action) in order to:
 - clarify that, provided that taking the proposed frustrating action is conditional on the offer being withdrawn or lapsing, target company shareholder approval will not be required under Rule 21.1;
 - require that, in circumstances where target company shareholder approval is to be sought at a shareholder meeting for any proposed frustrating action:
 - the target company board obtains competent independent advice on whether the financial terms of the proposed action are fair and reasonable; and
 - the Panel is consulted in relation to the proposed date of the target company shareholder meeting;
 - require that the target company board sends a circular to shareholders, containing certain specified information, where approval is sought at a target company shareholder meeting for a proposed frustrating action, or would be sought at a shareholder meeting were it not for the fact that the taking of the proposed action is conditional on the offer being withdrawn or lapsing; and

- allow a target company board to agree to pay an inducement fee to a counterparty to a transaction to which Rule 21.1 applies, if that fee is de minimis. De minimis is viewed by the Panel as being the lower of 1 per cent of the value of the proposed transaction and 1 per cent of the value of the target company (by reference to the price in the bidder’s Rule 2.7 announcement).
- Make clear that, in circumstances where a target board states that it proposes to sell all or substantially all of the assets of the company and return the cash balances of the company to target company shareholders, rather than accepting a takeover bid for the company:
 - a statement by the target company board that quantifies the amount of cash it expects to be returned to target company shareholders should be treated as a quantified financial benefit statement for the purposes of Rule 28. This will be catered for in a new Note to the definition of “Quantified financial benefits statement”;
 - the purchaser of some or all of the target company’s assets should be prohibited from acquiring interests in shares of the target company during the offer period, save where the board of the target company has made a statement that quantifies the amount of cash it expects to be returned to target company shareholders and the purchaser does not pay more than that amount for the interests in shares of the target company; and
 - any party or parties interested in purchasing all or substantially all of the assets of the target company should have the benefit of Rule 21.3 and therefore be entitled to receive information provided to any bidder or bona fide potential bidder for the target company. This will be catered for in a new Note to Rule 21.3.

In PCP 2017/1, the Code Committee proposes to make a number of further changes to the Code to address other matters:

- Setting aside a Rule 2.8 statement: Currently, the restrictions in Rule 2.8 cease to apply automatically in the situations specified in Note 2 to Rule 2.8. The Code Committee proposes to amend Rule 2.8 and Note 2 on Rule 2.8 to oblige any person making a “no intention to bid” statement to specify in that statement the situations in which it reserves the right to set the statement aside. This would mean that “no intention to bid” statements are treated by the Code in the same way as “no extension” and “no increase” statements.

- Social media:
 - Currently, Rule 20.4 restricts the use of social media to publish information about a party to an offer and information relating to the offer, other than the publication of information specified in Rule 20.4. The Code Committee propose to amend Rule 20.4 to remove the restrictions on the use of social media for the publication of information about a party to an offer, so that the restrictions apply only to the publication of information relating to the offer. Rule 20.4 will also be amended to allow videos approved by the Panel under Rule 20.3 to be published via social media; and
 - Note 1 on Rule 19.1 is proposed to be amended to make clear that financial advisers are responsible for guiding their clients in relation to information being published via social media in the same way as for information published by other means.
- Dispensation from the mandatory offer requirement: The Code Committee propose to amend the Notes on Dispensations from Rule 9 to reflect the Panel Executive’s existing practice that it will consider granting a waiver from the obligation to make a mandatory offer under Rule 9 as a consequence of the issue of new securities if independent target company shareholders holding a majority of the voting rights of the target company capable of being cast on a “whitewash” resolution give certain confirmations in writing.

The deadline for responses was 22 September 2017. We will report on the Code Committee’s Response Statement, once published.

The full PCP can be viewed at: http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/07/PCP.192957_1.pdf.

PCP 2017/2: On 19 September 2017, the Code Committee published PCP 2017/2 regarding statements of intention and related matters. The PCP proposes a number of amendments to the Code and seeks views on those proposed amendments.

Key amendments:

The Code Committee proposes to make the following changes to the Code:

- Currently, an offeror is required to state its intentions and strategic plans relating to the business, employees and pension schemes of the target company (see Rule 24). In addition, the bidder would be required to make specific statements of intention in relation to the target company's research and development functions, the balance of the skills and functions of the target company's employees and management, and the location of the target company's headquarters and headquarter functions.
- Bring forward the time that the bidder be required to make statements of intention to the time of the Rule 2.7 (firm intention to make an offer) announcement.
- The bidder would not be permitted to publish its offer document for 14 days after its Rule 2.7 (firm intention to make an offer) announcement, other than with the target company board's consent.
- Bidders and target companies would be required to publish reports regarding post-offer undertakings and intention statements given during the course of an offer.

The deadline for responses is 31 October 2017. We will report on the Code Committee's Response Statement, once published.

The full PCP can be viewed at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/09/PCP-re-statements-of-intention-September-2017.pdf>.

PANEL 2017 ANNUAL REPORT

On 19 July 2017, the Panel published its 2017 Annual Report for the year ended 31 March 2017.

Director General comments

Noteworthy points from the Director General's Report include the following:

- 2016-17 saw a lower level of public M&A activity than in the previous year.
- The number of firm offers announced during the year was 52 (61 in 2015-16).
- There were only five firm offers of over £1 billion in value announced during the 2016-17 year (12 in 2015-16).
- A significant amount of Panel resource is focused on investigating potential breaches of the Code and, in particular, the alleged existence of undisclosed concert parties.
- During the year, the Executive issued one letter of private censure and 17 educational/warning letters.
- There is a reminder that parties to an offer and their advisers who are considering making post-offer undertakings are required to consult the Panel in advance. The Director General highlights that ensuring that such undertakings comply in full with Rule 19.5 is a detailed and extensive exercise. Therefore, the deal timetable should allow for plenty of time to prepare any post-offer undertakings.
- In addition, there is a reminder that bidders who are considering buying shares and their advisers are strongly encouraged to consult the Executive before doing so.

The full Annual Report can be viewed at: <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/Panel-ARA-2017.pdf>.

REFERRAL OF 21ST CENTURY FOX'S BID FOR SKY TO THE CMA

On 20 September, the Secretary of State for Digital, Culture, Media and Sport referred 21st Century Fox's proposed takeover of Sky to the Competition and Markets Authority (**CMA**) for a Phase 2 investigation on public interest grounds. This had been widely expected following the announcement in June by the Secretary of State that she was minded to refer the transaction to the CMA for investigation. The CMA will now examine how the deal would impact media plurality and broadcasting standards in the UK.

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Appendix: Announced* UK takeover bids (1 July to 30 September 2017)¹

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/QIFBS
Novae Group plc (Main Market)	AXIS Capital Holdings Limited	£477.6m ²	20%	•			•						•	◊ ³					
Cape plc (Main Market)	Altrad Investment Authority SAS	£332.3m	46.2%	•	* ⁴		•				•			◊CS					
ASA Resource Group plc (AIM)	Halliang Group Co, Ltd	£35.5m	64.7%	•			•				•			◊C					
Jimmy Choo plc (Main Market)	Michael Kors Holdings Limited	£89.6m	36.5%	•			•						•	◊C R ⁵					

1. Note: the existence of an confidentiality agreement / NDA is not included in this analysis.

2. On 25 August 2017, the bidder increased the offer to £477.6m from £467.6m.

3. On 5 June 2017, AXIS and Novae entered into a share scheme letter.

4. RPI made an initial proposal to the ASA board on 16 June 2017 which was rejected on 22 June 2017. On 28 July 2017, ASA announced that its ordinary shares had been suspended from trading on AIM with effect from 28 July 2017.

5. On 28 June 2017, all parties entered into a joint defence agreement. On 24 August 2017 the bidder, target and PWC entered into a clean team agreement.

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 or white knight dispensation
- L Listed/traded shares
- NP No premium given in offer documentation or nil premium
- R Reverse break fee
- S Standstill agreement
- U Untraded shares

Appendix: Announced* UK takeover bids (1 July to 30 September 2017) 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-solicited undertakings****	Matching/Topping rights****	Shareholder vote	Profit forecast/Q/FBS
Paysafe Group plc (Main Market)	The Blackstone Group L.P. and CVC Partners Advisory Company (Lux) S.a.r.l.	£2.96b	42%	•			•						•	OC ⁶					7
Worldplay Group plc (Main Market)	Vantiv, Inc.	£8b	22.7%	•			•	•					•	OC					8
Revolution Bars Group plc (Main Market)	Stonegate Pub Company Limited	£101.5m	62.4%	•			•	•L					•	OP			• ¹⁰		11
eg solutions plc (AIM)	Vernit Systems Inc.	£263m	53%	•			•						•	O					12
Quantum Pharma plc (AIM)	Clingen Group plc	£150.3m	NP	•			•	•					•	OR					
Imagination Technologies Group plc (Main Market)	Canyon Bridge Capital Partners, LLC	£550m	41.6%	•			•	•A					•	OCF R S ¹¹					

6. On 20 July 2017, Paysafe, CVC and Blackstone entered into a clean team agreement to allow the disclosure of information in specific circumstances. On 3 August 2017, Bidco and each of the Managers entered into an equity terms letter regarding management arrangements and pursuant to rule 16.2 of the Code, Lazard have confirmed the management arrangements are fair and reasonable with regard to the independent shareholders.

7. Statements made in the interim management statement in May 2017 reaffirming profit statements in January and March 2017 are considered to be a profit forecast for the purposes of Rule 28 of the Code. The scheme document includes the directors' confirmations required by Rule 28.1(c)(i) of the Code.

8. Statements made in the announcement dated 9 August 2017 are considered to be a profit forecast for the purposes of Rule 28 of the Code. The Rule 2.7 announcement includes the directors' confirmations required by Rule 28.1(c)(i) of the Code.

9. On 23 August 2017, the bidder and target entered into a share options letter agreement to confirm the treatment of the target's share option schemes.

10. Topping right in shareholder irrevocables (with a 5% improvement threshold).

11. Statements made in the target's trading update announcement dated 19 May 2017 relating to the 52 weeks ended 1 July 2017 are considered to be a profit forecast for the purposes of Rule 28 of the Code. The Rule 2.7 announcement and the scheme document include the directors' confirmations required by Rule 28.1(c)(i) of the Code.

12. Statements made in the target's pre-close trading statement announcement dated 20 July 2017 are considered to be a profit forecast for the purposes of Rule 28 of the Code. The Rule 2.7 announcement and the scheme document include the directors' confirmations required by Rule 28.1(c)(i) of the Code.

13. On 31 July 2017, the bidder, target and external legal advisers entered into a joint defence agreement to ring-fence the disclosure and exchange of confidential information and ensure that the confidentiality of such materials does not result in a waiver of privilege, right or immunity that might otherwise be available.

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