

ashurst

UK Public M&A Update

Q2 2018



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Overview

Nine firm offers were announced in Q2 2018 (compared to 13 in Q1 2018 and 9 in Q4 2017), with a combined offer value of £74.09 billion (representing a significant increase compared to £20.13 billion in Q1 2018 and £11.32 billion in Q4 2017). Of those nine offers, six were all cash, one was all shares and two were in cash and shares.

In the last quarter, Ashurst mandates have included advising: (i) Evercore Partners, J.P. Morgan and Nomura as financial advisers to Takeda Pharmaceutical Company Limited in relation to its £46 billion recommended cash and shares offer for Shire plc; and (ii) Stafford Capital Partners Limited on its £182.7 million proposed takeover of Phaunos Timber Fund Limited.

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

Announced bids	9
Recommended on announcement	8
Schemes of arrangement	5
Average of bid premia (% unweighted)	38.42%
Average of bid premia (% weighted)	46.88%

During Q2 2018, there were a number of newsworthy items, including a further court decision in the Takeover Panel (the **Panel**) v King case and changes to the UK merger control regime. Further details are set out in the News Digest on page 2 of this publication.

News digest

Requirement for Mr King to announce a mandatory offer for Rangers International Football Club Plc

BACKGROUND

In March 2017, the Panel published Panel Statement 2017/4 and the TAB published Statement 2017/1, which set out their decisions to dismiss appeals by Mr King and required him to launch a Rule 9 mandatory bid for Rangers International Football Club Plc (**Rangers**) by 12 April 2017. Please see our [Q1 2017 Public M&A Update](#) for further details of these decisions.

On 13 April 2017, the Panel announced that, Mr King having failed to make a Rule 9 mandatory bid by the 12 April deadline, it had initiated proceedings in the Court of Session, Edinburgh (under section 955 of the Companies Act 2006) seeking an order requiring Mr King to comply with the Panel's rulings. The Outer House of the Court of Session found in favour of the Panel and granted the order sought under section 955 of the Companies Act 2006 ordering Mr King to announce in accordance with the Takeover Code (the **Code**), within 30 days of the date of the court's order, and thereafter make in accordance with the Code, a mandatory offer at a price of 20p per share for all the issued ordinary share capital of Rangers not already controlled by him and three others. Please see our [2017 Review](#) for further details on this decision.

LATEST DECISION

In the most recent development, the Inner House of the Court of Session upheld the decision of the Outer House of Session. The Inner House found in favour of the Panel and granted the order sought by the Panel under section 955 of the Companies Act 2006 (subject to a modification in the order), requiring Mr King to announce a mandatory offer for Rangers.

Mr King argued that he would be unable to pay the requisite price if the mandatory offer were accepted by shareholders because the funds used to purchase the Rangers shares were not his but trust funds held by New Oasis Asset Limited (**NOAL**), Mr King's family trust vehicle, for the purposes of a Guernsey trust established by Mr King.

The court reasoned that, in applying the Code, including when determining the availability and source of funds, regard should be had to the true structure and purpose of a transaction, disregarding the interposition of trusts and similar entities to conceal the reality of control and funding. The court stated that, in the present case, the findings in fact demonstrated that it was Mr King who had true control over the funds used to acquire the Rangers shares and that it was therefore probable that Mr King would continue to have control over the funds of NOAL and other assets of the Guernsey trust, be able to access them and thereby be able to pay the requisite price.

The court also rejected Mr King's second argument that the order of the Panel would not serve any practical purpose because the price specified in the order of 20p per share was too low to attract interest from other shareholders, considering that shares in Rangers were trading at a price of approximately 25p per share. The court reasoned that because the Code, and Rule 9 in particular, is of such importance in the practical operation of the system of corporate governance, and because the Panel is charged with its administration, the court should enforce an order made by the Panel for the acquisition of shares in the absence of exceptional circumstances. The court stated that in the present case such circumstances, for example the appointment of liquidators or the imposition of another insolvency regime, had not been suggested on behalf of Mr King.

In establishing the importance of the Code and the need for strict enforcement of Rule 9, the court emphasised the fact that the Code is not concerned merely with regulatory disputes between the Panel and those attempting to takeover a listed company, but also with ensuring fair treatment of all existing shareholders in a target company, and with preserving the integrity of the financial markets. The court further supported its decision by stating that the difference in between the prices of 20p and 25p was not great, and that some shareholders might wish to realise their shares quickly and easily. It also noted that shareholders in a football club are frequently driven by non-economic considerations.

Changes to UK merger control

As we reported in our [2017 Review](#), on 17 October 2017, the UK Government announced proposals to introduce new rules to protect the UK's national security, in particular in the context of foreign investment.

On 15 March 2018, the Government confirmed that it intended to proceed with the first part of its proposals, involving amendments to the current UK merger control regime to lower the thresholds for review of mergers in the military and dual-use sector, and parts of the computing hardware and advanced technology sectors. These changes came into effect on 11 June 2018.

The changes lower the thresholds under the existing merger control regime contained in the Enterprise Act 2002 (EA02):

- in the military and dual use sector – covering the design and production of military items and dual-use items (i.e. products which have both military and civilian uses); and
- for companies whose business involves certain activities relating to computer processing units (CPUs) or quantum-based technology.

In these sectors, the Secretary of State is now able to intervene (and potentially prohibit the merger) on national security grounds if either:

- the UK turnover of the target exceeds £1m (reduced from the normal £70m); or
- the target has an existing UK share of supply of 25 per cent or more (this would remove the need for an increase in market share); or
- the transaction will create or enhance a UK share of supply of 25 per cent or more (i.e. the existing “share of supply test”).

Pending any wider reforms under the long-term proposals, the existing thresholds will continue to apply in all other sectors.

Please see our [Q1 2018 Public M&A Update](#) for further details on these changes.

The first Ministerial intervention under the extended powers came quickly, on 17 June 2018, in relation to the proposed acquisition by Gardner Aerospace of aircraft parts maker, Northern Aerospace Limited. Gardner is controlled by a Chinese entity, Shaanxi Ligeance Mineral Resources. An outcome to this process is unlikely to be known before August.

21st Century Fox's Bid for Sky

On 12 April 2018, the Panel announced, in Panel Statement 2018/4, that, further to Panel Statement 2017/23, the Panel Executive had informed Disney, Fox and Sky of its ruling that, following completion of the acquisition by Disney of Fox, Disney will be required to make a mandatory offer to the holders of ordinary shares in Sky at £10.75 per share in cash pursuant to Note 8 on Rule 9.1 of the Takeover Code, due to Fox's stake of approximately 39% in Sky (the **Chain Principle Offer**). That ruling is on the basis that, under paragraph (b) of Note 8 on Rule 9.1, the Panel Executive was of the view that securing control of Sky might reasonably be considered to be a significant purpose of Disney's acquiring control of Fox.

The more substantive developments came in May and June.

On 21 May 2018, the Secretary of State for Digital, Culture, Media and Sport (the **Secretary of State**) published a written statement that he was not minded to intervene in Comcast's bid for Sky. On 5 June 2018, the Secretary of State published the CMA's final report into Fox's bid for Sky and stated that Fox will be allowed to buy Sky on the condition that Sky News is divested. Fox announced that it had already submitted proposed undertakings to achieve the divestiture of Sky News to Disney. On June 19 2018, the Secretary of State made a further announcement that that he intends to accept the final undertakings proposed by Fox and Disney, with a view to clearing Fox's bid for Sky. The undertakings are subject to a 15-day public consultation.

On 20 June 2018, Disney and Fox signed an amended acquisition agreement pursuant to which Disney agreed to increase the consideration payable under its acquisition of Fox. On 28 June 2018, the Panel announced, in Panel Statement 2018/7, that it is currently considering the impact of such increase on any consideration that would be payable under the Chain Principle Offer.

Other Panel News

On 26 April 2018, the Panel announced, in Panel Statement 2018/6, that Simon Lindsay, Managing Director and Head of UK M&A at Citigroup, will become Director General of the Takeover Panel from 2 July 2018.

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Appendix: Announced* UK takeover bids (1 April to 30 June 2018)

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 or bid****	Matching/Topping rights****	Shareholder vote	Profit forecast/Q/FBS
Vipera plc (AIM)	Banca Sella Holding S.p.A.	£24.03m	20%	•			•				•						•	•	
Fidessa Group plc (Main Market)	ION Investment Group Limited	£15b	48.6%	•			•				•		C				•		
CityFibre Infrastructure Holdings plc (AIM)	Antin and West Street Infrastructure Partners	£5378m	92.9%	•			•					•	C S ²				•		
Sky plc (Main Market)	Comcast Corporation	£22b	13%		• ³		•				• ⁴								

1. Banca Sella (through the bidding entity, Sella Open Fintech Platform S.p.A. ("SOPF") entered into a Management Share Exchange Agreement with certain Vipera directors and managers pursuant to which SOPF agreed to issue new SOPF shares to such Vipera directors and managers in exchange for a substantial proportion of Vipera shares held by them. The Management Share Exchange Agreement requires the approval of the independent Vipera shareholders in accordance with Rule 16.2 of the Takeover Code.
2. Standstill provisions included in the confidentiality agreement. In addition, on 24 April 2018, Antin Holdco 2 (owned by Antin), WSPH Holdco 2 (owned by West Street), CityFibre Infrastructure Topco Limited (Topco) and Bidco entered into a consortium bid agreement, under which, among other things, Antin Holdco 2 and WSPH Holdco 2 have agreed to make a direct investment, by way of subscription for an amount of shares in Topco such that each of them shall invest an amount equal to 50% of the total amount of cash funding required to be paid by Bidco to the scheme shareholders.
3. As a result of Comcast's offer, the independent committee of Sky withdrew its recommendation of Twenty-First Century Fox's offer. No recommendation has been made pending satisfaction of pre-conditions to Comcast's offer.
4. Conditional upon valid acceptances received in respect of more than 50% of voting rights.

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

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Shire plc (Main Market)	Takeda Pharmaceutical Company Limited	£46b	64.4%	•			•	• L ⁵					•	CR ⁶				•7	•
ZPG Plc (Main Market)	Silver Lake Management Company V, LLC	£2.2b	31%	•			•						•	C ⁸				•	•
Artillum plc (AIM)	Pareteum Corporation	£78m	18.48%	•			•	• L					•	C ⁹			•	•10	•
Business Control Solutions Group Limited (Unquoted) ¹¹	Business Control Trustees Limited	£52.03m	NP	•			•12				•								
Virgin Money Holdings (UK) plc (Main Market)	CYBG PLC	£17b	19%	•				• L					•	C				•13	•

5. Shire shareholders and holders of Shire ADSs (subject to certain restrictions) will be entitled to elect whether to receive the non-cash portion of the consideration payable to them in the form of either Takeda shares or Takeda ADSs.

6. On 30 April 2018, Takeda, Shire and their respective legal counsels entered into a confidentiality and joint defense agreement.

7. The acquisition is subject to the approval of Takeda shareholders.

8. Standstill provisions included in the confidentiality agreement.

9. On 8 May 2018 (and as amended on 7 June 2018), Pareteum and Bart Weijermans (a director of Artillum) (acting by Croozende Management BV) entered into a management services agreement, setting out the terms on which Bart Weijermans will be engaged as CEO of Pareteum Europe BV following completion of the acquisition.

10. The acquisition is subject to approval by Pareteum shareholders. In addition, the management arrangement (including incentivisation arrangements) to be put in place between Pareteum and Bart Weijermans (current CEO of Artillum) will require the approval of the independent shareholders of Artillum in accordance with Rule 16.2 of the Takeover Code.

11. Business Control Solutions Group Limited was previously traded on AIM, and its admission to trading was cancelled on 24 December 2009.

12. The cash consideration comprises an initial consideration of £751 million and a future consideration which will be financed by cash generated from the future trading of the target. The future consideration is therefore not fixed as to a time period or guaranteed.

13. The transaction is subject to the approval of CYBG shareholders, as it constitutes a class 1 transaction under the Listing Rules. In addition, in accordance with Rule 16 of the Takeover Code, the approval of independent Virgin Money shareholders will be required for the proposed brand licence agreement, which grants CYBG exclusive rights in the UK to use the "Virgin Money" names and logos and related non-exclusive rights to use the "Virgin" trade marks.

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