

ashurst

UK Public M&A Update

Q3 2018



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Overview

14 firm offers were announced in Q3 2018 (compared to 9 in Q2 2018 and 13 in Q1 2018), with a combined offer value of £14.3 billion (representing a decrease compared to £74.09 billion in Q2 2018 and £20.13 billion in Q1 2018). Of those 14 offers, 11 were all cash, 1 was all shares, 1 was in cash and shares (with an all-cash alternative) and 1 was all cash with an alternative consideration structure comprising cash, shares and loan notes.

In the last quarter, Ashurst mandates have included advising: (i) Stafford Capital Partners Limited on its £185.4 million hostile takeover of Phaunos Timber Fund Limited; (ii) Volcan Investments Limited on its £2.33 billion recommended cash offer for Vedanta Resources Plc; (iii) Lazard & Co., Limited as financial adviser to Dalmore Capital Limited and Equitix Investment Management Limited in relation to Jura Acquisition Limited's £1.448 billion recommended cash offer for John Laing Infrastructure Fund Limited; (iv) CareTech Holdings PLC on its £327 million recommended cash and share offer for Cambian Group plc; and (v) Deutsche Bank as financial adviser to Twenty-First Century Fox, Inc. in relation to its £27.4 billion revised offer for Sky plc.

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

Announced bids	14
Recommended on announcement	12
Schemes of arrangement	11
Average of bid premia (% unweighted)	47.6%
Average of bid premia (% weighted)	18.4%

During Q3 2018, there were a number of newsworthy items, including the latest decision by the UK Takeover Panel (the **Panel**) on the King/Rangers case and the Panel's chain principle ruling in relation to 21st Century Fox's bid for Sky plc. Further details of these developments are set-out in the News Digest on pages 2-6 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.

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. Please see our [Q2 2018 Public M&A Update](#) for further details on this decision.

LATEST DECISION

In the most recent development, the Chairman of the Hearings Committee of the Panel (the **Committee**) in Panel Statement 2018/8, rejected a request by Mr King that the Committee be convened to review the refusal by the Executive of the Panel (the **Executive**) to grant Mr King an extension of time to send an offer document to Rangers shareholders. The Chairman's ruling was made pursuant to Rule 2 of the Rules of Procedure of the Hearings Committee (the **Rules of Procedure**), which permits the Chairman to reject a request that a Hearings Committee be convened on certain

specified grounds. The Chairman relied in his ruling on the grounds that (a) the request was not validly notified and (b) the matter had no reasonable prospect of success.

The Executive's Ruling

Following the Court of Session's decision, an announcement was published on 29 March 2018 stating the intention of Laird Investments (Proprietary) Limited (**Laird**) to make an offer at 20 pence per share in cash for all the ordinary issued share capital of Rangers not already controlled by Mr King or persons acting in concert with him. Pursuant to rule 24.1, except with the consent of the Panel, Laird was required to send an offer document to Rangers shareholders by 26 April 2018 (within 28 days of the announcement of a firm intention to make an offer).

The announcement did not contain the cash confirmation required by rule 2.7(d). The Executive explained to Mr King on 6 April 2018 that a cash confirmation would need to be provided by a UK financial adviser or bank. On 24 April 2018, the Executive applied for and obtained an interim interdict from the Outer House that prevented Laird from publishing an offer document that did not contain the necessary cash confirmation.

On 26 April 2018, Mr King made a request to the Executive for an extension of time to send the offer document to Rangers shareholders. The rationale for the request was that Laird was based in South Africa and required approval under South African exchange control regulations to transfer money out of South Africa into the UK and to convert those funds into sterling for possible completion of the share purchase transactions. On the same date, the Executive refused the request stating that Mr King had been aware since 28 February 2018 of his obligation to make an offer in accordance with the Code and that he had had enough time since then to obtain all the consents necessary for cash confirmation to be given.

Request to the Committee was not validly notified

One of the reasons for the rejection of Mr King's request to convene the Committee is the failure to notify a request within one month of the Executive's ruling. Rule 1.2 of the Rules of Procedure provides that, unless otherwise stipulated by the Executive, the time limit for requesting a review of a ruling of the Executive is one month from the date of the ruling. Mr King's request was made on 11 June 2018. The Chairman considered that Mr King offered no adequate justification for waiting more than six weeks to request a review of the Executive's ruling. In addition, the hope that a decision maker may reverse

its decision, as Mr King had claimed, can rarely, if ever, be a good reason for failing to comply with time limits for an appeal. The Chairman also stated that Mr King does not require a reversal of the Executive's ruling to enable him to procure the making of an offer, as the Executive had stated that subject to cash confirmation being provided, it is open to Mr King to procure the making of an offer that complies with the Code other than as to the rule 24.1 time limit.

No Reasonable Prospect of Success

The Chairman also relied in his decision on the ground that the matter had no reasonable prospect of success under Rule 2.1 of the Rules of Procedure. The Chairman stated that it was Mr King's obligation as a resident of South Africa and as the party obliged to procure a Code compliant offer, to ascertain at an early stage what if any exchange control difficulties he might face in publishing an offer and then promptly to start the process of dealing with them having first consulted the Executive. Mr King was informed of the requirements separately by the Executive on 6 April 2018, and it was not until 23 April 2018 that he raised the problem of exchange control approval. In view of the wider context and the fact that Mr King had previously failed to comply with the ruling of the Takeover Appeal Board, the Chairman considered it highly unlikely that a review by the Committee of the Executive's decision would be successful and therefore Mr King's request would stand no reasonable prospect of success.

Chain Principle Ruling: 21st Century Fox's Bid for Sky

On 20 June 2018, Disney and Fox signed an amended acquisition agreement pursuant to which Disney agreed to increase the consideration payable for its acquisition of Fox (the **Revised Acquisition Agreement**). On 28 June 2018, the Panel announced, in Panel Statement 2018/7, that it was considering the impact of such increase on any consideration that would be payable under Disney's obligatory chain principle offer (the **Chain Principle Offer**) to the holders of ordinary shares in Sky following completion of the acquisition.

Since then, a number of further developments have taken place.

First, on 13 July 2018, the Executive gave its ruling, as published in Panel Statement 2018/9, that the price payable by Disney under the Chain Principle Offer would be £14.00 for each ordinary share in Sky.

In response, the Independent Committee of Sky and several of its larger shareholders requested that the Executive's ruling be reviewed by the Committee, which was convened on 27 July 2018. The Committee's ruling, published as Panel Statement 2018/14, confirmed the Executive's ruling.

The Committee reasoned that, because the Code does not regulate the process of determining a Chain Principle Offer price, and as previous rulings of the Committee and Takeover Appeal Board afford no precedent, the Committee had to attempt to identify the approach which, on the particular facts of the case, best reflected the rationale of Rule 9 of the Code, which seeks to ensure equivalent treatment of shareholders. The Committee stated that a key consideration in this respect was to identify an approach which gave effect to the principle that, where a party acquires control of a company or consolidates or secures control, the other shareholders should be offered the highest price actually paid by that party in obtaining or securing control.

The Committee concluded that the most reliable piece of evidence for inferring the value attributed by Disney to Fox's stake in Sky from the consideration payable under the Revised Acquisition Agreement (and by extension what a suitable offer price for the remaining Sky shares would therefore be), was the price at which Disney had subsequently authorised Fox to bid for the remaining shares of Sky on 11 July 2018. In the Committee's view, the fact that the Fox offer price was authorised and supported just three weeks after the announcement of the Revised Acquisition Agreement meant that it had real value as evidence for inferring, retrospectively, the value which Disney had attributed to the 39% stake in Sky when agreeing the increased consideration payable under the Revised Acquisition Agreement. The Committee then stated that, as under Rule 9 of the Code it is the price paid to gain or consolidate a controlling interest that must, in turn, be offered for the remaining shares of a company, the Chain Principle Offer price should reflect the price attributed by Disney and to be received by Fox's shareholders for Fox's 39% stake in Sky.

Applying this logic, the Committee proceeded to note that in authorising and supporting Fox's bid, Disney had agreed to take on the increase in debt which Fox would have to incur to make the offer. It also noted that Disney had undertaken to indemnify Fox for liabilities attributable to the offer price exceeding £13.00 in the event the acquisition of Fox did not complete for regulatory or for some other specified reasons.

Drawing these considerations together, the Committee concluded that the Chain Principle Offer price should reflect the offer price of £14.00 per share authorised and supported by Disney for Fox's bid shortly after the Revised Acquisition Agreement had been announced.

Following the Committee's ruling, several interested parties lodged appeals to the Takeover Appeal Board against the ruling, and a hearing took place on 15 August 2018. The Takeover Appeal Board, in its ruling announced on 16 August 2018 in TAB Statement 2018/3, confirmed the Committee's ruling.

Other Panel News

On 18 January 2018, the Panel announced the publication of its Annual Report and Accounts for the year ended 31 March 2018.

Noteworthy points from the Director General's Report include:

- 2017-18 saw a higher level of public M&A activity than the previous year.
- The number of firm takeover offers which were announced during the year was 57 (52 in 2016-17).
- There were 13 firm offers announced of over £1 billion (5 in 2016-17).
- During the year, the Executive issued four letters of private censure and seven educational/warning letters.
- There is a reminder to offerors of the amendments to the Code made in January 2018 and the extended range of subjects on which offerors are required to make specific intention statements, and that details of intention statements should be included in both the offer document and the Rule 2.7 announcement.
- Advisers to offerors are reminded to consult the Executive about the form of the intention statements ahead of the proposed publication.

The full Annual Report can be found at:

<http://www.thetakeoverpanel.org.uk/statements/reports>.

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Appendix: Announced* UK takeover bids (1 July to 30 September 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 undertaking in shareholder irrevocable	Matching/topping rights****	Shareholder vote	Profit forecast/QoFBs
Phaunos Timber Fund Limited (Main Market)	Stafford Capital Partners Limited	US\$259.1m	18%				•				•								
Electronic Data Processing PLC (Main Market)	Kerridge Commercial Systems Group Limited	£11.85m	36.8%	•			•						•		•				
John Laing Infrastructure Fund Limited (Main Market)	Dalmore Capital Limited and Equitix Investment Management Limited	£1.448b	23.6%	•			•						•						
Arsenal Holdings PLC (NEX:Exchange Growth)	KSE, UK, Inc.	£1.8b	NP				•												

Key

- At the same time as Stafford announced an increased final offer, it lowered the acceptance condition from 90% to more than 50% in value of the relevant Phaunos shares.
- 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 2.12 of the Code
 - AIM traded shares
 - Co-operation agreement/bid conduct agreement
 - Break fee given under formal sale process or white knight dispensation
 - Listed/traded shares
 - No premium given in offer documentation or nil premium
 - Reverse break fee
 - Standstill agreement
 - Untraded shares

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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 undertaking/bid in shareholder irrevocable	Matching/Topping rights****	Shareholder vote	Profit forecast/QIBS
Harvey Nash Group plc (AIM)	DBAY Advisors Limited	£98.7m	16.6%	•			•						•						•
Vernalis plc (AIM)	Ligand Pharmaceuticals Incorporated	£32.67m	45.7%	•			•						•	C	•		•	•	
esure Group plc (Main Market)	Bain Capital Private Equity, LP and its affiliates	£1.207b	37%	•			•						•	C, S			•	•	
Abzena plc (AIM)	Welsh, Carson, Anderson & Stowe	£34.4m	167%	•			•						•	•	•		•	•	
Cambian Group plc (Main Market)	CareTech Holdings PLC	£372m / £354m ⁷	35% / 28% ⁸	•			•	•	•				•	C, S, R			•	•	•

- In the event of a higher competing offer being announced which represents an improvement of 20% (in the case of Invesco Asset Management) or 10% (in the case of Woodford Investment Management) or more on the value of Ligand's offer, the irrevocable undertakings given by IAML and Woodford, respectively, lapse unless Ligand increases its offer price to at least an equivalent amount within seven days of the date on which the competing offer is announced.
- The irrevocable undertakings from each of Sir Peter Wood and Toscafund Asset Management LLP cease to be binding in the event of a higher competing bid that is at a price or in exchange for such number of shares (or other securities) that implies a value of at least 3.25 pence per share and Bain Capital has not made a revised offer which is not subject to any preconditions for at least an equivalent consideration within 10 business days following the date of the announcement of the competing offer.
- Sir Peter Wood has agreed (a) to re-invest £50 million (represented by esure shares) in the topco of the post-completion group and (b) to provide advisory services to the post-completion group if he ceases to be the chairman of esure. These arrangements (the Rollover Arrangements) will be implemented by way of a share exchange agreement, a put and call option agreements, an equity terms agreement and an advisor agreement and require the approval of the independent shareholders of esure pursuant to Rule 16.2 of the Code.
- Sir Peter Wood has agreed (a) to re-invest £50 million (represented by esure shares) in the topco of the post-completion group and (b) to provide advisory services to the post-completion group if he ceases to be the chairman of esure. These arrangements (the Rollover Arrangements) will be implemented by way of a share exchange agreement, a put and call option agreements, an equity terms agreement and an advisor agreement and require the approval of the independent shareholders of esure pursuant to Rule 16.2 of the Code.
- On 16 August 2018, Abzena and WCAS entered into a facility letter under which WCAS has agreed to provide to Abzena a £2 million term loan facility. The Executive has agreed to disapply Rule 21.1(a) of the Code on the basis that Abzena shareholders holding shares carrying more than 50% of voting rights of Abzena have stated in writing they approved the term loan facility and would vote in favour of any resolution to that effect proposed at a general meeting.
- The irrevocable undertakings from each of Woodford Investment Management and Marlborough Fund Managers cease to be binding in the event of a higher competing cash only offer at a value which exceeds WCAS' offer by 50% or more and WCAS has not made a revised offer for at least an equivalent value within five business days of the date of the higher competing offer.
- The bid value of £372 million relates to the cash and shares offer and the bid value of £354 million relates to the full cash alternative.
- The bid premium of 35% relates to the cash and shares offer and the bid premium of 28% relates to the full cash alternative.
- The offer includes a full cash alternative, under which Cambian shareholders may elect to receive 190 pence per share in respect of any or all of their Cambian shares.
- The offer is subject to approval by CareTech shareholders as the offer constitutes a reverse takeover under the AIM Rule for Companies.

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Appendix: Announced* UK takeover bids (1 July to 30 September 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 undertaking/bid in shareholder irrevocable	Matching/Topping rights****	Shareholder vote	Profit forecast/QIBS
Produce Investments plc (AIM)	Promethean Investments LLP	£55.29m	35.44%	•			•	•	•										
Albion Community Power plc (Unquoted)	GCP Infrastructure Investments Limited	£5.8m	NP	•			•						•			•			
Jardine Lloyd Thompson Group plc (Main Market)	Marsh & McLennan Companies, Inc.	£4.3b	33.7%	•			•						•	C, S				•	
Sindair Pharma plc (AIM)	Huadong Medicine Co, Limited	£166.6m	74.9%	•			•						•	•				•	•
Randgold Resources Limited (Main Market)	Barrick Gold Corporation	US\$6.06b	NP	•			•	•					•	CR				•	•

- Produce Investments shareholders may elect to receive as an alternative to the full cash consideration the Unlisted Partial Share and Loan Note Alternative, comprising cash, shares and loan notes consideration. This alternative consideration is limited to such number as would constitute no more than 24.9% of the entire issued share capital of April 1983, the Bidco. To the extent this alternative cannot be satisfied in full, they will be scaled down pro rata to the size of relevant elections.
- On 12 September 2018, Jardine Lloyd Thompson, Marsh & McLennan and their legal counsel entered into a clean team and joint defence agreement.
- On 28 August 2018, Sinclair, Huadong and HMC entered into an offer agreement, which contains details of the pre-conditions which were required to be satisfied prior to the release of the Rule 2.7 announcement. These pre-conditions have been satisfied. On 28 August 2018, HMC and Huadong entered into a legally binding term sheet setting out key terms of the proposed management incentive plan with Chris Spooner and Alan Olby (acting on their own behalf and on behalf of proposed management incentive plan participants).
- As the value of the management incentive plan is significant, it is subject to the approval of independent shareholders of Sinclair pursuant to Rule 16 of the Code.
- The issue of the new Barrick shares is subject to the approval of Barrick shareholders at a Barrick special meeting.

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