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UK Public M&A Update

Q2 2020

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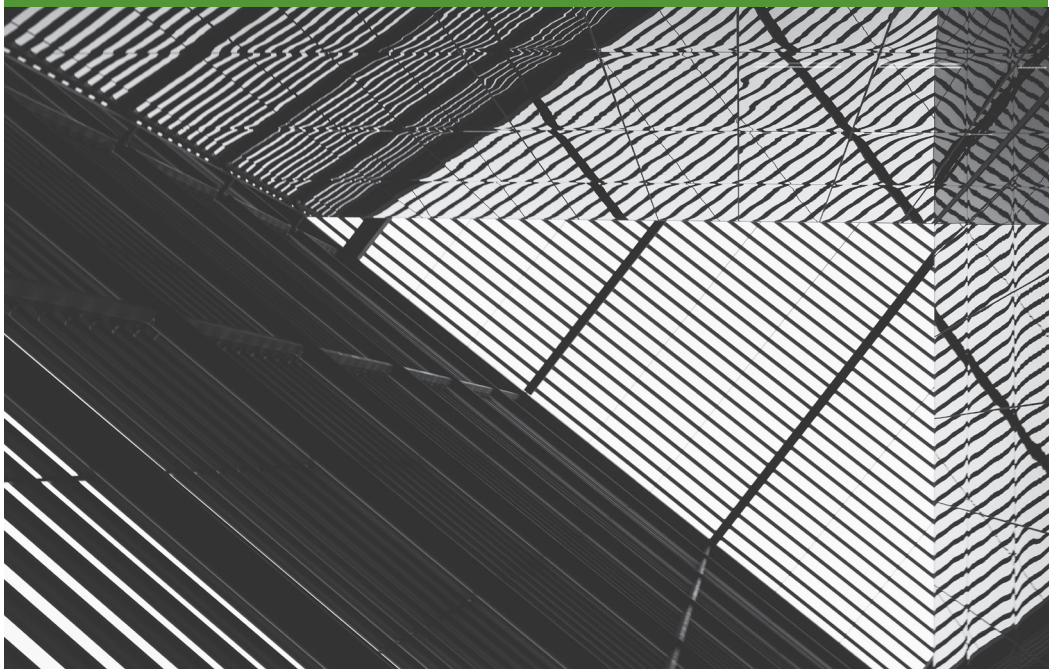

Overview

As one would expect against the backdrop of the Covid-19 pandemic, Q2 saw very low levels of deal activity. Only five firm offers were announced in Q2 2020 (compared to eight in a relatively quiet Q1 2020 and 21 in Q4 2019), with a combined offer value of £155.8 million (representing a very large decrease compared to £2.37 billion in Q1 2020 and £11.27 billion in Q4 2019). Of those five offers, two were all cash and three were all shares.

In the last quarter, Ashurst mandates included advising Moss Bros Group plc (**"Moss Bros"**) on the attempt by Brigadier Acquisition Company Limited (**"Brigadier"**) to lapse its offer for Moss Bros in light of circumstances triggered by the Covid-19 pandemic.

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

Announced bids	5
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Average of bid premia (% unweighted)	23.46%
Average of bid premia (% weighted)	26.22%

Q2 was also relatively quiet from a regulatory and legal news perspective. Notable exceptions included the significant and precedent setting ruling from the Panel Executive on Brigadier/Moss Bros, as well as the new merger control protections regarding public health and national security matters announced by the government.

Further details of this and a few other developments are set out in the News Digest on pages 2 to 6 of this publication.

News digest

Moss Bros Group plc

On 22 April 2020, Brigadier lodged a submission with the Panel Executive seeking permission to invoke certain of the conditions to its £22.6 million offer to purchase Moss Bros and thereby lapse the offer on account of the impact on Moss Bros of the Covid-19 pandemic and related government measures. The takeover had been announced on 12 March 2020, prior to the introduction of the government measures which resulted in Moss Bros closing its stores nationwide. The scheme document was posted on 7 April 2020.

Hitherto the leading case on material adverse change conditions in UK public M&A concerned the offer by WPP Group plc (**"WPP"**) for Tempus Group plc (**"Tempus"**), resolved by the Hearings Committee of the Takeover Panel (the **"Panel"**) on appeal by WPP whose decision is set out in Panel Statement 2001/15. WPP/Tempus can be compared with Brigadier/Moss Bros inasmuch as both related to attempts by offerors to invoke material adverse change conditions following macro events and resulting circumstances which severely impacted the offeree company's business. Both cases therefore involved an assessment of materiality. The two cases can however be contrasted because the circumstances impacting the offeree company's business in the case of WPP/Tempus (which resulted from the 9/11 terrorist attacks) were not reasonably foreseeable at the time the offer was made.

The questions of foreseeability and materiality were therefore relevant to the arguments made by each party and, on 19 May 2020, the Panel Executive ruled that Brigadier should not be permitted to invoke any of the relevant conditions to its offer. Specifically, it found that Brigadier had not established that the circumstances which would have given rise to its right to invoke the relevant conditions were of 'material significance' to Brigadier in the context of the offer. Accordingly, Brigadier had not satisfied the requirements set out in Rule 13.5(a) of the Takeover Code. On 21 May 2020, the Panel announced that Brigadier had requested a review of the Panel Executive's ruling and that a hearing of the Hearings Committee of the Panel would be convened. However, this request was subsequently withdrawn on 26 May 2020 and on 11 June 2020 the scheme of arrangement to implement the offer became effective.

New merger control protections for public health and national security

A new public interest ground on which the government can intervene in UK merger control came into effect on 23 June 2020. The new ground – evidently prompted by the Covid-19 pandemic – relates to the need to maintain the capability to combat, and mitigate the effects of, public health emergencies.

The Competition & Markets Authority (**"CMA"**) is generally the decision-maker on deals caught by UK merger control. However, the government can intervene on certain public interest grounds, in which case the public interest consideration may override the competition analysis conducted by the CMA. Previously there were three public interest intervention grounds: national security, media plurality and stability of the financial system. The new public health ground now becomes the fourth.

The government is also planning to introduce reduced merger control thresholds for three additional sectors which are perceived as important for national security: artificial intelligence, cryptographic authentication technology and advanced materials. In those sectors, acquisitions of targets with a UK turnover of £1 million would be caught by UK merger control, instead of the usual £70 million. The same lower threshold was introduced for targets active in the defence sector, computing hardware and quantum technology in 2018.

Re Sirius Minerals plc – High Court rules on schemes where there are a large number of beneficial owners of shares

In March 2020, the High Court was asked to sanction a scheme of arrangement for Anglo American plc (**"Anglo American"**) to acquire Sirius Minerals plc (**"Sirius"**) where certain objections had been raised. One such objection arose from the fact that several members of Sirius were nominees for a large number of beneficial owners of shares. It was argued that the shareholder vote to accept Anglo American's offer was not representative of the views of these beneficial owners, as many did not find out about the scheme in time and were not contacted by their nominee to ask how their vote should be exercised.

The High Court acknowledged the gathering movement for new laws to improve shareholder democracy, but nonetheless found that the statutory requirements for the holding of the vote were complied with. The court noted that the law requires the scheme documents to be sent to the registered members, not the beneficial owners. The court also rejected arguments that there was a lack of fair representation at the court meeting, or that the members who voted in favour were acting other than bona fide or were acting oppressively. Accordingly, the High Court sanctioned the scheme.

Although the High Court noted the push for reform in this area – as seen in the Law Commission's recent call for evidence on the system of intermediated securities – it showed unwillingness to diverge from the letter of the statute. This is consistent with, and reinforces, the court's long-held reluctance to block schemes where the statutory requirements are complied with (see *Re Heron International NV* and *Re Inmarsat Plc* as examples). The Law Commission intends to publish a 'scoping study' in Autumn 2020 based on responses to the abovementioned call for evidence. However, it has not been asked to produce a full report with recommendations for reform.

Impact of Covid-19 on post-offer intention statements

One (perhaps unsurprising) trend this quarter has been the number of Rule 19.6 announcements from bidders who have not been able to confirm that they have complied with their post-offer intention statements. Out of the 24 Rule 19.6 announcements released this quarter, 13 provided updates to, or reasons for non-compliance with, their post-offer intention statements, compared to 11 confirming compliance with their post-offer intention statements. This is a distinct change from Q1 2020, which saw only four non-confirmation announcements out of a total 12 Rule 19.6 announcements. As might have been expected, the vast majority of updates to post-offer intention statements in this quarter related to decisions made as a result of the Covid-19 pandemic.

Takeover Panel appointments

On 15 April 2020, the Panel announced the appointments of Claudia Arney as a member designated to sit on its Hearings Committee and Jessica Ground as a member designated to sit on its Code Committee, to be effective from 1 May 2020. Claudia Arney is the Interim Chair of the Premier League, alongside other directorships and Jessica Ground is the Global Head of Stewardship at Schroder Investment Management.

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Appendix: Announced* UK takeover bids (1 April to 30 June 2020)

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 of bid in shareholder irrevocable	Matching/Topping rights****	Shareholder vote	Profit forecast/QFBS
Castleton Technology plc (AIM)	MRI Software Limited	£82.8 m	42.9%	•			•						•	C•			•[1]		
Georgia Healthcare Group PLC (Main Market)	Georgia Capital PLC	£31 m	-0.3%	•				L•			•							B•	
Sativa Group Plc (AQSE Growth Market)	StillCanna Inc.	£10.7 m	-28.6%	•				L•					•	C•					
Columbus Energy Resources plc (AIM)	Bahamas Petroleum Company plc	£25.1 m	11%	•				L•					•[2]	C•					
Be Heard Group plc (AIM)	MSQ Partners Limited	£6.2 m	92.3%	•			•[3]						•						

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

B Bidder shareholder approval

T Target shareholder approval

1. Matching rights. Shareholder irrevocable undertakings cease to be binding if a competing offer is made that is at least 10% higher than that offered by the Bidder, and the Bidder does not match that competing offer within seven days.
2. Bahamas Petroleum Company plc reserves the right to elect (with the consent of the Takeover Panel) to implement the acquisition by way of an offer.
3. Certain employees and managers of Be Heard Group plc have agreed, under the Rollover Manager arrangements, to exchange their Be Heard Group plc shares for shares to be issued by Topco (Ensco 1314 Limited).

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