Public to private

The impact of Takeover Code changes

Spencer Summerfield, Chris Hale and **Laura Brocklehurst** of **Travers Smith LLP** explain how the recent changes to the Takeover Code have affected the practice of public to private transactions.

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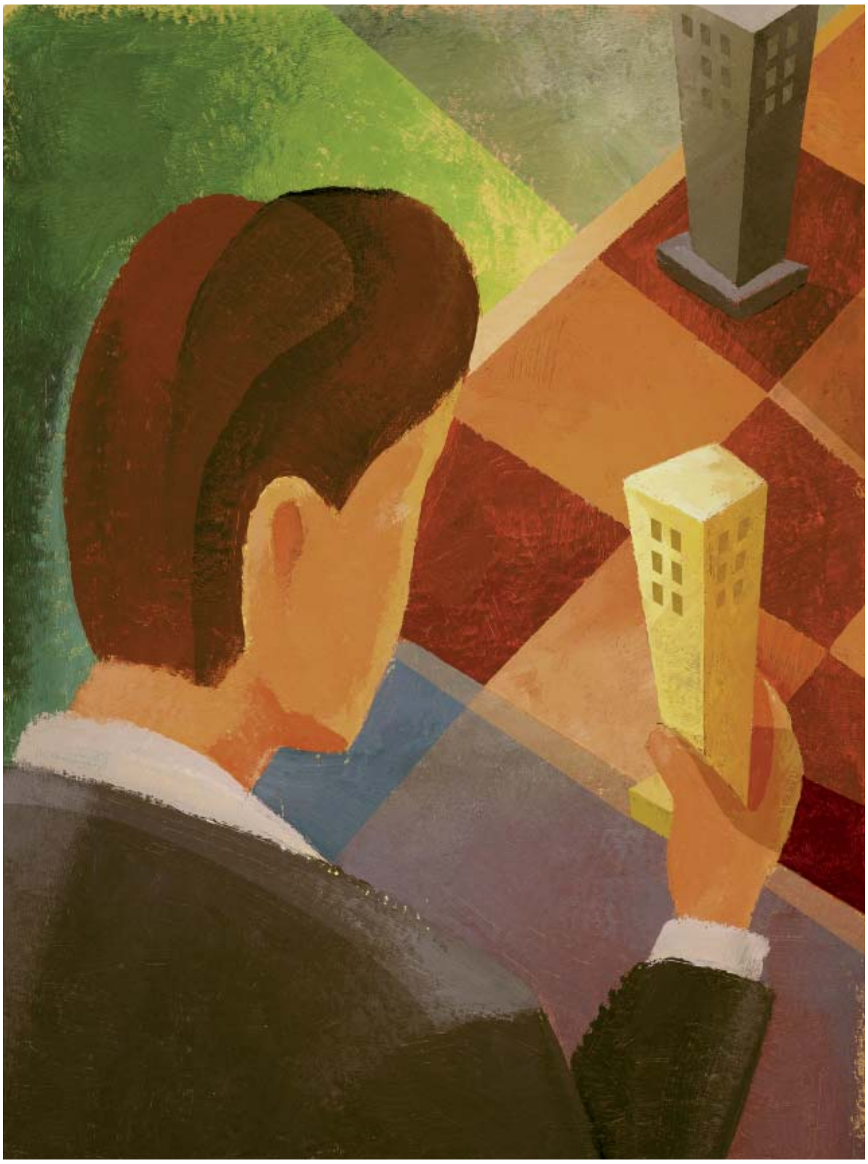

So-called "public to private" (P2P) transactions are takeovers of listed public companies by private equity (PE) houses. The Takeover Code (the Code) governs P2P transactions and other takeovers of public companies, and, in September 2011, some fairly significant amendments were made to the Code that have had a knock-on effect on the implementation of P2Ps (the Code changes) (*see Focus "Takeover Code changes: impact on private equity bidders", www.practicallaw.com/2-507-9308*).

This article explains how the Code changes have affected, or are likely to affect, the practice of P2Ps, and highlights some of the more important developments in P2P transactions since we last wrote about the subject (*see feature article "From public to private: management buyouts of listed companies", www.practicallaw.com/9-100-8010*).

TAKEOVER CODE CHANGES

The Code changes were designed to restore the tactical balance in takeovers in favour of the target (*see box "Takeover Code headline changes"*).

Market reaction

Since the Code changes were made, only 16 potential P2P transactions (backed by private equity or quasi private equity investors, but excluding real estate fund investors) have been publicly announced in respect of 13 target companies. It is, therefore, early days to draw any firm conclusions, but of the Code changes, the principal ones that have had an impact on the implementation of P2Ps are:

- The general prohibition on offer-related arrangements.
- The accelerated "put up or shut up" regime.

This article first appeared in the September 2012 issue of PLC Magazine.

Takeover Code headline changes

In September 2011, several key changes were made to the Takeover Code (the Code), including:

Requirement to identify potential bidders. The target company must now identify all known potential bidders in a public announcement if there is a leak or speculation about a potential offer or a significant movement in the target's share price, irrespective of whether a particular potential bidder is the subject of any rumour or speculation that gives rise to the requirement for an announcement to be made. Other potential bidders, who arrive on the scene later, need not automatically be disclosed unless they are then the subject of specific rumour or speculation.

Accelerated "put up or shut up" (PUSU) regime. A named bidder is now required to make an announcement under Rule 2.7 of the Code of a firm intention to make an offer, or to withdraw from bidding within 28 days of being named (although this time limit can be extended with the agreement of the target and the consent of the Takeover Panel (the Panel)). The Panel argued that this accelerated PUSU regime would:

- Provide targets with greater certainty of, and control over, the timetable.
- Remove the often difficult decision for a target as to whether to request the imposition of a PUSU deadline.
- Reduce the incentive for a bidder to leak discussions with the target.

If a potential bidder (or private equity (PE) house) faces being named under the new regime and wishes to avoid such disclosure, the Panel may be willing to exercise its discretion to avoid disclosure of that bidder/PE house if that bidder/PE house is willing to confirm privately that it will no longer pursue such a takeover.

Ban on inducement fees and other offer-related arrangements. Subject to limited exceptions, inducement fee arrangements and other deal protection measures (including exclusivity/no-shop agreements, matching rights, implementation agreements and any arrangement which has a similar financial or economic effect to an inducement fee) are now prohibited under the Code.

The limited exceptions are either when the target has publicly announced that it is up for sale (although it is not enough for a company simply to announce a strategy review that may include consideration of a sale process) or where the target board wishes to incentivise a so-called "white knight" in the context of a hostile bid. In these situations, the Panel will generally permit a 1% inducement fee to be agreed by the target and may, in exceptional circumstances in the case of a formal sale process only, permit other offer-related arrangements. The Panel has suggested that exceptional circumstances are likely only to be an impending insolvency event.

A bidder is still able to request certain undertakings from the target board, but these are limited in scope. They broadly cover: confidentiality; non-solicitation of a bidder's employees, customers or suppliers; and the provision of information or assistance for the purposes of obtaining any official authorisation or regulatory consent for the takeover offer. Irrevocable undertakings from the target directors are also still permitted.

Greater disclosure in bid documentation. Greater disclosure of financial information on a bidder, including a detailed description of the debt finance arrangements, is now required in the bid documentation. This is true for all offers, even those where the consideration is cash and there can be no minority shareholdings (that is, where the offer is to be implemented by way of a scheme). The Panel now also requires much fuller disclosure of advisory fees incurred by both the bidder and the target. An estimate of the fees and expenses expected to be incurred in relation to an offer must be disclosed both in aggregate and by category of adviser. A bidder is also required to disclose separately an estimate of the expected fees and expenses to finance the offer.

Future intentions as regards the target and its employees. Changes were made to the Code to require further disclosure of the bidder's future intentions as regards the target and its employees, with any statements of intention being expected to hold true for at least one year. These changes were made as a result of the Panel's concerns regarding Kraft's statements about the operation of Cadbury's Somerdale factory in the Kraft/Cadbury takeover in 2010 (*www.practicallaw.com/3-502-6376*).

- The disclosure of debt financing terms.

In the run up to the Code changes, a number of concerns were expressed by PE houses and practitioners that the Code changes would deter PE houses from undertaking P2Ps. Practitioners considered a number of alternative structures for P2P transactions that sought to avoid the consequences of the Code changes, which included:

- Business acquisitions rather than share acquisitions (which would fall outside the Code's scope).
- Target companies implementing formal sale processes (where inducement fees and, in exceptional circumstances, other offer-related arrangements are still permitted).
- Shareholder activism structures involving the initial acquisition of

less than 30% of the issued shares combined with board changes.

None of these alternative structures seem to have received any real traction following the implementation of the Code changes, and, despite the concerns expressed before the changes came into force, the general sentiment appears to be that most PE houses now seem more willing to do P2Ps under the new regime.

The dearth of P2Ps since September 2011 is therefore generally thought to be more a reflection on the current economic environment, rather than an unwillingness of PE houses to participate in P2Ps as a result of the Code changes.

Co-operation agreements

In light of the prohibition on implementation agreements under the changes to the Takeover Code that came into force in September 2011, a practice has evolved of agreeing co-operation agreements, particularly where regulatory approval for the takeover offer is necessary.

Under these agreements, the bidder and the target agree to co-operate to obtain any necessary authorisations and regulatory clearances for the takeover offer. These can also include agreements as to how to deal with share options and other incentive arrangements of the target employees.

These co-operation agreements are expressly excluded from the prohibition on offer-related arrangements, but in practice, they provide limited additional deal protection for a bidder.

Offer-related arrangements

As a consequence of the Code changes, PE houses have lost a lot of the deal protections from which they were previously able to benefit on a P2P transaction.

Aside from co-operation agreements (*see box "Co-operation agreements"*), there are now really only two forms of deal protection available (assuming one of the limited exceptions does not apply):

Irrevocable undertakings. The Code changes have not prohibited irrevocable undertakings being given by the director shareholders of the target or by non-director shareholders of the target. Typically, these undertakings commit the relevant shareholder to accept the takeover offer within a prescribed period of time (usually before the first closing date) or, if the takeover is to be implemented by way of scheme of arrangement, to vote in favour of the scheme at the court-convened shareholders' meeting and at any associated general meeting of target shareholders.

Some institutional shareholders are less willing to give binding irrevocable undertakings (often preferring non-binding letters of intent or not to give any commitment at all) (*see box "Attitude of institutional investors to irrevocable undertakings"*). Even those institutional shareholders willing to give a binding irrevocable undertaking will usually require some "step up" provision entitling them to accept (or vote in favour of) a competing offer if it is announced before the first closing date of the original bid and is at least 5% or 10% higher than the original bid (commonly known as a "soft" irrevocable undertaking).

Given the new importance of irrevocable undertakings for deal protection and the restrictions on getting any direct comfort from the target, bidders are now trying to include additional provisions within the irrevocable undertaking such as:

- "Matching" or "topping" rights: these prevent the irrevocable undertaking from falling away if the bidder to which it has been granted is able to match or beat any competing bid within an agreed period of time.
- Non-solicitation undertakings: the relevant shareholder agrees not to solicit any counter-bid for the target or talk to any other bidder about a counter-bid for an agreed period of time.
- Notification undertakings: the relevant shareholder agrees to notify the bidder as soon as it becomes aware of a possible counter-bid.
- Directors' commitments to recommend the offer, subject to their fiduciary duties and obligations under the Code.

Although irrevocable undertakings are very helpful, the level of protection that they provide to a PE house should not be overstated unless they are in respect of a significant percentage of the target shares. This is because PE houses generally need to reach an acceptance level of at least 75% before declaring an offer unconditional and therefore, unless a bidder has irrevocable commitments close to 75% (which would be unusual), it may not be able to satisfy this requirement.

Obtaining irrevocable undertakings is subject to Rule 5 of the Code. This restricts the occasions when irrevocable undertakings may be obtained over, in aggregate, 30% or more of the target's shares.

On recommended transactions, bidders typically will collect irrevocable undertakings immediately prior to making a Rule 2.7 announcement and, in these circumstances, there is no limit on the aggregate number of shares to which the irrevocable undertakings can relate. It does, however, mean that there is no certainty that the bidder will be able to collect the necessary number of irrevocable undertakings until very late in the process.

Attitude of institutional investors to irrevocable undertakings

Below are some examples of the position that is often adopted by some of the more well-known institutional investors:

Institution	Historical irrevocable behaviour
Artemis	Letters of intent and soft irrevocables
Aviva	Letters of intent and soft irrevocables
AXA	Letters of intent and soft irrevocables
BlackRock	Letters of intent and soft irrevocables
Fidelity	Unlikely to give irrevocables
Gartmore	Letters of intent and soft irrevocables
Henderson	Letters of intent and soft irrevocables
Invesco	Soft irrevocables
JP Morgan	Letters of intent
Schroders	Letters of intent and soft irrevocables

Rule 5 only permits irrevocable undertakings that will result in the bidder having undertakings and voting rights over, in aggregate, 30% or more of the target shares to be collected sometime prior to a Rule 2.7 announcement where it is from a single shareholder and is the only acquisition within any period of seven days. Irrevocable undertakings and voting rights over, in aggregate, less than 30% are not subject to restrictions under Rule 5 of the Code.

In the future, it will be interesting to see if PE houses seek to obtain irrevocable undertakings earlier in the process (particularly where they have already been named as a potential bidder) in order to add more certainty to their bid at an earlier stage in the timetable. This is, however, perhaps an unlikely trend since institutional investors are likely to resist giving any binding commitments early in the process. Any irrevocable undertaking given to a bidder requires public disclosure.

One interesting development is that, because of the general recognition of the importance of irrevocable undertakings under the new regime, there seems more willingness among investors (and hedge funds in particular) to "break" their contracts for difference and acquire the underlying shares in order to be able to give an irrevocable undertaking.

Purchasing target shares. By far and away the best form of deal protection is for a bidder to acquire target shares. If a higher counter-bid is then successful, at least the acquiring bidder will be able to recover some of its deal costs by selling its target shares for a price higher than originally paid. More importantly, if a significant number of target shares can be acquired, this is likely to act as a real deterrent against a counter-bid.

There are, in practice, three opportunities for a bidder or PE house to acquire target shares:

- At the very outset before the PE house is in possession of any price-sensitive information.
- After the Rule 2.7 announcement of the offer has been publicly announced but before the offer documents have been received by target shareholders.
- After the offer document has been received by target shareholders.

Each opportunity has associated advantages and disadvantages (*see box "Acquiring target shares"*).

The fund documents for private equity funds can sometimes restrict the PE house from buying target shares in the market before making a bid. For new fundraisings, it would be worth ensuring that the fund documents expressly make it clear that this is allowed and specify how such purchases may be funded.

In addition to considering the timing implications of purchasing target shares, the PE house must also consider the impact that stakebuilding can have on the terms of the bid and the disclosure that is required. The following should be borne in mind when considering whether to make market purchases of target shares:

- If the bidder or its concert parties (which would include the PE house) acquire securities in the target during an offer period or in the three months prior to an offer being made, the offer itself must be on no less favourable terms (*Rule 6, the Code*).
- Where any cash purchases are made by the bidder or its concert parties during the offer period or, where cash purchases in the 12 months prior to the offer period by the bidder and its concert parties exceed 10% of any class of securities, any offer must be in cash or have a full cash alternative at no less than the highest price paid (*Rule 11, the Code*).
- Dealings that result in a person together with its concert parties holding securities carrying 30% or more of the voting rights of the target will give rise to an obligation to make a mandatory cash offer for that company (*Rule 9, the Code*).

Accelerated "put up or shut up" regime

When this new regime was originally proposed, there was significant concern expressed by PE houses and other City commentators that it would stifle P2P transactions, as PE houses would be

This article first appeared in the September 2012 issue of PLC Magazine.

Acquiring target shares

Timing	Advantages	Disadvantages
At the very outset before the private equity (PE) house is in possession of any price sensitive information	• Generally advantageous from a cost perspective (provided that the PE house is willing to commit funds at this stage) as the target shares can be acquired at the prevailing market price as opposed to the proposed offer price, which will be at a premium to the market price. • Assuming the PE house's stake in the target is, and remains, below 3%, its interest would not need to be disclosed to the market (under the Disclosure Rules and Transparency Rules). However, if the target is already in or enters into an offer period and the PE house has been identified as a potential bidder, the PE house would be required under the Takeover Code (the Code) to make an opening position disclosure (OPD) of its interests. If the PE house has not yet been identified as a potential bidder and the target is in, or enters into, an offer period, it may still need to make an OPD if it has an interest in 1% or more of the target's shares. In either case, the PE house would be required to disclose any subsequent dealings.	• There is only a limited window at the very outset of the P2P process when the PE house can buy shares in the target, because once it commences its due diligence on the target and is likely to be in receipt of price sensitive information, it will be prevented from doing so by insider dealing and market abuse legislation. This limited window is when the only inside information a person has on the target is that it knows it intends to make a bid. This is, however, further restricted by the Code which only allows the bidder to do this, except in limited circumstances. The PE house would only be able to make purchases to support the bid on the basis of no gain/no loss arrangements with the bidder. • Where the P2P is to be structured as a traditional takeover offer, any shares bought by the PE house before the offer becomes capable of acceptance will not count towards the 90% threshold which needs to be reached before the statutory procedure can be implemented to squeeze out a dissenting minority. So, for example, if a bidder and its concert parties had already acquired 20% in the market before it launched its offer, the compulsory acquisition procedure would only be possible if it further achieved 90% of the remaining 80%. • Where the P2P is to be structured as a scheme of arrangement, any shares bought by the PE house cannot be voted on the shareholder resolution to approve the scheme at the court meeting.
After the Rule 2.7 announcement of the offer has been publicly announced but before the offer documentation has been received by target shareholders	• Although the price paid for the shares is unlikely to be significantly less than the offer price, any significant acquisition is likely to act as a deterrent to a counter-bidder. By acquiring target shares shortly after announcement, a bidder will minimise the time that a counter-bidder has to make its move.	• The PE house cannot increase its stake under the radar as any dealing disclosure must be announced to the market. • Shares purchased by the bidder or its associates at this stage will not count towards the 90% threshold unless the offer is capable of acceptance at the date of the relevant purchase. Bidders have tried to get around this by making available a form of acceptance of the offer on a website at the same time as the offer is formally announced. • Where the P2P is to be structured as a scheme of arrangement, any shares bought by the PE house cannot be voted on the shareholder resolution to approve the scheme at the court meeting.
After the offer documentation has been received by target shareholders	The considerations here are broadly the same as for the period after the Rule 2.7 announcement of the offer has been publicly announced except that, most importantly, any target shares bought after the offer documentation has been received by target shareholders will count towards the 90% threshold for the exercise of the statutory squeeze-out procedure under a traditional takeover offer.	

reluctant to be named as a potential bidder early on in the process and certainly would be unlikely to be able to go through all the hoops necessary to be in a position to make a Rule 2.7 announcement of a firm intention to make an offer within 28 days of being named.

However, our experience has been that PE houses have become less concerned about this, principally as a result of the apparent willingness of the Panel to grant extensions of the 28-day period with the consent of the target board (*see box "Takeover Panel extensions"*).

Nevertheless, PE houses are now taking greater steps than they used to in order to minimise the risk of a put up or shut up (PUSU) ruling from the Panel. There is now much greater emphasis on the need for secrecy (which is a good thing). Our experience has been that some PE houses are delaying talking to third-party finance providers until later in the transaction process. In addition, more due diligence is now being undertaken by the PE houses and their advisers based on public information before the target board is formally approached.

In the Alterian takeover offer by SDL, at the request of SDL, in November 2011 the Alterian board publicly announced that it would be willing to consent to an extension of the 28-day PUSU period. While this is a first after the Code changes, in future, it may become a common request by bidders.

Takeover Panel extensions

The Takeover Panel granted put up or shut up (PUSU) extensions in relation to 21 approaches (including approaches to target companies which entered into an offer period before the Takeover Code changes) in the period between 17 October 2011 (the first PUSU deadline) and 31 July 2012.

These extensions resulted in:

- 11 Rule 2.7 announcements of a firm intention to make an offer.
- Nine Rule 2.8 announcements of no intention to make an offer.

One potential bidder was still in discussions within an extended PUSU timetable as at 31 July 2012.

Of the 21 approaches, two were in the context of public-to-private transactions.

Disclosure of debt documents

Under the Code changes, more detailed disclosure is now required of the debt arrangements relating to a takeover. In particular, details of interest rates must be provided in the offer documents. In addition, any documents relating to the financing of the offer are required to be published on a website as soon as possible after the Rule 2.7 announcement has been made. This provision would cover any commercially sensitive market flex arrangements (normally contained in a side letter) that permit the arranger of a syndicated loan to increase the interest rate if necessary to achieve syndication.

On a number of occasions, the Panel has consented to these arrangements not being published while the syndication is happening, but instead only requiring disclosure after the syndication has occurred.

Another way of avoiding disclosure of the debt documents is for the PE house to provide an equity bridge for the debt element until the offer has completed and then to refinance in the debt markets immediately after that (or even to have a debt facility largely agreed but only completed after the offer is unconditional).

New trends against bidders

Several new mechanisms have recently been introduced by practitioners which are to the disadvantage of bidders. None of these arrangements has yet been agreed to by a PE house but it may only be a matter of time, particularly if the target company has any leverage. These include:

Reverse break fees. Although break fees payable by the target are now not permitted under the Code changes (except in limited circumstances), there are no similar Code restrictions preventing bidders from entering into such arrangements in favour of the target.

Reverse break fee agreements impose an obligation on the bidder or one of its concert parties (such as the PE house providing the equity finance) to pay a fee to the target company in the event that the bidder does not proceed with the bid at an agreed price.

In February 2012, in the context of Glencore's bid for Xstrata, Glencore agreed to pay Xstrata £298 million if the Glencore board withdrew or modified its recommendation of the merger except as a result of a new event outside Glencore's control. Similarly, in October 2011, Chengdu agreed to pay a break fee of £500,000 to the target, Harvard, if the offer document was not posted by a certain date.

Commitment to extend the offer. In Hewlett Packard's offer for Autonomy, Hewlett Packard committed to Autonomy that it would extend its offer for up to the maximum period permitted under the Code. The reason for this was that the target company was concerned that Hewlett Packard might use any failure to satisfy the acceptance condition by the first closing date as a means to avoid going through with its bid for Autonomy.

PRACTICE DEVELOPMENTS

Over the last 15 years since we wrote our first article on P2Ps, there have been a number of practice developments and a few changes to the law relating to the execution of P2P transactions that are noteworthy.

Scheme of arrangement vs takeover offer

Issue	Scheme of arrangement	Takeover offer
Recommended by target board?	Must (in practice) be recommended.	Can be recommended or hostile.
Acceptance levels for 100%	Majority in number and 75% in value of those voting of each class of members (or creditors).	90% of shares to which offer relates.
Timing	Quicker to 100% and 100% certainty if court sanction is obtained.	Flexibility to declare unconditional at 50.1%.
Control of process	Target has control.	Bidder has control.
Market purchases by bidder	Purchases of shares may not be voted at members' meeting.	Purchases made after receipt of the offer document by target shareholders may count towards 90% for squeeze-out.
Stamp duty	Stamp duty avoided on a cancellation scheme.	0.5% duty on consideration.
Costs	Slightly more than a takeover offer, though normally offset by stamp duty saving.	Slightly less than a scheme (before any stamp duty cost saving).
Overseas shareholders	Issue of consideration to shareholders rarely triggers local securities laws problems.	Potential securities laws problems.
Management shareholders	All target shares held by management (where management is rolling over some of their shares into bidder shares) cannot be voted on the scheme.	May be possible to include within the 90% required for squeeze-out any target shares held by management for which they are receiving the offer consideration.

Cash confirmation

Under the Code, the financial adviser to the bidder has to be satisfied that the bidder has sufficient funds to pay the cash consideration under the takeover offer. This is commonly referred to as the "cash confirmation". In the context of P2Ps, the following practice has grown up in the context of the bidder's financial adviser satisfying itself that the PE house will have the funds available to meet its equity commitments to the bidder (which will then be used to part-fund the cash consideration under the takeover offer):

- The bidder's financial adviser will seek informal comfort regarding the nature of the investor base underlying the relevant PE fund, although it is generally recognised that this is a sensitive area for the PE house and therefore the form of comfort usually involves no more than a conversation between the bidder's financial adviser and the PE house.

- The PE house's funds lawyers will provide written confirmation of the underlying obligations of the limited partners in the relevant PE fund to make a payment following a drawdown notice, including the timing of such obligations, so that the bidder's financial adviser can get comfortable that funds will be available within the timetable required by the Code (14 days from the offer becoming wholly unconditional or the scheme becoming effective).

- The PE house will provide a letter confirming the application of drawn funds to finance the cash consideration payable in the P2P.

- The general partner of the relevant PE fund will provide written confirmation to the bidder's financial adviser that drawdown notices to finance the P2P will be sent out at the appropriate time.

- The investment agreement under which the PE fund agrees to subscribe for shares in the bidder (or, more likely, a holding company of the bidder) will be reviewed to ensure that this commitment is only conditional on the takeover offer becoming wholly unconditional (or the scheme becoming effective) and that there is then a commitment directly (or, where the PE fund is investing in a holding company of the bidder, indirectly) to ensure that the bidder uses the proceeds to fund the cash consideration payable under the P2P.

This article first appeared in the September 2012 issue of PLC Magazine.

In parallel, more prescriptive equity commitment letters are now emerging in private buy-outs, so the public and private practices may become more aligned over time.

Management special arrangements

Under Rule 16 of the Code, where the bidder has entered into or reached an advanced stage of discussions for any form of incentive arrangements with the target's management who are also target shareholders, the Panel requires the target's financial advisers to confirm in the offer document that they believe the arrangements to be fair and reasonable. The Panel also requires the arrangements to be approved at a general meeting of target shareholders where the target management are receiving shares in the bidder group and in certain other circumstances.

To avoid these requirements, there have been several P2P transactions (notably, Expro and Alliance Boots) where the PE house has elected not to have any discussions with the target management about incentivisation until after the takeover offer has completed.

In these circumstances, the Panel requires a statement to appear in the public documents to the effect that no, or only limited, discussions have taken place and details of any such discussions disclosed.

In practice, the Panel has a fairly low threshold as to when discussions have reached a stage where a fairness opinion and possibly a shareholder vote are required. There is generally some scepticism as to the level of discussions which are presented as having taken place.

Scheme vs offer

The scheme of arrangement has become the more popular deal structure for larger P2P transactions (*see box "Scheme of arrangement vs takeover offer"*). The principal reason for their popularity on P2Ps is because under a traditional takeover offer, the PE house is likely to need to get to at least the 75% acceptance level. Under a scheme, at 75% (assuming you can also satisfy the majority in number test required for a scheme), this will enable a PE house to acquire 100% of the target shares.

For some years there was a widely held view that irrevocable undertakings to vote in favour of a scheme could result in a court effectively treating those giving the undertaking as a different class when exercising its discretion to sanction a scheme. The preferred view now appears to be that this is not the case and irrevocable undertakings to vote in favour of a scheme should not have an adverse impact on the court sanction process.

Investee companies as concert parties

The general position adopted by the Panel remains that investee companies of the PE house sponsoring the P2P will only be treated as acting in concert with the bidder once the identity of the PE house is publicly known, provided there are appropriate Chinese walls in place to ensure that the investee companies are not made aware of the situation until the proposed P2P has become public.

One interesting point which arose recently was where one of the PE house's investee companies was a stockbroking business which made a market in the target's shares as part of its normal day-to-day business. The executive at the PE house promoting the proposed P2P was also on the board of the investee stockbroking company. In that circumstance, the Panel agreed to maintain the existing position that the investee company would not be treated as acting in concert with the bidder until the identity of the sponsoring PE house was publicly

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For subscription enquiries to PLC web materials please call +44 207 202 1200 known, provided that the relevant executive was not involved in or otherwise seeking to influence the day-to-day trading of the stockbroker. However, the Panel said that it would look carefully at trades in the target company by the stockbroking company after the event to ensure that they did not look out of line.

Squeeze-out of minorities

The Companies Act 2006 (2006 Act) brought some relatively minor changes to the statutory squeeze-out regime. There are, however, two points of note in the context of P2P transactions:

- The 2006 Act now expressly provides that conditional contracts entered into by a bidder to acquire target shares are to be treated as shares held by a bidder. This gives statutory confirmation that a PE house can (through a conditional contract) offer a different deal for management's target shares without jeopardising its ability to use the 2006 Act squeeze-out regime (although the target shares acquired through the conditional contract are then excluded from the calculation of the 90% level needed to be achieved to implement the regime).

- Under the Companies Act 1985, there was a concern that where a management team were only exchanging some of their target shares for shares in the bidder and accepting the same offer terms for the remainder of their target shares, all of the target shares held by management would have to be excluded for the purposes of determining the 90% acceptance level under the squeeze-out regime. Under the 2006 Act, if structured properly, it should be possible to include within the 90% acceptance level test, the target shares held by management for which they are receiving the same offer terms.

Abolition of financial assistance for private companies

The statutory prohibition against financial assistance being given by private companies was abolished in 2008. As a result the "three debenture approach" in respect of security granted to the lending bank by a bidder has become a "two debenture approach". Therefore, at the time that the Rule 2.7 announcement is made, the lending bank will take a debenture over the assets and undertaking of the bidder (which will include target shares assented to the offer once the offer has become wholly unconditional).

Once the offer has become wholly unconditional, the target will be re-registered as a private company and the target and its subsidiaries will then grant security over their assets and undertaking, which can cover both the acquisition finance and also any working capital finance. Previously, under the three debenture approach, the security could not cover the acquisition finance until after the financial assistance whitewash had been implemented.

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This article first appeared in the September 2012 issue of PLC Magazine.