

# ACQUIRING A UK PUBLIC COMPANY

---





# Introduction

With few governmental restrictions on foreign ownership, takeovers of UK listed companies by international bidders are comparatively common. Indeed, the regulatory system, governed by the City Code on Takeovers and Mergers (**Takeover Code**) is designed to create, amongst other things, a fair and transparent environment in which bidders can compete equally for an acquisition, regardless of where the bidders are from.

Nevertheless, the regulatory regime in the UK has a number of complexities. Actions taken at the beginning of the transaction, even before an offer is seriously contemplated, can significantly influence the process and chances of success. Consequently, early deal-specific advice should always be sought, as well as taking simple practical steps such as analysing the shareholder base of the target company.

An early analysis of the shareholder register will reveal any stakes over 10% that, effectively, can block a direct offer and require a preliminary off market deal to be put in place. This will also identify any stakes near the 10% level which could act in concert or be taken over 10% relatively easily as a defensive measure.

## Advisors

The Bidder will need to appoint the following advisors:

- ▶ Investment bank to provide financial advice
- ▶ Broker to manage the acquisition of the shares in the target
- ▶ Law firm to advise on all legal aspects of the takeover and prepare the required documentation
- ▶ Public relations adviser to advise on and coordinate public communications, including with the media

Other advisors may also be needed, depending on the circumstances, such as tax or accounting advisors.

## Methods of acquisition

There are two principal methods of acquiring a UK public company: a direct offer and a scheme of arrangement. In either case, the target company's board of directors will form a view as to whether to recommend to the target's shareholders to accept the offer or not. If the purchaser chooses to proceed without the recommendation of the target board this is known as a "hostile" takeover.

### Direct offer

A direct offer is a contractual offer made directly to the target company's shareholders to acquire their shares. Provided the bidder is able to acquire more than 50% of the voting rights within the designated time then the offer will be successful in terms of board control, but only if more than 90% of the voting rights not already owned by the bidder are acquired can the bidder force the remaining minority shareholders to sell their shares and obtain 100% ownership.

### Scheme of arrangement

A scheme of arrangement is a court-based procedure managed by the target company. Such schemes can provide a faster route to guaranteeing the acquisition of 100% of the shares in the target. However, in practice such schemes can be a slower route to obtaining actual control of the target company.

The target board is obliged to obtain competent and independent advice on any offer, including the value of the offer, usually from an investment bank. The independence of such advisers from the bidders is paramount.

# Takeover Code

The Takeover Code is a principles-based set of rules designed to ensure shareholders are treated fairly and equally and to avoid unnecessary market disruption. As such, it is not always easy to comply on a "tick box" basis and early input from advisors is essential.

The Takeover Code is implemented and overseen by the Panel on Takeovers and Mergers (**Panel**), a non-governmental regulatory organisation. There is an obligation to consult the Panel where it is unclear how the Takeover Code applies.

Addleshaw Goddard has four lawyers who have spent time on secondment at the Takeover Panel (more than any other UK law firm), and so have deep unrivalled experience of how the Panel implements its rules on a day to day basis.

## Which companies are subject to the Takeover Code?

The Takeover Code applies to any public company which has its registered office in the UK, the Channel Islands or the Isle of Man, as well as to some private UK companies. It also applies in part to some companies incorporated in the European Economic Area which are listed in the UK.

The London Stock Exchange has many non-UK companies listed on it which do not have a registered office in the UK, Channel Islands or Isle of Man and are therefore not subject to the Takeover Code. However, such companies often build in provisions within their constitutional arrangements which seek to replicate certain aspects of the Takeover Code and which should therefore be analysed at an early stage.

## When does the Takeover Code apply?

Generally speaking, an acquisition of a public company will be governed by the Takeover Code if the result would be for the purchaser and its "concert parties" to control 30% or more of the voting rights of the target. Concert parties include persons affiliated with the bidder and anyone cooperating with it under any arrangement or understanding to acquire or consolidate control of the target.

Strictly speaking, where the bidder is a state-owned entity, all other state-owned entities could be concert parties, which could have significant implications under the Code. The Takeover Panel's consent must be obtained to instead limit the definition of concert party to the relevant group.

Should a bidder breach the 30% threshold, it will generally be required to make a mandatory takeover offer for all the shares it does not own. Such offers must be for all cash or have an all cash alternative at a price at least equal to the highest price paid for shares in the previous 12 months. Such offers may only be subject to a limited number of conditions which are set out in the Takeover Code and which usually make a mandatory offer unattractive to a bidder.

Any acquisition no matter how small by any person connected with the bidder (e.g. a member of a concert party or any of its directors or subsidiaries) that takes the bidder over 30% will trigger a mandatory bid. Accordingly, from the very earliest time, the bidder must seek to manage the actions of such persons.

In addition to the provisions of the Takeover Code, it is also the case that interests acquired of 3% or more, and any subsequent acquisition or disposal of a percentage point or more, must be publicly disclosed.

## Certainty of funds

The Takeover Code requires a bidder to ensure that it can fulfil any cash consideration. This must be formally confirmed by an appropriate third party, usually the bidder's financial adviser. Since the financial adviser may be obliged to provide the money if the bidder fails to do so, it will require significant due diligence into the bidder's funding arrangements.

The Panel does not normally grant concessions for the NDRC and SAFE approvals required by Chinese companies. In practice, this requirement can present significant difficulties for bidders from the People's Republic of China since such approvals can take some time to obtain and are rarely granted in advance. Crucially, it can prevent such bidders from responding quickly to rival bids, rendering them uncompetitive.

Launching the bid through a pre-funded offshore subsidiary can be one solution to the certainty of funds issues for companies from the People's Republic of China.

## Put up or shut up

Following a holding announcement in which the potential bidder is identified, the bidder has just 28 days in which it must announce a firm intention to either make an offer or not: an obligation known as the "put up or shut up" regime.

A request can be made to the Panel for an extension to this 28-day window, and the Panel has indicated that it will usually agree to such an extension when agreed to by the target.

Where the bidder indicates that it does not intend to make an offer, a moratorium will be imposed preventing that bidder from making an offer for the target for a period of six months, although there are specific circumstances in which an offerer may make an offer before then.

The bidder may be bound by any statement made by anyone connected with the bid team which suggests that it does not intend to make an offer, giving rise to the six month moratorium on future bids. All such individuals should be appropriately controlled.

## Due diligence

The overriding need to keep the potential takeover confidential can restrict the amount of due diligence that can be carried out. Indeed, the bidder may be restricted to reviewing publicly available information, such as public registers and financial analysts' reports.

Crucially, in a competitive bid situation, anything shown to one bidder, whether publicly announced or not, must be made available to any rival bidder provided they specifically request such information and do not generally "fish" for information. This information must be provided by the target even where the second bidder is less welcome than the first.

The need for secrecy is paramount. All confidential information should be kept within a tight circle of directors and advisors within the bid team, with all recipients of information made aware of the necessity of secrecy.

## Protecting the Bidder's position

### Break fees

Historically, break fees of up to 1% of the value of the offer were commonly included to protect bidders in the event the deal did not complete. Such measures, and other inducement fees, are now prohibited under the Takeover Code except in certain limited circumstances, such as where the target is in serious financial distress or where it initiates a formal sale process.

### Acquiring shares

It is a criminal offence in the UK to deal in particular securities while in possession of "inside information" about them. It is likely that knowledge of the bid will be inside information preventing an advisor, director or shareholder from acquiring shares. However, the bidder's own knowledge of the bid should not amount to inside information.

Therefore, one practical way in which a bidder may seek to protect its position against the risk of being outbid is to, before announcing, purchase the maximum amount of shares permitted without incurring a disclosure obligation (i.e. <3%). By doing this, if subsequently outbid, the likely profit it will make from the shares it holds may limit its wasted legal and other expenses in preparing their bid.



## Key contacts at Addleshaw Goddard



**Simon Wood**

**Partner, Mergers and Acquisitions**

+44 (0)20 7160 3558 / +44 (0)7979 757373

simon.wood@addleshawgoddard.com



**Giles Distin**

**Partner, Corporate**

+44 (0)207 160 3747 / +44 (0)7939 273782

giles.distin@addleshawgoddard.com



**Charles Penney**

**Senior Partner, Corporate**

+44 (0)20 7544 5456 / +44 (0)7730 015277

charles.penney@addleshawgoddard.com



**Andrew M. Yang**

**Partner, Corporate Finance, Hong Kong**

+852 2253 3051 / +852 7730 015277

a.yang@aglaw.com



**Linda Fu**

**Head of China Desk, Corporate Finance**

+44 (0)207 788 5090 / +44 (0)7442 492878

linda.fu@addleshawgoddard.com



addleshawgoddard.com

---

Aberdeen, Doha, Dubai, Edinburgh, Glasgow, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo\*

\*a formal alliance with Hashidate Law Office

© 2017 Addleshaw Goddard LLP. All rights reserved. Extracts may be copied with prior permission and provided their source is acknowledged. This document is for general information only. It is not legal advice and should not be acted or relied on as being so, accordingly Addleshaw Goddard disclaims any responsibility. It does not create a solicitor-client relationship between Addleshaw Goddard and any other person. Legal advice should be taken before applying any information in this document to any facts and circumstances. Addleshaw Goddard is an international legal practice carried on by Addleshaw Goddard LLP (a limited liability partnership registered in England & Wales and authorised and regulated by the Solicitors Regulation Authority and the Law Society of Scotland) and its affiliated undertakings. Addleshaw Goddard operates in the Dubai International Financial Centre through Addleshaw Goddard (Middle East) LLP (registered with and regulated by the DFSA), in the Qatar Financial Centre through Addleshaw Goddard (GCC) LLP (licensed by the QFCA), in Oman through Addleshaw Goddard (Middle East) LLP in association with Nasser Al Habsi & Saif Al Mamari Law Firm (licensed by the Oman Ministry of Justice) and in Hong Kong through Addleshaw Goddard (Hong Kong) LLP, a Hong Kong limited liability partnership pursuant to the Legal Practitioners Ordinance and regulated by the Law Society of Hong Kong. In Tokyo, legal services are offered through Addleshaw Goddard's formal alliance with Hashidate Law Office. A list of members/principals for each firm will be provided upon request. The term partner refers to any individual who is a member of any Addleshaw Goddard entity or association or an employee or consultant with equivalent standing and qualifications. If you prefer not to receive promotional material from us, please email us at [unsubscribe@addleshawgoddard.com](mailto:unsubscribe@addleshawgoddard.com). For further information please consult our website [www.addleshawgoddard.com](http://www.addleshawgoddard.com) or [www.aglaw.com](http://www.aglaw.com).