TRAVERS SMITH

CRAVATH

PUBLIC TAKEOVERS IN THE UK

A GUIDE FOR US PE SPONSORS | NOVEMBER 2024

Executive Summary

- Following a record year in 2023, US PE sponsors – and their portfolio companies - have continued to explore take-private opportunities with respect to UK-listed public companies. This briefing sets out many of the key matters that should be considered by US PE sponsors on a proposed UK public takeover.
- In the early stages of a UK public takeover bid, a bidder should ensure that the potential transaction remains strictly confidential – any unexpected leak could have significant legal and strategic implications. In particular, advice should always be taken before: (i) approaching external parties (e.g., external due diligence providers, target shareholders, debt and equity finance providers, potential co-investors, and existing or potential LPs) in relation to a potential bid, or (ii) acquiring, selling or otherwise trading in any securities of the target.
- A bidder will generally have affirmative obligations under the UK Takeover Code (including with respect to price monitoring and leak announcements) once a potential bid has been discussed with external parties (including external due diligence providers and the other external parties referred to above) or considered by the PE sponsor's investment committee. Therefore, prior to reaching out to external parties, it would be prudent to ensure that legal advisors are brought up to speed.
- A threshold question will be how best to structure the bid – either as a tender offer or as a scheme of arrangement. It is most common for bids executed by PE sponsors to be implemented as a scheme of arrangement; however, this structure is a target-led process so will be less appropriate for a proposed or potential hostile transaction.
- The UK Takeover Code imposes prohibitions on entering into 'special deals' which are only available to certain target shareholders. Therefore, a clear strategy will be necessary from the outset with respect to the treatment of any existing management team of the target and the availability of any proposed equity rollover. It is common to navigate these restrictions by agreeing not to discuss potential incentivization with the management team prior to completion of the transaction.
- The target will be restricted from entering into a full-form merger agreement. Instead, it is typical to see the parties enter into a short co-operation agreement covering a limited range of matters (including the process for obtaining regulatory clearances and treatment of existing incentives). As a result, a bidder should not expect to receive substantive contractual deal protections, warranties or operating covenants from the target, its shareholders, or management team. However, the UK Takeover Code prescribes that a target should not carry out certain restricted actions once subject to a bid, which is similar to certain protections typically included in US M&A take-private transactions.
- A bidder will only be able to formally announce that it intends to make a bid after ensuring that it can fulfil, in full, any cash consideration being offered to target shareholders. This will require the bidder to navigate, upfront, a range of additional requirements (including heightened scrutiny with respect to conditionality) in respect of its debt and equity financing.
- While securities related litigation is rare in the UK, it will be prudent for a PE sponsor to manage expectations internally regarding the potential for personal liability to arise in respect of certain information published during a bid. In particular, this potential liability is likely to extend to members of the PE sponsor's investment committee.

1. Introduction

- US PE sponsors, and their portfolio companies, have continued to execute a significant number of UK public takeovers – launching bids for UK companies listed across both the Main Market of the London Stock Exchange and AIM.
- In 2023, UK public takeovers increased by 24 per cent., year-on-year, with 63 per cent. of these bids being backed by PE or other financial sponsors ("**UK P2Ps**").
- In the first six months of 2024, interest from PE-backed sponsors continued to remain strong – despite a resurgence in activity by strategic acquirers – with 13 of 30 UK public bids (43 per cent.) being UK P2Ps.
- PE-backed sponsors have shown a particular interest in using UK P2Ps to deploy funds across the technology, financial, logistics and real estate sectors.
- UK P2Ps have the potential to offer a range of benefits, including:
  - the availability of high-quality assets, which have – in recent years – been at low valuations relative to private and US-listed peers;
  - the improved alignment of interests with target management, who often wish to access private capital for the purposes of M&A or other growth opportunities; and
  - a relatively fast and flexible takeover regime, with bids typically occurring outside a formal sale process.
- UK P2Ps are notably different processes from both private M&A deals and US takeover bids. This briefing is intended to provide a trans-Atlantic perspective on certain key matters which US PE sponsors should consider when contemplating a potential UK P2P.

Contents

1. Introduction 2

2. Regulation of a UK P2P 3

2.1 Role of the Takeover Panel

2.2 Role of the UK Courts

3. Early-stage considerations........................... 4

3.1 Pre-deal secrecy and leak protection

3.2 Due diligence and clean teams

3.3 Analysis of concert parties

4. Formulating the takeover bid 7

4.1 Point of no return – the 2.7 announcement

4.2 Recommendation of the target board

4.3 Scope of the offer

4.4 Form of consideration

4.5 Deal protections

4.6 Structuring the transaction

4.7 Navigating the timetable

4.8 Navigating US securities laws

4.9 Consequence of an unsuccessful or partially successful bid

5. Procedural considerations 15

5.1 Management incentivization

5.2 Navigating the financing

6. Disclosure and liability 17

6.1 Key disclosure requirements

6.2 Scope of potential liability

Contributors 19

Appendix A 20

Indicative phases of a UK P2P

Appendix B 21

Indicative timetables from posting

2. Regulation of a UK P2P

2.1 Role of the Takeover Panel

- UK P2Ps are subject to the *City Code on Takeovers and Mergers* (the "**Code**") which is administered by a panel of takeover professionals (the "**Panel**"). The Code sets out principles of conduct which must be observed on public takeover transactions.
- Bid parties and their advisors confidentially liaise with the Panel from the outset, with an allocated staffer (typically an investment banker or attorney on secondment to the Panel) providing guidance and rulings on their interpretation of the Code for the duration of the bid. While the Panel is often willing to provide real-time guidance, the Panel will not (with limited exceptions) review or comment on scheme / offer documentation prior to its release.
- The Panel has statutory enforcement powers, including the power to fine, publicly sanction or 'cold-shoulder' parties (i.e., pronounce that, as a disciplinary matter, those parties should not be permitted to engage in future transactions governed by the Code – a tool recently used against seven individuals, including two attorneys). This tends to ensure that bidders abide by the Code, despite the potential challenge of overseas enforcement in some jurisdictions. While it is possible to appeal Panel decisions, in practice it is rare to do so.
- The Code sets out several key principles which require, among other matters, that: (i) all target shareholders of the same class must be treated the same (similar to the "all-holders rule" and "best-price rule" in US tender offers), (ii) all target shareholders must be given sufficient time and information (including the views of the target board) to reach a properly informed decision on the merits of an offer, (iii) artificial or distorted markets in respect of target securities must be avoided (i.e., parties to a bid should not make statements which could be misleading or which could create uncertainty), and (iv) all bidders must ensure that they can fulfil any cash consideration being offered.

2.2 Role of the UK Courts

- Due to the administration of the Code by the Panel, litigation is not generally a tool used during a UK takeover process. Instead, the role of UK Courts is typically confined to the clearance of takeovers implemented by way of a scheme of arrangement (see "***Structuring the transaction***" below). In such circumstances, the UK Courts' role is limited to approving the scheme of arrangement and confirming that the correct procedural steps have been followed.
- There has, however, been a steady rise of after-the-fact securities litigation in the UK, backed by a mature litigation-funding market. Such claims have leveraged specific legislation, notably the UK's Financial Services and Markets Act 2000, which imposes civil liability in connection with untrue or misleading statements in, and/or omissions from, published information. It is also possible for a tortious claim to be brought for negligent misstatement, if a statement has been relied on by another person and that person has suffered loss as a consequence.
- In particular, while rare, claims could be brought in the UK following completion of a bid: (i) by former shareholders of the target against the target, the bidder or other persons who have accepted responsibility in connection with the bid (such as their respective directors, or members of the PE sponsor's investment committee ("**IC**")), or (ii) by the bidder against the target's directors. See "***Scope of potential liability***" below for further information.
- The role of UK Courts on a public takeover in the UK differs considerably to the US, where shareholder litigation is common both in federal and state courts. Such claims in the US may be brought during the pendency of a transaction, or after closing. Federal claims are generally brought under Sections 14(a), (d) and (e) of the US Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), challenging disclosures that parties may have made in connection with a transaction. However, it is also common to see other claims made in respect of US public company takeovers, including alleged breaches of fiduciary duties under state law, stockholder appraisal litigation and litigation related to demands for books and records.

- In this respect, despite the potential for members of the PE sponsor's investment committee to attract liability in the UK for certain published information on a UK P2P, US PE sponsors may take comfort that the overall risk of securities litigation in connection with a UK P2P is lower than would otherwise typically be the case on a US takeover bid.

3. Early-stage considerations

An illustrative flow chart showing the key phases of a UK P2P is set out in *Appendix A*.

3.1 Pre-deal secrecy and leak protection

- The Panel is particularly focused on ensuring the secrecy of an offer before an announcement is made to the market. All persons who are privy to confidential information concerning an offer, or a possible offer, must seek to minimise the chances of a leak of that information; any such leak can have significant legal and strategic implications.

Avoiding unlawful conduct: improper disclosure and insider dealing

- The existence of an offer, or possible offer, is likely to constitute "inside information" (i.e., material non-public information) for the purposes of both UK market abuse regulation and the UK Criminal Justice Act. As a result, a bidder's representatives should always ensure that they do not: (i) disclose the existence of the offer, or possible offer, except in the proper course of the exercise of their employment, profession, or duties, or (ii) encourage another person to deal in the target's securities. For instance, it may be unlawful to discuss a possible offer in a social context, or to give advance warning of an offer to select investors. While it is often possible to navigate these restrictions on a UK P2P, care needs to be taken (including, where appropriate, imposing formal confidentiality obligations and using customary market-sounding protocols).
- In addition, it may be unlawful to trade in listed securities while holding inside information with respect to those securities; any such conduct may amount to insider dealing in the UK. As a result, third-parties – particularly existing shareholders of the target – should only be given, and will only want to be in receipt of, such inside information for a very short period prior to the public announcement of the offer. Typically, a bidder will be allowed to buy target shares in the market if the only inside information that it possesses is the knowledge of its potential bid (rather than, for instance, any material information obtained through private diligence or other enquiries) – but specific advice should always be taken.
- US PE sponsors should be conscious that the UK regime with respect to the disclosure of inside information and insider dealing is different from the US in many significant respects. Notably, the UK regime does not require any misappropriation of confidential information, or breach of any duty owed to the source of the relevant information; restrictions apply regardless of how inside information has been obtained. As a result, certain disclosures and dealings may be unlawful in the UK, even where they would be permitted under US law.

Limiting inside information: the "Rule of six"

- To aid in maintaining secrecy of the deal, without either obtaining consent from the Panel or publicly announcing the transaction, a bidder is only permitted by the Code to approach a maximum of six external parties to assist the bidder in considering an offer (for such purposes excluding immediate advisors and employees of both the target and the bidder, in each case who need to know). Such external parties generally include finance providers, LPs, co-investors, target shareholders, pension trustees and key customers / suppliers.
- The rule of six operates on a rolling basis for finance providers: the Panel will typically allow a bidder to discount any lender who declines to participate. In addition, the Panel will often be open to expanding the list of external parties by a small number, typically when the external party is a sophisticated institution (provided that sufficient safeguards are established).

- As a practical matter: (i) any potential bidder should work with its financial advisor at the outset of a UK P2P to identify who it wants to approach before an announcement is made to the market, and (ii) any such list of external parties should be monitored and, if applicable, refreshed.

Price monitoring during 'active consideration' by the bidder

- A potential bid will become subject to the Code once it is under 'active consideration' by a potential bidder. It is therefore important for a potential bidder to recognise the usual triggers for active consideration so that it can proactively engage professional advisors at the appropriate time and comply with its corresponding obligations under the Code.
- This threshold for active consideration requires more than just undertaking general day-to-day desktop analysis of M&A opportunities. The typical triggers are: (i) the engagement of an external advisory team for a specific deal (with or without an engagement letter), (ii) consideration of the potential bid at the IC level, and/or (iii) speaking to other external parties (see "***Limiting inside information: the Rule of six***" above).
- During any such active consideration, it becomes the responsibility of the bidder (typically through its financial advisor) to monitor movements in the target's share price and/or market rumour and speculation with respect to the target, each of which may trigger an obligation for the bidder to make a leak announcement (see "***Leak consequences: 'put up or shut up'***" below). However, once the bidder makes an 'approach' (as defined below), this responsibility to monitor share price movements switches to the target (unless the target unequivocally rejects the bidder's approach).
- This 'approach' phase will occur when a director or representative of, or advisor to, the target is informed that a potential bidder is considering the possibility of making an offer for the target's shares. The manner of the approach may be informal, and it may be at the very early stages of the bidder's preparations. There is no requirement for an approach to be in writing, for there to be an indicative offer price nor for any terms or conditions to be specified.

Leak consequences: 'put up or shut up'

- If, after the potential bidder begins actively considering an offer for the target, there is: (i) a material or abrupt movement in the target's share price, or (ii) rumour and speculation about the target, the Panel needs to be notified immediately. The Panel may then require a leak announcement to be made to the market.
- With respect to the price monitoring obligations of a potential bidder, the Panel typically considers the following matters as being relevant for determining whether a price movement is material and/or abrupt, and therefore when the Panel should be consulted:
  - a movement of 10 per cent. or more in the target's share price above the lowest share price since the possible offer was first actively considered (unless the Panel has already been notified of the potential offer); and/or
  - a rise of 5 per cent. or more in the target's share price in the course of a single day.
- If the Panel requires a leak announcement, it will expect the relevant party to update the market within minutes. Financial advisors will therefore typically agree to a leak protocol with their client, pre-authorising the financial advisor to release a leak announcement on their client's behalf without further sign-off, if requested by the Panel while their client is not immediately contactable.
- A leak announcement by the target must identify all bidder(s) with whom the target is in talks (even if a competing bidder is not itself the subject of the rumour or speculation), subject to limited exceptions in respect of a formal or private sale process.
- A leak announcement will trigger what is known as the Put Up or Shut Up period ("**PUSU**") – a 28-day period within which the named bidder(s) must either announce a binding intention to make an offer (see "***Point of no return – the '2.7 announcement'***" below) or withdraw (by announcing that it does not intend to make an offer). If a bidder announces that it does not intend to make an offer, it will generally be precluded from doing so for six months, except in limited circumstances.
- The fundamental principle underlying the PUSU period is that a target should not be exposed to

an excessive period of disruption by reason of an unwelcome bid. In practice, depending on the relevant stage of the bidder's discussions with the target and potential financing sources, it may be difficult to finalize a possible bid within the time permitted. If the bid is proceeding towards recommendation, the 28-day PUSU period can be extended at the request of the target's board (with the consent of the Panel); however, any leak could be strategically disadvantageous for a hostile bidder.

- To maintain secrecy and mitigate the risk of a leak announcement being required, a potential bidder may wish to consider the extent to which it can feasibly delay engaging with potential third-party financiers and, subject to the terms of any co-investment rights, prospective co-investors with respect to a UK P2P (e.g., by seeking bridge finance).

3.2 Due diligence and clean teams

- As with a private M&A transaction, the target will always require that a potential bidder enters into a confidentiality agreement (an "**NDA**") before it discloses any non-public diligence materials. It is also common on a UK P2P for a target to require that a potential bidder provides a standstill undertaking (i.e., to confirm that the bidder, and its affiliates, will not trade in target shares or make a bid without the target's consent). Subject to certain carve-outs, a standstill undertaking can restrict the ability of a potential bidder to subsequently launch a hostile bid. This is substantively similar to the typical approach with respect to NDAs in US transactions.
- The diligence process for a UK P2P differs from a private M&A deal. In particular, a target's board will generally be wary of disclosing sensitive information to a prospective bidder as: (i) disclosure obligations for public companies in the UK are already stringent, meaning that material price sensitive information relating to the target's business will often already be in the public domain, and (ii) the Code requires that any information made available by the target to one potential bidder must, upon request, be equally and promptly made available to any other *bona fide* potential bidder (even if it is a competitor of the target).
- Subject to this requirement for the target to provide equality of information, there is no strict legal obligation on target directors to provide due diligence information to potential bidders. However, target directors are likely to share some business-related information if: (i) the potential bidder has made an approach for a price which the target board is inclined to recommend, or (ii) the target's directors, in considering their fiduciary duties, believe that sharing such information might result in a recommendable offer.
- A potential bidder will frequently need to consider certain non-public commercially sensitive information to determine whether anti-trust or other regulatory consents / approvals are required and, if so, to make the requisite filings. In such circumstances, it is possible for a clean team arrangement to be put in place, such that certain commercially sensitive information can be provided on an "outside-counsel only" basis.
- If such clean team arrangements have been approved by the Panel, the target will generally not be required to provide information shared in accordance with those arrangements to a competing bidder. Otherwise, such information must, upon request, be equally and promptly made available to any other *bona fide* potential bidder (even if it is a competitor of the target).

3.3 Analysis of concert parties

- The Code extends certain rules which apply to a bidder, to other persons who are (or are deemed to be) acting together with the bidder to obtain or consolidate control of a target, or to frustrate a bid ("**concert parties**"). For instance, the concert parties of the bidder will also be subject to certain disclosure requirements and dealing restrictions. In particular, dealings by any concert parties (including those prior to announcing the bid) could affect the minimum price and form of any consideration which must be offered by the bidder.
- The Code contains several rebuttable presumptions as to who is acting in concert with a party involved in a public bid. These presumptions generally extend not only to the relevant fund entities, but also all portfolio companies controlled by the funds. These rebuttable presumptions have the

potential to be problematic for a PE sponsor that is considering a UK P2P if: (i) the PE sponsor's portfolio includes asset managers, or (ii) there is a particular concentration with respect to ownership of the bid vehicle on a look-through basis, whether by reason of the relevant fund's limited partnership interests, co-investment rights or the use of a consortium offer.

- Where a bid is made by a consortium, members may consider it prudent to enter into a bid conduct agreement, pursuant to which each member contractually agrees that they shall not, among other matters, take any action directly or indirectly which might adversely impact the consortium's bid, including the acquisition of target shares (other than pursuant to the bid).
- Accordingly, a PE sponsor should undertake an analysis of the scope of its potential concert parties early in the bid process (in any event, prior to announcing a firm intention to make an offer) so that appropriate steps can be taken by the PE sponsors' advisors to seek waivers from the Panel (where available) and/or mitigate these potential risks (typically by sending out dealing 'stop notices' immediately upon the offer becoming public).

4. Formulating the takeover bid

4.1 Point of no return – the 2.7 announcement

- Market certainty is a key principle of the Code and – unlike in a typical US merger – the Panel regulates whether the bidder is able to invoke any conditions to the transaction's consummation (notwithstanding that such conditions may have been expressly agreed between the bidder and the target).
- Once a bidder publicly announces a firm intention to make an offer (such announcement being referred to as a "**2.7 announcement**"), the offer timetable under the Code will commence. Following such an announcement, it is very unlikely that the Panel will permit a bidder to walk away from its offer (even where circumstances or market conditions change). The release of a 2.7 announcement is therefore generally considered to be the point of no return for a bidder on a UK P2P.
- Specific regulatory and occurrence / non-occurrence conditions can only be invoked if they are materially significant in the context of the bid. The threshold is even higher for the invocation of any material adverse change ("**MAC**") condition (in two instances the Panel determined that changes arising in connection with the 9/11 terrorist attacks and COVID-19 were insufficient to allow a MAC to be invoked). This is consistent with general practice in the US, where courts have generally been reluctant to find that a MAC has occurred.
- It is therefore crucial that prior to the 2.7 announcement being made: (i) all due diligence and financing arrangements are complete on a certain funds basis (see "*Requirement for certain funds*" below), and (ii) the bidder has every reason to believe that it will continue with, and be able to implement, its offer.
- However, a bidder will not be restricted from invoking certain conditions which relate to the offer process (e.g., failure to complete the deal by the agreed long stop date or failure to obtain the requisite support of target shareholders). In this respect, a bidder may secure some down-side protection by establishing mini long stop dates for key milestones, retaining the ability to waive these deadlines.

4.2 Recommendation of the target board

- The target board must obtain competent independent advice from a financial advisor (known as the "**Rule 3 advisor**") as to whether the financial terms of any bid (including any alternative offer, e.g. the issue of shares in the bidder in lieu of cash consideration) are fair and reasonable. The substance of such advice must be disclosed to target shareholders.
- Target directors will also need to be mindful of their fiduciary duties in deciding whether or not to recommend an offer, including their duty to act in good faith to promote the success of the company for the benefit of shareholders as a whole.
- These requirements and considerations with respect to the target board's recommendation are generally consistent with those applicable in the US. However, in practice, given the nature of

directors' duties (particularly the absence of a prescriptive duty under English law analogous to Revlon duties in Delaware) and the rarity of shareholder litigation in the UK, the process for arriving at the target board's recommendation is typically subject to less after-the-fact scrutiny on a UK takeover bid.

4.3 Scope of the offer

- While a takeover bid will generally be undertaken in respect of a target's common equity, the Code requires that a bidder must also make an appropriate corresponding offer to the holders of other classes of equity share capital and the holders of options, restricted stock units, warrants or other subscription rights, unless they are "underwater" / out of the money.
- In particular, in order to properly price the bid and determine any cash funding requirements, a bidder will want to understand (among other matters) the extent to which any unvested awards will become exercisable or lapse as a consequence of a completed bid. Assumptions with respect to vesting should be diligenced and, where appropriate on a recommended bid, agreed with the target prior to the publication of the 2.7 announcement. In the context of a recommended bid, full details in respect of such unvested awards will typically be provided to the bidder following the execution of an NDA (see "***Due diligence and clean teams***" above).
- While US-listed companies often operate stock-based compensation plans which provide for double-trigger acceleration (i.e., requiring both a change of control and cessation of employment in order to accelerate the vesting of any awards), it is common in the UK to accelerate the vesting of awards solely upon a change of control of the target.
- The extent to which unvested awards can be exercised is usually subject to the discretion of the target's compensation committee. Generally, in the context of a recommended bid, the committee will agree to take into account the extent to which the applicable vesting period has elapsed, and applicable performance conditions satisfied, at the time the bid completes. Therefore, the vesting of awards is often a negotiated point.

4.4 Form of consideration

Choice of consideration

- The most common form of consideration offered on a UK P2P is cash. However, a bidder can also offer consideration in the form of securities, such as unlisted equity in the relevant bid vehicle ("**stub equity**"), loan notes or contingent value rights ("**CVRs**"). While loan notes and CVRs are comparatively rare in practice, offers of stub equity (particularly as a partial alternative to cash) have become increasingly popular on UK P2Ps – allowing a bidder to: (i) appease target shareholders wishing to retain continued up-side exposure, and (ii) implement a rollover by management as part of its overall approach to incentivization.
- A bidder is prohibited from entering into any favorable arrangements or 'special deals' which are only available to certain target shareholders. As a result, a rollover by management for stub equity is only available if: (i) offered on equal terms to all target shareholders, (ii) limited to an approved management incentive package (see "***Management incentivization***" below), or (iii) if the Panel can be persuaded that the rolling shareholders will have sufficient influence so as to be 'joint offerors' alongside the bidder (however, this is a very high threshold and is not usually available as an exemption for most management teams).

Securities exchange offers

- A bidder offering securities (in the form of stub equity or otherwise) should consider: (i) the specific terms of the relevant securities, including transfer rights, voting, and governance (as applicable), (ii) any legal restrictions that may apply in offering securities to target shareholders, and (iii) the possibility of a UK or EU prospectus being required.

- It is common to structure the bid as a scheme of arrangement, as the prevailing legal view is that a scheme of arrangement does not involve an offer to the public, and so a prospectus is not required in respect of the issue of unlisted securities to target shareholders as consideration for the bid. Where target shareholders are offered the opportunity to receive securities as a full or partial alternative to cash, the bidder will also typically require a warranty from electing shareholders confirming that they are legally permitted to receive those securities.
- To the extent that any securities form part of the consideration of the takeover bid, the issuance of such securities to US target shareholders as part of the transaction would typically be made pursuant to an exemption from the US Securities Act of 1933, as amended (the "**Securities Act**"). While the issuance of securities pursuant to a UK scheme of arrangement will be exempt from registration pursuant to Section 3(a)(10) of the Securities Act, further consideration by the bidder of appropriate exemptions (or the exclusion of US persons, where appropriate) will be necessary in the case of a tender offer.

4.5 Deal protections

Limited availability of contractual protections

- Once an offer is reasonably in contemplation, the Code imposes a wide prohibition on deal protections and other deal-related arrangements (despite such provisions being common practice on private M&A and US public M&A transactions). Except for specified exemptions, neither the target nor its concert parties will be permitted to enter into any agreement, arrangement or commitment with the bidder or its concert parties in connection with the offer.
- As a result, on a UK P2P:
  - the parties will typically be unable to enter into a comprehensive merger or business combination agreement, or otherwise agree to exclusivity or break fee arrangements;
  - there will be no warranties, representations or indemnities from the target, its shareholders, or management team in respect of its business (whether for recovery purposes, or to trigger termination rights); and
  - the target will not be contractually restricted with respect to the operation of its business (however there are restrictions under the Code against certain conduct referred to as 'frustrating action', as described further below).
- The Code permits the target to enter into limited arrangements in connection with the offer, including: (i) obligations to maintain confidentiality, (ii) non-solicitation provisions with respect to employees, customers and suppliers, (iii) obligations with respect to the provision of information, or assistance, for the purposes of obtaining regulatory clearances, (iv) arrangements imposing obligations only on the bidder, and (vi) provisions regulating employee incentive arrangements. These measures are often negotiated between the bidder and the target in the form of a co-operation agreement.
- Importantly, the Code also permits the bidder to enter into irrevocable commitments and letters of intent with the target's shareholders (see "***Tactical use of shareholder undertakings / stake-building***" below). Given the absence of any exclusivity or break fees, such arrangements with target shareholders can be critical to mitigate the risk of a competing bid.
- A copy of any such offer-related arrangements (including the co-operation agreement, any irrevocable commitments and/or letters of intent) must be made publicly available on a website, on an unredacted basis, promptly following release of the 2.7 announcement.

Restrictions on the target imposed by the Code

- In the absence of interim operating covenants, bidders generally take comfort from restrictions imposed by the Code on the target taking 'frustrating action', unless approved by the target's shareholders in general meeting or undertaken with the consent of the Panel.
- This prohibition would generally restrict the target from: (i) issuing or dealing in its shares (such as implementing a rights plan or issuing, transferring or redeeming share capital), (ii) disposing or acquiring any material assets, or (iii) entering into or terminating a material contract, or any other

extra-ordinary action which may result in the frustration of the bid. The use of poison pills by a target in connection with a UK P2P is therefore, essentially, prohibited.

- In addition, the Code provides procedural certainty to a bidder, with express obligations and deadlines on when key stages of the offer need to be implemented. In particular, a target company must implement a UK P2P (structured as a scheme of arrangement) in accordance with the published timetable, unless the board of the target withdraws its recommendation of the offer.

Limited availability of R&W insurance

- As there can be no comprehensive merger agreement, there are no business warranties given by the target, its shareholders, or management team. In principle, it is possible for a bidder to purchase representations and warranties insurance ("**R&WI**") in connection with a UK P2P based on a synthetic set of warranties. However, in practice, such insurance products are not readily available to the market on commercially viable terms. The use of R&WI on a UK P2P would also face impediments: (i) under the Code (e.g., the "rule of six"), and (ii) as a result of the standards expected within the insurance industry (for instance, underwriters may be uncomfortable that the bidder has only undertaken diligence on the target at a high-level). US PE sponsors should therefore assume that, in addition to the absence of warranties being provided, R&WI will not be available on a UK P2P.

Tactical use of shareholder undertakings / stake-building

- The Code contains various rules which prescribe the process and content for any discussions between the bidder and target shareholders. In particular, the bidder's financial advisor will generally need to chaperone discussions with target shareholders so that such discussions can be carefully managed, documented and reported to the Panel. The primary aim is to ensure that no material new information or significant new opinion (which is not readily available to all other target shareholders) is provided to such target shareholder. The bidder will also need to ensure that interactions with target shareholders comply with any NDA.
- It is common to seek irrevocable undertakings from target management shareholders (in a recommended bid) and institutional shareholders to support the bidder's offer. However, practice varies with respect to the terms of these undertakings. For instance, institutional investors will typically want the ability to switch to a significantly superior offer, or may only be willing to provide a bidder with a non-binding letter of support. Any irrevocable undertakings or letters of intent obtained by the bidder must be made publicly available on a website, on an unredacted basis, promptly following release of the 2.7 announcement.
- A bidder may also wish to increase the likelihood of success of its offer by building a stake in the target through the purchase of target shares. There are, however, several strategic and Code implications to consider (which may differ depending on the relevant structure used to implement the bid). In particular: (i) there may be insider dealing issues, or standstill restrictions in the NDA, (ii) if the price paid for target shares is higher than the proposed offer price, the offer price must be increased to that higher price (depending on the timing of the relevant acquisition), and (iii) the acquired shares may not count towards the relevant approval / acceptance threshold for the bid. A bidder should therefore always discuss with its financial and legal advisors, in advance, the merits and method of stake-building.

4.6 Structuring the transaction

- A UK P2P can be structured either as a 'scheme of arrangement' or as a 'tender offer'. Each of these options have different Code and strategic considerations, including with respect to relevant approval / acceptance thresholds, the expected timetable and the degree of control maintained by the bidder over the transaction process.
- The preferred structure of the bid will generally be a threshold question to be determined by the PE sponsor, in conjunction with its legal and financial advisors, at the start of the transaction process. Most UK P2Ps are implemented by way of a scheme of arrangement rather than a tender offer (with 28 of the 36 UK P2Ps announced in 2023 – approximately 78 per cent. – being structured as schemes).

Scheme of arrangement

- A scheme of arrangement is a statutory procedure, supervised by UK Courts. The scheme process generally requires the offer to be approved at a general meeting by 75 per cent. in value, and a majority in number, of target shareholders who vote in person or by proxy. Any target shares held by the bidder and its group will be excluded for the purposes of this vote.
- The offer will then need to be approved by the UK Courts; however, while the UK Courts must assess the fairness of the scheme, it is not for them to determine the commercial merits of a bid. It would be very unusual for the UK Courts to block an offer which has been approved by the target's shareholders, unless there is a procedural issue with respect to the scheme of arrangement.
- If approved, all target shareholders will be bound by the bidder's offer and 100 per cent. of the target's shares will be transferred to the bidder on closing (regardless of whether a shareholder voted for or against the offer, or failed to vote).
- Debt financiers will typically prefer a UK P2P to be structured as a scheme of arrangement because, if the scheme becomes effective, it guarantees that the bidder will be able to: (i) acquire 100 per cent. of the target's common equity, and (ii) de-list and re-register the target as a private company shortly following closing (thereby avoiding financial assistance rules applicable to UK public companies, which restrict them from granting security in connection with the purchase of its shares).

Contrast to a US 'one-step' merger

The UK scheme process is similar to a US 'one-step' merger. In particular, both processes allow the target to formally bind its stockholders by operation of a vote. However, the two processes vary in several meaningful ways:

1. **Court review**: In a US one-step merger, the bidder negotiates a merger agreement with the target's board of directors, which will be much more extensive than the co-operation agreement typically negotiated on a UK P2P. By contrast to the UK process – where the UK Court considers the scheme process, including the corresponding scheme terms, in approving the scheme – US Courts do not consider or approve the merger agreement (although the SEC does review proxy materials filed after the target's board of directors approves the merger agreement).
2. **Voting threshold**: In a US one-step merger, once the target board approves the merger agreement, it is then submitted to the stockholders for their approval. The stockholder approval threshold varies according to, among other things, state law and the target's governing documents. However, a one-step merger commonly requires the approval of a majority of the outstanding voting stock. This threshold is significantly lower than that required on a scheme of arrangement in the UK, which requires 75 per cent. in value, and a majority in number, of target shareholders who vote.
3. **Minority protections**: In a US one-step merger, the bidder and its group would generally be entitled to vote at the stockholders' meeting to approve the merger. However, dissenting stockholders may exercise formal appraisal rights – pursuant to state laws – to receive 'fair value' for their stock in the target (rather than the price paid pursuant to the bid). By contrast, while there are no general appraisal rights under English law, minority stockholders would typically be protected on a UK scheme by excluding the bidder and its group from voting their target shares. As a result, stake-building by the bidder (or its group) is not generally an effective strategy to secure the necessary approval threshold where the bid is implemented as a UK scheme.

Tender offer

- A tender offer on a UK P2P involves an invitation directly to target shareholders to tender their shares in the target to the bidder – there is no court involvement in a tender offer. By contrast to a scheme of arrangement – which is a target-led process and will therefore require, in practice, an initial recommendation and ongoing support from the target's board – a tender offer can be used with or without such a recommendation (i.e., on a hostile bid).
- The Code requires, as a condition to any such tender offer, that the bidder has acquired or agreed to acquire (either pursuant to the tender offer or otherwise) over 50 per cent. of the target's shares.

For such purposes, target shares already held by the bidder and its concert parties prior to the tender offer will count towards this threshold. However, a bidder may, and often will, set a higher acceptance threshold.

- For instance, a bidder will require at least 75 per cent. of target shares in order to delist the target from trading on the Main Market or AIM (as applicable) and re-register it as a private company. As a result, debt financiers will generally insist that any tender offer includes a minimum acceptance threshold of 75 per cent., and that any waiver of this condition by the bidder requires their consent. This clear route through to delisting and re-registration ensures that there are no impediments to the target group subsequently granting security over its assets in respect of the new debt financing arrangements.
- Once a bidder reaches acceptances in respect of shares representing 90 per cent. of the target shares under offer (excluding shares already held by the bidder and its associates), there is a statutory process to 'squeeze-out' any remaining shareholders. Where a UK P2P is structured as a tender offer, it is therefore common for the bidder to initially prescribe a minimum acceptance condition set at 90 per cent. of the target shares under offer (reserving the right to subsequently waive this condition down to a lower threshold, if required or considered necessary to close the transaction).

Contrast to a US 'two step' transaction

In the US it is common for public takeovers to be implemented as a 'two-step' transaction where the bidder: (i) makes an initial tender offer to acquire stock directly from target stockholders, and (ii) subsequently executes a 'back-end' or 'squeeze-out' merger to acquire any remaining untendered target stock. In substance, a UK tender offer provides many similarities to a two-step transaction in the US. However, the two processes vary in several meaningful ways:

1. **Squeeze-out options**: On a UK tender offer, if the bidder reaches acceptances in respect of 90 per cent. of the target shares under offer (excluding shares already held by the bidder and its associates), it will generally have a right to squeeze-out any remaining target shareholders by following a prescribed statutory process. Similarly, while the requirements in the US vary according to the law of the relevant states, under Delaware law the bidder would generally be able to effect a 'short-form' merger (thereby squeezing out minority target stockholders on an expedited basis without a stockholder vote) where it has accumulated 90 per cent. of the target stock under offer.

   However, a significant difference arises where the bidder has failed to reach this initial squeeze-out threshold by the end of the tender offer period. On a two-step transaction in the US, a bidder can still effect the corresponding back-end merger to squeeze out minority stockholders: (i) by acquiring sufficient target stock by other means, to satisfy the squeeze-out threshold for a short-form merger, or (ii) by using the same process as a one-step merger, to implement a long-form merger (with the bidder typically being able to ensure, if required, that any stockholder vote passes given it would generally own a majority of outstanding stock as a result of the tender offer).

   By contrast, on a UK tender offer, if the 90 per cent. squeeze-out threshold has not been satisfied by the end of the tender offer period, a bidder would have limited options to squeeze-out remaining target shareholders by alternative means. In particular: (i) the bidder would be excluded from voting on a subsequent scheme of arrangement to squeeze-out minority shareholders in the target, and (ii) the Code imposes restrictions on the bidder's ability to offer improved terms to remaining shareholders for at least six-months following completion of the tender offer.

2. **Acceptance threshold**: For the reasons set out above, a UK tender offer is usually subject to an initial minimum acceptance condition set at 90 per cent. of target shares under offer. This is a much higher threshold than that typically prescribed on a two-step transaction in the US, where the tender offer would often be subject to a minimum acceptance condition set at a majority of the target's stock (on a fully diluted basis).

   It is common for the bidder on a UK tender offer to waive the 90 per cent. minimum acceptance condition down to a lower threshold to encourage target shareholders to accept the offer – without any assurance that the corresponding squeeze-out threshold will ultimately be satisfied. As a result, in practice, a UK tender offer can provide a less certain outcome for the bidder than a scheme of arrangement (which offers an all-or-nothing approach with respect to ownership). This execution risk is one of the main reasons why tender offers are less popular in the UK.

4.7 Navigating the timetable

- A UK P2P timetable will depend on several external factors, with regulatory approvals generally being the most significant. The key stages of a UK P2P will also differ depending on whether the bid is being implemented by way of a scheme of arrangement or a tender offer. An illustration of the typical timetable for a UK P2P is set out in *Appendix B*, with key milestones described further below.

Scheme of arrangement

- A scheme document (containing the full terms of the offer and a circular to convene two meetings of target shareholders) must be posted to the target's shareholders within 28 days from the date of the 2.7 announcement, unless the parties agree a later date (with the Panel's consent).
- Target shareholders will be required to vote to approve the scheme at a shareholder meeting not less than 21 days following publication of the scheme document.
- The scheme must be approved by the High Court in the UK once shareholder approval is obtained from target shareholders. The timing of this approval by the UK Court will often depend on its availability, but can occur as early as one week after target shareholder approval.
- The scheme will become effective once the target files the court order with the UK's registrar of companies (usually within two business days of the scheme being approved by the UK Court).

Tender offer

- An offer document (containing the full terms of the tender offer) must be posted to the target's shareholders within 28 days from the date of the 2.7 announcement, unless the parties agree a later date (with the Panel's consent).
- If hostile, the target will have 14 days following the publication of the offer document to publish a separate defence document.
- The offer must remain open for a minimum of 21 days following the publication of the offer document (although, this minimum period may need to be extended to comply with US tender offer rules – see "*Navigating US securities laws*" below).
- The last day that the offer can become unconditional (i.e., all offer conditions, including regulatory approvals, being satisfied or waived) is 60 days after the offer document is posted (although this time period can be suspended on day 37 if regulatory approvals have not yet been obtained). Accepting shareholders can withdraw an acceptance at any time up to the point that the offer becomes or is declared unconditional.
- The offer must remain open for a minimum of 14 days after it has become, or been declared, unconditional.

General – settlement

- The settlement of consideration (including the payment of any cash to target shareholders) must take place within 14 calendar days of the takeover becoming effective / unconditional. As set out below (see "*Timing of drawdown and co-investment rights*" below), this has important considerations with respect to the drawdown of funds and facilitation of co-investment rights.

4.8 Navigating US securities laws

- Notwithstanding that the bid vehicle on a UK P2P would usually be incorporated in the UK, it will still be necessary to consider US securities laws, particularly the US tender offer rules. This is particularly important in the context of a UK P2P backed by a US PE sponsor given: (i) the increased appetite for shareholder litigation in the US, (ii) the geographic nexus of US PE sponsors from an enforcement perspective, and (iii) the potential for affiliate liability to apply under applicable US securities laws.

- The applicability of the US tender offer rules to a UK P2P will be driven primarily by: (i) the level of US beneficial ownership in the UK target company, and (ii) the structure of the transaction itself (i.e., whether the transaction is effected through a tender offer or by means of a UK scheme of arrangement). The key considerations with respect to a bid are set out below.

Tender offers

- The applicability of the various rules on tender offers in the US is often a fact-driven analysis. As a general matter, the tender offer rules will apply unless an exemption (discussed below) is available. The US tender offer rules are set out in Sections 14(d) and 14(e) of the Exchange Act and Regulations 14D and 14E, respectively, thereunder. These rules apply to any tender offer if the target's securities are held at least in part by US beneficial owners, regardless of the jurisdiction of incorporation of the bidder / target.
- Provided that the target is a "foreign private issuer" (as defined in Rule 405 of Regulation C under the Securities Act), nearly all UK P2Ps will be able to utilise one of the available "cross-border" exemptions from the US tender offer rules. These exemptions are structured in a two-tier system based on the level of US beneficial ownership in the target:
  - Tier I exemption – the Tier I exemption applies to cross-border tender offers where US beneficial owners hold less than 10 per cent. of the target's securities. The exemption offers broad relief from the US tender offer rules, including the US requirements relating to the minimum offer period, notice of extensions, prompt payment and target response requirements, such that the bidder generally only needs to comply with UK rules and practice.
  - Tier II exemption – the Tier II exemption applies to cross-border tender offers where US beneficial owners hold between 10 per cent. and 40 per cent. of the target's securities. This exemption offers more limited relief from the US tender offer rules, including relief from the Regulation 14E requirements around notice of extensions and prompt payment. However, the offer must remain open for at least 20 US business days – imposing a more onerous requirement than the minimum UK requirement of 21 days.
- If the target: (i) is not a foreign private issuer, or (ii) has more than 40 per cent. of its equity securities held by US beneficial owners, then a UK P2P structured as a tender offer will not be eligible for any relief from the US tender offer rules under either exemption.
- In order to ensure that the bidder complies with applicable US tender offer rules, the bidder's advisers will need to undertake a look-through analysis of the target's register (making reasonable inquiry of nominee holders to determine the residency of underlying accounts). In practice, this look-through analysis should be undertaken prior to the release of the 2.7 announcement, but not more than 60 days prior to such date.

Schemes of arrangement

- Takeover bids effected by means of a UK scheme of arrangement are generally not considered to be tender offers and therefore are not subject to the US tender offer rules. To the extent that any securities will be issued to US holders as part of the transaction, a UK scheme of arrangement also has the benefit of qualifying for an exemption from registration under Section 3(a)(10) of the Securities Act. Accordingly, it is typically more straightforward to navigate US securities laws on a UK P2P undertaken as a UK scheme of arrangement.

4.9 Consequence of an unsuccessful or partially successful bid

- Where an offer has failed (i.e. it has been withdrawn or has lapsed), except in limited circumstances and with the Panel's consent, the bidder and its concert parties will be restricted for a 12-month period from: (i) making another offer or possible offer for the target, and/or (ii) making any statement which raises or confirms the possibility of an offer being made. A bidder will usually be able to obtain the consent of the Panel if the target's board agrees, or if a third party announces its own firm intention to make an offer.

- If a bidder acquires more than 50 per cent. of the ordinary shares in the target pursuant to a tender offer, but is unable to achieve sufficient acceptances to acquire 100 per cent. of the target, when the offer closes the bidder will subsequently be prohibited (except in limited circumstances) from making a second improved offer for the remaining ordinary shares for six months following closure of the first offer.

5. Procedural considerations

5.1 Management incentivization

- A PE sponsor may, with the consent of the Panel, offer members of the target management team a 'special deal', provided that such arrangement is: (i) disclosed in the offer / scheme document sent to target shareholders, together with an opinion from the target's financial advisor with respect to the fairness and reasonableness of the arrangement, and (ii) approved by an ordinary resolution of independent target shareholders (i.e., more than 50 per cent. of votes cast) at a general meeting.
- The Panel will usually provide consent for such purposes where management are permitted to exchange their target shares for shares in the bidder, in fair and reasonable circumstances. This may include the issue of incentives to management on completion of the bid. Any related long form documentation, such as an investment agreement, would need to be made publicly available on a website, on an unredacted basis.
- In practice, most bidders choose not to agree or discuss any management incentivization arrangements prior to completion of the bid – this avoids the need to comply with the disclosure / approval obligations set out above, enables the commercial deal to remain private and mitigates risks associated with conflicts of interests for executive directors.
- Where such arrangements are not agreed in advance, it is crucial to ensure that the bidder does not get drawn into discussions of possible incentivization plans with management until post-closing. The bidder will be required to confirm the absence of such discussions in the scheme / offer documentation.

5.2 Navigating the financing

Requirement for certain funds

- A bidder must only make a 2.7 announcement after ensuring that it can fulfil, in full, any cash consideration being offered to target shareholders. The bidder's financial advisor will be required to make a corresponding public statement that the bidder has sufficient funds available to satisfy all cash payment obligations to target shareholders (the "**cash confirmation**"). This limitation imposed by the Code with respect to the availability of the bidder's financial resources is referred to as the 'certain funds' requirement.
- Generally, debt financing on a UK P2P must not be subject to conditions which are outside the bidder's control – restrictions on the right to draw-down funds should only apply in respect of certain major defaults and breaches of certain major representations (e.g., bidder insolvency or unlawfulness / invalidity). As a result, unlike typical practice in the US, debt commitment letters alone are not sufficient, and financing commitments with limited conditions to funding under a US-style SunGard provision are likely to still be too uncertain for the purposes of the cash confirmation. Instead, there must be legally committed funds upon release of the 2.7 announcement – e.g., an interim facility agreement, typically with an obligation on the lenders and the bidder to enter into a long form senior facilities agreement on or prior to closing pursuant to a separate commitment letter.
- As mentioned above (see "***Limiting inside information: the "Rule of six"***"), any providers of debt or equity financing who are approached by the bidder prior to the first public announcement of the offer, or possible offer, will be included in the "rule of six". Therefore, from a timing and marketing perspective, a bidder may need to: (i) draw down on a bridge facility that is later replaced, or (ii) engage a mandated lead arranger to underwrite the debt and later syndicate following announcement of the offer.

Cash confirmation

- Although the cash confirmation provided by the bidder's financial advisor is not strictly an underwrite or guarantee of the bidder's obligation to pay, the relevant financial advisor may be held accountable by the Panel if: (i) the bidder is unable to meet its cash payment obligations in respect of the bid, and (ii) the financial advisor has not acted responsibly, and taken all reasonable steps to assure itself that the cash was available, in carrying out verification of the bidder's financing prior to the 2.7 annoucement being made.
- The bidder's financial advisor will therefore instruct separate attorneys to undertake due diligence on the bidder's funding arrangements. In addition to ensuring that the bidder's debt financing arrangements comply with the certain funds requirements set out above, the financial advisor will also make enquiries in relation to equity funding arrangements.
- To ensure a US bidder is able to fund payment of cash consideration to target shareholders, notwithstanding foreign exchange movements between the date of the 2.7 announcement and closing, the attorneys for the bidder's financial advisor may require the bidder to: (i) seek undrawn commitments from lenders with a significant headroom to mitigate forex movements, and/or (ii) buy a deal contingent hedging product on ISDA terms. As a last resort, the bidder could be required to drawdown committed funds and place a sufficient Sterling amount into an escrow or other segregated bank account.
- To avoid advance drawdown of equity funds, this diligence process is typically supported by a fund-level equity commitment letter (which must be publicly disclosed on a website) and supporting representations to the bidder's financial advisor (which are not publicly disclosed).

Disclosure requirements for financing

- Generally, the bidder's financing documentation must be made publicly available on a website, in an unredacted form, promptly following release of the 2.7 announcement. This may include any applicable senior financing agreements, bridging loan agreements, commitment letters, fee letters and syndication documentation.
- However, it is possible to seek a dispensation from the Panel: (i) to redact a market flex clause between the date of the 2.7 announcement and the offer / scheme document being posted, to give the Mandated Lead Arranger an opportunity to negotiate syndication terms, and (ii) to redact the amount of any headroom available to the bidder under the financing documents.
- A summary of the material terms of the financing arrangements and security package connected to the offer also needs to be included in the offer / scheme document sent to target shareholders, in addition to a breakdown of all fees and expenses of the bidder and the target (including any financing fees). See "***Key disclosure requirements***" below for further details with respect to material public disclosures required by the Code.

Timing of drawdown and co-investment rights

- The Code requires that accepting target shareholders must be paid within 14 calendar days following the closing of the bid (see "***Navigating the timetable***" above).
- Given the significant number of shareholders in a UK public company, payments of cash consideration are made by a receiving agent engaged by the target and the bidder. The receiving agent will typically request payment of funds to them within nine or 10 calendar days following closing, in order to meet the 14 calendar day settlement period required by the Code.
- A US PE sponsor will therefore need to give careful consideration with respect to the drawdown timelines for both equity and debt funds. If the equity and/or debt utilisation periods are longer than 10 calendar days, a pre-funding notice may need to be delivered prior to closing of the bid (typically following the satisfaction, or waiver, of all material conditions).
- US PE sponsors will also need to consider if any investors in the relevant fund(s) have co-investment rights with the fund(s). If such rights can be exercised prior to the 2.7 announcement being made, those potential co-investors will need to be managed in the context of the "rule of six".

6. Disclosure and liability

6.1 Key disclosure requirements

- There is no requirement for a bidder or target to disclose details of the negotiation process as between the parties; however, disclosure of the reasons for the bidder's offer, the bidder's intentions for the business (see further details below) and reasons for the target board's recommendation (if applicable) are required. The target will also be required to disclose the substance of the advice that it receives from its financial advisor, as to whether the financial terms of the offer are fair and reasonable. This approach is broadly similar to the US disclosure framework, except that, in the US, the parties must disclose additional information with respect to the background of the transaction as part of the proxy solicitation process.
- In particular, on a UK public bid, the bidder will need to disclose – in general terms – its 12-month post-closing intentions with respect to the target's business, its location, employees and pension schemes (or a negative statement with respect to any changes). This requirement applies even to an all-cash offer. The bidder should be extremely careful with respect to any such forward-looking statements as the Panel will revisit these 12 months following closing. Any material divergence during that period will need to be explained to the Panel and potentially announced to the market.
- The bidder will also need to summarise the terms of any material contracts in relation to the offer, to which the bidder or its concert parties are a party, in the scheme / offer document. This may include any bid conduct agreement entered into with co-investors or other members of the bidding consortium (see "***Analysis of concert parties***" above). Full unredacted copies of these contracts will generally need to be made publicly available on a website.
- While the bidder will need to provide a high-level summary of the US PE sponsor (e.g., brief details of the US PE sponsor's history, AuM / committed funds and investment expertise), there is no general requirement to name LPs in the relevant fund(s) (except any LPs deemed to be a concert party) or publish underlying fund documentation. Further disclosures may be required if the bid is undertaken by an existing portfolio company, or funded through co-investment.

6.2 Scope of potential liability

Liability of the bid vehicle and its directors

- Any documents, announcements or other information published (or statements made) during an offer must be true, accurate, not misleading and be prepared to the highest standard of care. Both the bidder's and the target's directors may be legally liable for inaccurate or misleading statements and are required to take personal responsibility for the information contained in the scheme / offer documentation (to the extent relating to themselves, their connected parties and respective companies).
- The scheme / offer documentation will outline this responsibility, and each relevant person will be expected to sign a written statement acknowledging such responsibility. This public acceptance of responsibility is generally understood to impose a duty of care, potentially exposing these persons to: (i) claims for negligent misstatement or misrepresentation (in the event that they have failed to adhere to the strict standards of care), or (ii) statutory liability in connection with untrue or misleading statements in, and/or omissions from, certain published information (e.g., statements regarding intentions for the target group's business following closing). However, as noted above, securities litigation in the UK – as opposed to in the US – is rare and very few cases arising in connection with takeover bids have ever proceeded to trial.

Liability of the US PE sponsor / IC members

- The Panel will typically expect all members of the US PE sponsor's IC to take personal responsibility for the relevant information in the scheme / offer documentation – in addition to the directors of the

bid vehicle itself. Our experience is that the legal and deal teams of the US PE sponsor should bring this matter to the attention of IC members as soon as possible in the bid process, particularly where the IC are likely to be unfamiliar with UK P2Ps.

- Members of the IC will be able to take comfort from the verification exercise undertaken by the US PE sponsor (in conjunction with its financial advisor and internal / external attorneys), in respect of public statements to be made by the bidder in the scheme / offer documentation. Members of the IC should also be given an adequate opportunity to review such statements and confirm the accuracy of any statements of belief attributed to them.
- Where applicable, the US PE sponsor's attorneys may also wish to: (i) review the fund's insurance / indemnification arrangements for details of cover in the event of a claim (with assistance, with respect to insurance arrangements, from the fund's insurance brokers), and (ii) summarise the relevant recourse / protection for the benefit of IC members.

Contributors

About the contributors

Travers Smith - *English Law*

Travers Smith is a leading full-service law firm in London. The Travers Smith corporate team specialises in UK public and private M&A, having acted on approximately 20 per cent. of all UK public bids made in 2023.

Andrew Gillen
Senior Partner
andrew.gillen@traverssmith.com
+44 20 7295 3369

Adrian West
Head of Corporate M&A and ECM
adrian.west@traverssmith.com
+44 20 7295 3419

Ben Lowen
Partner, Corporate M&A and ECM
ben.lowen@traverssmith.com
+44 20 7295 3417

James Addison
Senior Associate, Corporate M&A and ECM
james.addison@traverssmith.com
+44 20 7295 3698

Will Yates
Partner, Private Equity & Financial Sponsors
will.yates@traverssmith.com
+44 20 7295 3460

Cravath - *US Law*

Cravath, Swaine & Moore LLP has been known as one of the premier US law firms for over two centuries. Each of the Firm's practices is highly regarded, and Cravath lawyers are recognized for their commitment to the representation of their clients' interests in the US and throughout the world.

David Perkins
Partner, Private Equity
dperkins@cravath.com
+1 212 474 1708

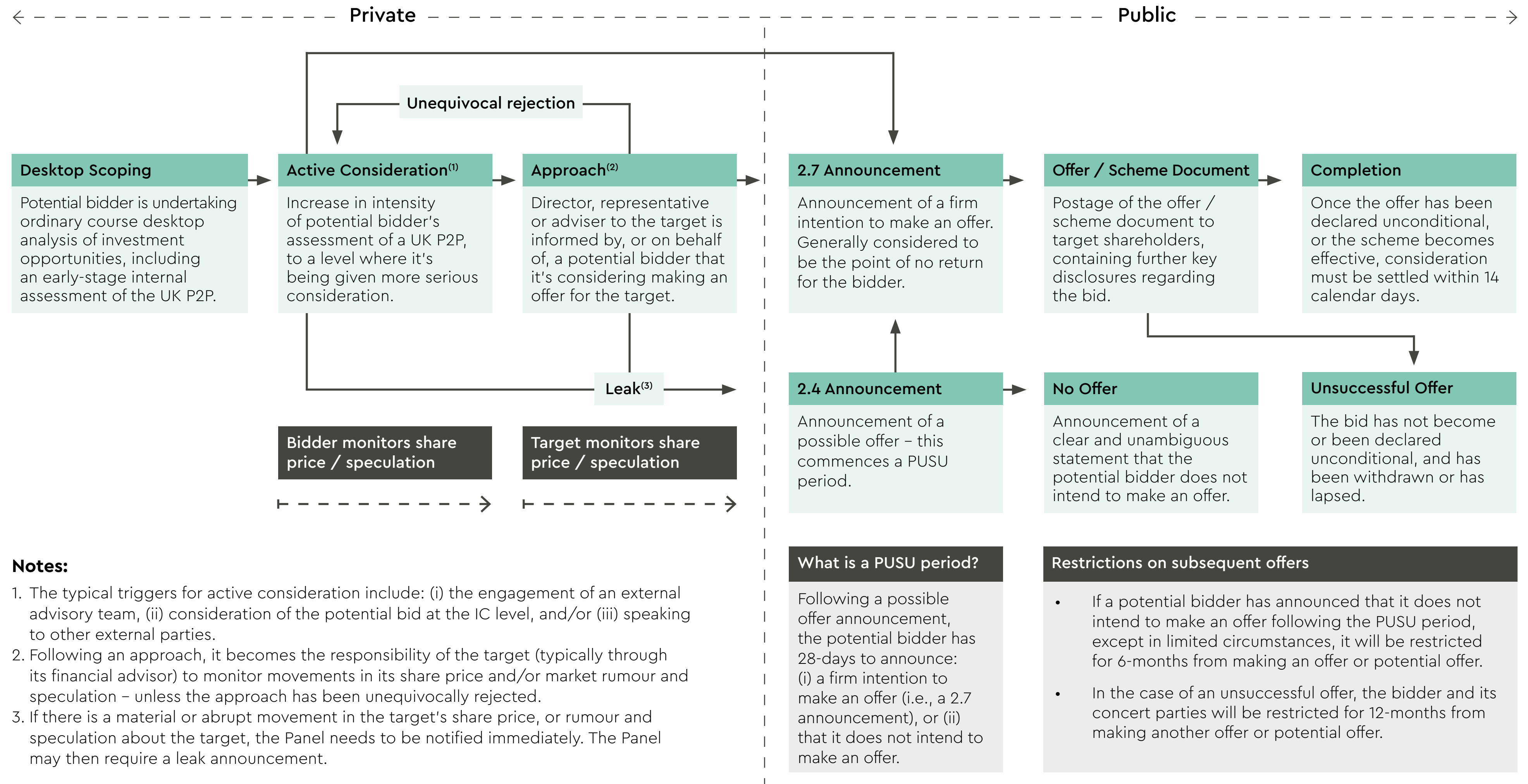
Richard Hall
Partner, Corporate
rhall@cravath.com
+1 212 474 1293

Adam Sanchez
Partner, Private Equity
asanchez@cravath.com
+1 212 474 1436

Yeana Lee
Associate, Corporate
ylee@cravath.com
+1 212 474 1496

Appendix A

Indicative Phases of a UK P2P

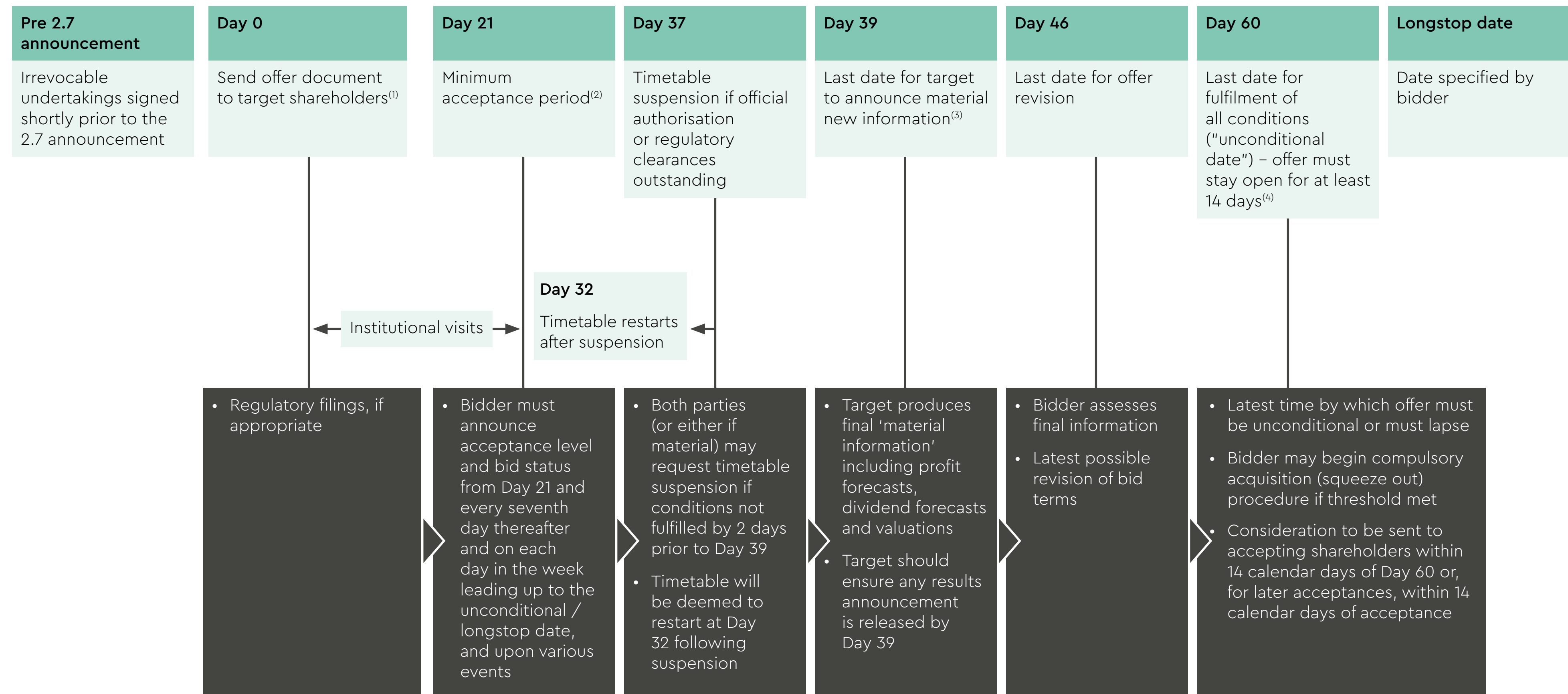


Notes:

1. The typical triggers for active consideration include: (i) the engagement of an external advisory team, (ii) consideration of the potential bid at the IC level, and/or (iii) speaking to other external parties.
2. Following an approach, it becomes the responsibility of the target (typically through its financial advisor) to monitor movements in its share price and/or market rumour and speculation – unless the approach has been unequivocally rejected.
3. If there is a material or abrupt movement in the target's share price, or rumour and speculation about the target, the Panel needs to be notified immediately. The Panel may then require a leak announcement.

Appendix B

Part 1 – Indicative timetable on a tender offer from posting

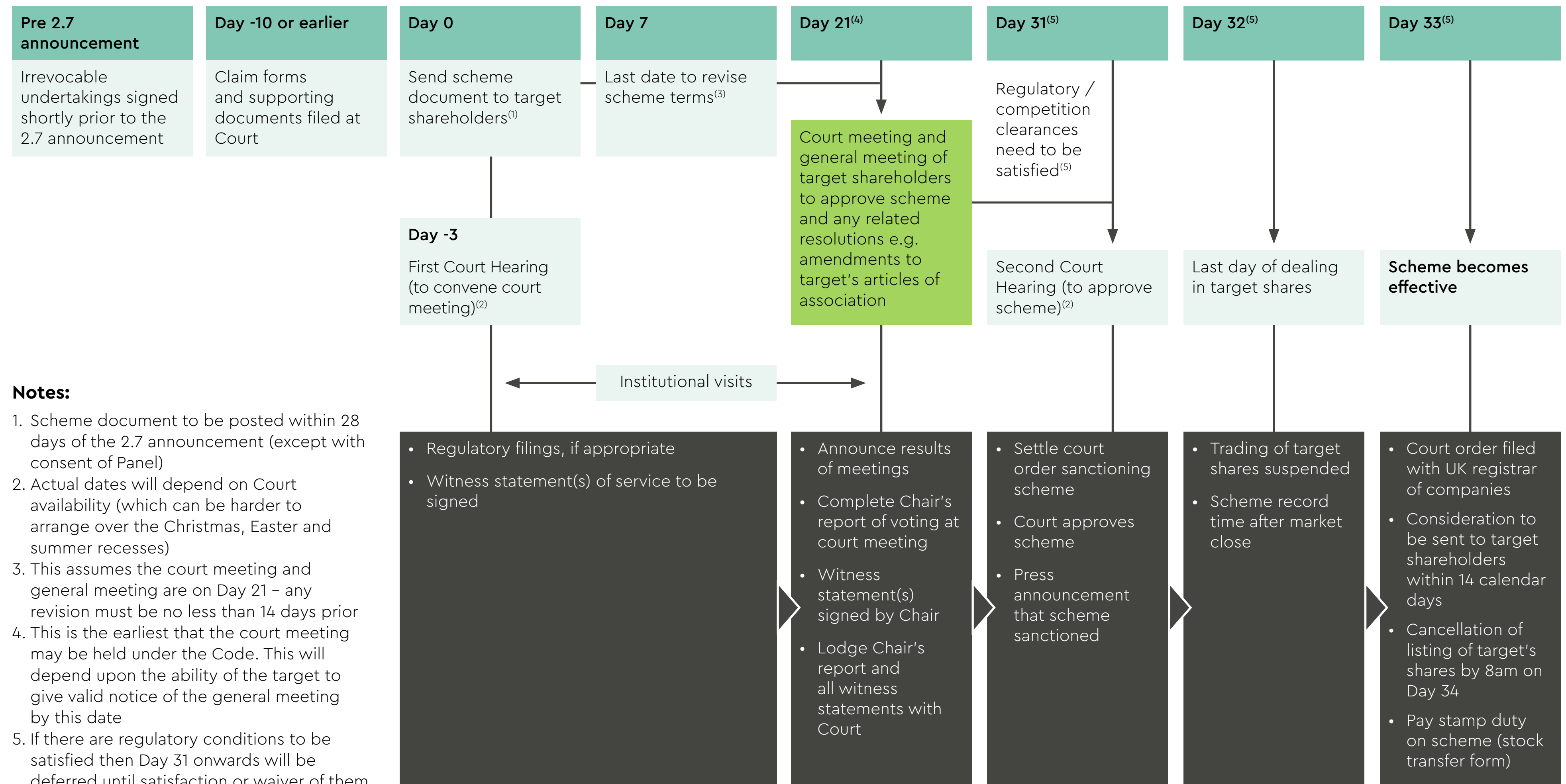


Notes:

1. Offer document to be posted within 28 days of the 2.7 announcement (except with consent of Panel) and not less than 14 days following the 2.7 announcement, unless the target board agrees
2. A bidder which wishes to invoke the acceptance condition on or after Day 21 and prior to the unconditional date may serve an "acceptance condition invocation notice"
3. This timetable assumes that there is no competing offer
4. A bidder may bring forward the unconditional date by making an "acceleration statement", in which case: (a) it will be required to waive its regulatory conditions, and (b) certain requirements which are normally imposed (including on Day 39) will not be applied

Appendix B

Part 2 – Indicative timetable on a scheme of arrangement from posting



Notes:

1. Scheme document to be posted within 28 days of the 2.7 announcement (except with consent of Panel)
2. Actual dates will depend on Court availability (which can be harder to arrange over the Christmas, Easter and summer recesses)
3. This assumes the court meeting and general meeting are on Day 21 – any revision must be no less than 14 days prior
4. This is the earliest that the court meeting may be held under the Code. This will depend upon the ability of the target to give valid notice of the general meeting by this date
5. If there are regulatory conditions to be satisfied then Day 31 onwards will be deferred until satisfaction or waiver of them

TRAVERS SMITH

CRAVATH