Global Public M&A Guide - United Kingdom

Takeover Tactics

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

# 6. Takeover Tactics

[Last updated: 1 January 2025, unless otherwise noted]

**6.1 Stake building**

One tactic a potential bidder may consider is to build up a stake in the target company. This would have a number of potential benefits, including indicating to the target's board the seriousness of the bidder's intentions, lowering the overall cost of acquiring the shares in the target and potentially deterring competing bidders. However, before deciding to acquire any interests in the securities of the target, the bidder should consider the following issues and implications:

The bidder should not acquire any interest in target securities at a time when to do so would constitute market abuse or insider dealing (see 6.2). This is likely to be the case if the bidder is in possession of non-public due diligence information which includes inside information and the bid has not yet been made. In addition, the Takeover Code prohibits any person, other than the bidder, who has confidential, price-sensitive information concerning a bid or contemplated bid from dealing in the securities of the target between the time when there is reason to suppose that an approach or bid is contemplated and the announcement or termination of such discussions.

Any acquisition (even of one share) may be prohibited or may result in a requirement for a mandatory bid to be made for the target (see 4.4) if that acquisition takes the shareholder's aggregate holding to 30% or more or, if the shareholder is already interested in more than 30% but less than 50%, that acquisition increases the percentage of shares carrying voting rights in which the shareholder is interested.

Any dealing by the bidder (or anyone acting in concert with it) must be publicly disclosed either prior to or at the start of the offer period (see 3.6).

An acquisition may impact on the nature and level of consideration that the bidder may then offer in a takeover bid:

If the bidder (or any person acting in concert with it) acquires any interest in shares during the offer period, any bid must be in cash or accompanied by a cash alternative at not less than the highest price paid by the bidder during the offer period and within the 12 months prior to the offer period; and

If shares carrying 10% or more of the voting rights are acquired in exchange for securities in the three months prior to the offer period and during the offer period, then the bidder will normally be required in its bid to offer the same class of securities to other target shareholders.

If the bid is structured as a scheme of arrangement, any shares in the target which are held by the bidder cannot be voted on when voting to approve the scheme. Market purchases by the bidder will therefore have the effect of concentrating the voting power of other shareholders in relation to the scheme. This is in contrast to the position where the bid is structured as a contractual offer, where shares purchased by the bidder after the offer is made will count towards the acceptance condition and can therefore be an effective tool for a bidder seeking to ensure its bid succeeds. Note, however, that if the bidder purchases shares before it makes a contractual offer, those shares will not count towards the squeeze out threshold which would enable it to acquire the shares of the remaining minority shareholders (see 7.1).

**6.2 Insider dealing and market abuse**

It is important that all parties involved in a potential takeover bid in the UK are aware of and comply with the rules and regulations on insider dealing and market abuse.

The UK has stringent rules relating to insider dealing. These are contained in the Criminal Justice Act 1993, which makes it a criminal offense for a person who has inside information to deal or to encourage others to deal on the basis of inside information or to disclose inside information. Inside information is:

specific information;

relating to a particular company or particular securities;

which has not been made public;

but which, if it were made public, would be likely to have a significant effect on the price of the securities.

It is important to note that the rules surrounding inside information, and how this definition is interpreted, are complex and based on EU legislation and that the penalties for infringement can be severe.

Alongside the criminal sanctions against insider dealing and market manipulation, the Market Abuse Regulation contains a civil prohibition on market abuse. The FCA is empowered to decide that certain conduct constitutes market abuse. It can then impose unlimited fines and/ or other penalties. Given that it is based on the EU Market Abuse Regulation, the position on market abuse in the UK will be similar to that in European Economic Area jurisdictions. Of particular relevance will be the prohibitions on insider dealing, improper disclosure of inside information and market manipulation.

**6.3 Deal protection and equality of treatment**

The Takeover Code includes a general prohibition on inducement fee agreements and other deal protection measures including exclusivity/"no- shop" agreements, implementation agreements and arrangements having a similar or comparable financial or economic effect as an inducement fee. These are collectively termed "offer-related arrangements". There are exemptions that permit:

a commitment to maintain confidentiality of information;

a commitment not to solicit employees, customers or suppliers;

a commitment to provide information or assistance for the purposes of obtaining any official authorization or regulatory clearance;

irrevocable undertakings and letters of intent (see 6.4);

any agreement, arrangement or commitment which imposes obligations only on a bidder, e.g., reverse break fee, or its concert parties, other than in the context of a reverse takeover; and

any agreement relating to any existing employee incentive arrangement, e.g., as to how discretion should be exercised in relation to the number of shares to be issued or the amount of any bonus payable.

There are limited exceptions to the general prohibition on inducement fee arrangements, as follows.

Where an announcement has been made of a firm intention to make a bid which is (and remains) hostile, the Panel will normally consent to the target entering into inducement fee arrangements with one or more potential "white knight" alternative bidders, provided that (i) the aggregate value of the inducement fee or fees that may be payable must be no more than 1% of the offer value. This is calculated by reference to the competing bid, and (ii) any inducement fee is capable of becoming payable only if a bid is successful.

In the case of a formal sale process initiated by the target, the Panel will normally consent, prior to any firm intention to make a bid being announced, to the target entering into an inducement fee agreement with one bidder who has participated in that process, subject to the same provisos as to quantum and trigger.

The Panel may grant a dispensation where the target is in serious financial distress.

The target board and the bidder should always seek detailed legal advice before agreeing any deal protection measures to ensure full compliance with the Takeover Code and applicable legal and regulatory requirements.

For schemes of arrangement, some limited deal protection exists in respect of the process and timetable by virtue of the fact that the target will be required to implement the scheme in accordance with a timetable published in the scheme circular. The target will be able to depart from this timetable if its board ceases to recommend the bid, announces its decision to propose an adjournment to a shareholder meeting or court sanction hearing, or a shareholder meeting or court sanction hearing is actually adjourned. In these situations, the target will need to obtain the approval of the bidder for a new scheme timetable whilst the bidder will be able to make a request to switch to a contractual offer, and the Panel will usually consent to such a request. In order to prevent uncertainty and the bidder being forced to keep open a bid for a protracted period where the initial timetable is departed from, bidders are permitted to include, within the conditions to a scheme, specific dates by which the shareholder meetings and/or court sanction hearings must be held. The dates in such conditions must be more than 21 days after the dates set out in the published agreed timetable for such events.

It is worth remembering that whilst there are significant prohibitions and restrictions in respect of the bidder and target entering into deal protection arrangements, the bidder may derive some comfort from the restrictions on frustrating action to which the target board is subject from an early stage (see 4.7). Bidders will also need to carefully evaluate the advantages and disadvantages of stake building as a means of achieving some level of deal protection (see 6.1).

All shareholders of the same class must be offered equivalent treatment by a bidder and therefore, subject to very limited exceptions, special deals for certain shareholders are prohibited (see 4.6 in relation to arrangements to incentivize management). This equivalence of treatment also extends to equality of information, such that information about parties to a bid must be made equally available to target shareholders at the same time and in the same manner, or as near as possible.

**6.4 Irrevocable undertakings**

An irrevocable undertaking is an undertaking given by a target shareholder to a bidder where they undertake to accept the bidder’s bid for the target company when it is made. Irrevocable undertakings are used so that bidders do not need to purchase the shares directly. There are several reasons why a bidder might not wish to purchase the shares directly, such as the following.

A bidder who buys the shares will be left with the shareholding if its bid fails

Provided that an irrevocable undertaking is correctly drafted, the shares to which it relates can either be (a) voted in favor of the scheme if the bid is structured as a scheme of arrangement, or (b) counted towards the 90% squeeze-out threshold in order to buy out the remaining minority in case of a contractual offer (see 7.1).

If the bidder buys the shares and as a result obtains 30% or more of the shares in the target, they will be required to make a mandatory bid for the target. By contrast, if the bidder takes an irrevocable undertaking, the shares covered by that irrevocable undertaking will not be counted towards the 30% level for these purposes, provided that the irrevocable undertaking does not give the bidder general control over voting rights

A selling shareholder may be more willing to give an irrevocable undertaking than to sell their shares because if they sell they will not benefit from any revised or increased offer, whereas they would do so by accepting the bid pursuant to the irrevocable undertaking

On a recommended bid, it is market practice for the target directors, who will generally hold shares and/or options in the target, to give “hard” irrevocable undertakings to support the bid. Such undertakings remain binding even in the event of a competing bid. It is also common for bidders to seek “soft” irrevocable undertakings from the target’s major shareholders. These undertakings lapse if a higher competing bid is made above a negotiated threshold. Where these cannot be obtained, the major shareholders may instead be willing to provide non-binding letters of intent in support of the bid. It should be noted that both irrevocable undertakings and letters of intent must be disclosed publicly.

**6.5 Anti-takeover defense measures**

To fulfil their fiduciary duties, the directors of a UK target company must:

act in a way that the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole; and

act within the director's powers and use those powers for the purposes for which they are conferred.

Under the duty to use powers for their proper purpose, it is clear that defensive acts motivated primarily by a desire to entrench management's own position are unlawful. The position on fiduciary duties, combined with the prohibition on frustrating action (see 4.7), means that it is not common in the UK takeover market for target directors to implement particular measures during an offer period. Instead, if the target directors view a bid approach as unwelcome, market practice would be for them to make their case publicly as to why the (potential) bid is unattractive and persuade shareholders not to support it. They would also then generally refuse the bidder access to any non-public due diligence information regarding the company except where they are compelled to grant such access as they have already granted it to another bidder.

©Copyright © 2025 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction or copying of the Content on this Site without express written authorization is strictly prohibited.

**Internal content**: This is internal Content and may be used as a reference. Do not distribute the Content outside the Firm.