STAKEBUILDING IN EUROPEAN PUBLIC LISTED COMPANIES

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Important Note

The rules relating to stakebuilding are complex and this guide provides only a summary of certain major provisions. Specific legal advice should be obtained before entering into any stakebuilding transaction. The information in this guide is not intended to be used and should not be used as general or specific advice.

The information in this guide is given as at 1 May 2011.

Chapter 1 : Introduction

This guide provides a brief overview of certain regulatory issues related to stakebuilding in public listed companies in six European jurisdictions; France, Germany, Italy, the Netherlands, Spain and the United Kingdom.

Stakebuilding refers to the process by which ownership and other rights over shares in a public listed company are acquired, including through the acquisition of the right to acquire or to vote shares.

In particular, this guide addresses issues relating to:

- disclosure,
- acting in concert,
- the point at which it becomes necessary to make a mandatory bid for the rest of a target,
- the consequences of stakebuilding for any subsequent bid, whether or not a mandatory bid,
- insider dealing, and
- market abuse.

The rules apply notwithstanding the fact that the stakebuilder may be from a different jurisdiction.

Stakebuilders that are state owned companies give rise to particular issues on which specific advice should be sought if relevant. In particular, specific advice should be sought on the following rules:

- those relating to the disclosure of interests in shares, and which require the disclosure of interests held by controlled persons, and
- those relating to 'acting in concert', and which deem certain persons to be acting in concert, including persons under common control.

The penalties for non-compliance vary from jurisdiction to jurisdiction. They may include criminal and civil sanctions, including fines, compensation, mandatory disposal obligations and the loss of economic and voting rights associated with the relevant shares. In certain circumstances, sanctions may be applied to individuals associated with the non-compliance, as well as to any companies involved.

Please note that this guide does not cover the situation that arises once a stakebuilder has announced an intention to make a bid or become obliged to make a bid. Nor does it relate to the situation that arises once a stakebuilder is already deemed to control a target company, which generally is the case when a stakebuilder and others acting in concert with it control 30% or more of a target. Stakebuilding by a consortium also gives rise to particular issues not fully covered by this guide.

Similarly, different rules not mentioned in this guide apply to market professionals such as investment managers and custodians.

Please also note that this guide does not address all regulatory or taxation issues that may be relevant to stakebuilding. It does not, for example, address regulatory consents and approvals necessary for acquiring shares in regulated sectors, such as financial services companies, or companies giving rise to national security issues. Furthermore, it does not address competition or merger control issues or issues arising from issues particular to a stakebuilder such as consent, disclosure or filing requirements to which it may be subject by virtue of its own status.

The firms listed at the front of this guide would be pleased to provide general or more specific advice upon request.

Chapter 2 : France

The regulatory landscape

"AMF" means the Financial Markets Authority (*Autorité des Marchés Financiers*). The AMF, which is an independent governmental body, is the stock markets regulator in France.

"General Regulation" means the *Règlement général* of the AMF. The General Regulation issued by the AMF, which has regulatory (rather than statutory) status, is the main source of regulation for takeovers and more generally financial markets regulation in France. It details and completes the principles enacted by law in the Commercial Code and the Monetary and Financial Code.

"acting in concert" means, for the purposes of the General Regulation, having entered into an agreement with a view to acquiring or disposing of voting rights or with a view to exercising voting rights to implement a policy in relation to a target. Such an agreement is presumed to exist between certain persons including a company and the companies it controls or companies controlled by the same person or persons, or a company and the chairman of its board of directors and its general managers or the members of its management board. Persons acting in concert are jointly and severally bound by the obligations imposed on them by the laws and regulations.

"offer period" means the period from (i) the publication by the AMF of the main provisions of the draft offer filed with the AMF to (ii) the publication of the results of the offer or the re-opening of the offer, as the case may be.

Disclosure under the Commercial Code

Any person or entity whose aggregate shareholding in a target reaches any of the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, one-third, 50%, two-thirds, 90% or 95% of the outstanding shares or voting rights in the target must inform:

- the target within four trading days after reaching the relevant threshold, and
- the AMF within four trading days after reaching the relevant threshold. (The AMF then discloses this information to the public.)

The articles of association of a target may also provide that the requirement to give notice to the target is triggered at a lower ownership threshold (the minimum threshold is 0.5% of the outstanding shares or voting rights).

In addition, shareholders who reach the 10%, 15%, 20% and 25% thresholds referred to above must also make a declaration of intent for the next six months to the AMF within five trading days after reaching the relevant threshold.

This notice must state:

- the method used for financing the acquisition and the arrangements for such financing. The reporting entity must indicate, in particular, whether the acquisition is being financed with equity or debt, the main features of any debt, and, where applicable, the main guarantees given or received in respect of the financing by the reporting entity. The notice must also indicate what portion of the holding, if any, has been obtained through stock lending arrangements,
- whether the reporting party is acting alone or in concert,
- whether the reporting party plans to cease or continue its purchases of target securities,

- whether the reporting party intends to take control of the target,
- the strategy that the reporting party intends to pursue in relation to the target,
- any steps planned for carrying out that strategy (including any plans for a merger, reorganisation, liquidation or transfer of the assets of the target, any plan to modify the business of the target, any plan to modify the articles of association of the target, any plans to de-list the target and any plan to issue target securities),
- any agreements to sell temporarily the shares or voting rights of the target (for example, through a stock lending arrangement), and
- whether the reporting entity intends to request the appointment of itself or of one or more other persons as members of the target board of directors.

This notice is made public by the AMF.

The obligation to make this declaration does not apply to entities who are managing a portfolio for a third party account and reach the 10% or the 15% threshold as a result, so long as they make a declaration that they do not intend to take control of the target.

Once a declaration has been made, the intentions set out in the notification may be modified by way of a new declaration, setting out the reasons for the modifications.

For the purpose of establishing a stakebuilder's aggregate holding in a target, shares or voting rights will be deemed to be held by a stakebuilder if:

- they are held by entities controlled by that stakebuilder,
- they are held by other persons on behalf of that stakebuilder,
- they are held by a third party with whom the stakebuilder is acting in concert,
- they are existing shares or voting rights that may be acquired by that stakebuilder, or by persons that come within any of the paragraphs above, at their sole discretion pursuant to an agreement or a security (such as an option to purchase or a bond that is exchangeable for issued shares),
- they are held in "*usufruct*" (a French law arrangement under which the beneficial ownership of the shares is held separately from the legal title),
- they are held by persons to whom that stakebuilder has temporarily sold its shares, including by way of repurchase orders (*pension livrée*),
- they are held by that stakebuilder on behalf of other persons if that stakebuilder is entitled to exercise the voting rights attached to the shares without any specific voting instruction, or
- a proxy has been given to that stakebuilder without any specific voting instructions.

If a stakebuilder is required to give notice that it has reached a threshold as described above, it must also give information on any shares and voting rights that it is able to acquire pursuant to securities or agreements, subject to certain exceptions (including conditional entitlements to acquire shares and entitlements to acquire shares to be issued), although the holding of such instruments is not taken into account in the calculation of the legal threshold amounts. It must also give information on instruments it holds having a similar economic effect to holding shares (for example, equity derivatives settled exclusively in cash), provided that they are referenced to issued shares.

In order to facilitate the necessary threshold percentage calculations the target must announce the total number of voting rights and capital in respect of each of its classes of shares, including the total number of voting rights attaching to shares held by the target in treasury, at the end of each calendar month in which a change occurs.

Any agreement that provides for preferential terms and conditions of sale (for example, a put/call option or a pre-emption agreement) over 0.5% or more of the outstanding shares or voting rights of a target must also be disclosed to the AMF. Failure to make this disclosure results in such terms and conditions being unenforceable during the course of a tender offer. The AMF makes the terms public.

Disclosure under the General Regulation: preparation of a financial transaction

Article 223-6 of the General Regulation provides that:

"*Any person that is preparing a financial transaction liable to have a significant impact in the market price of a financial instrument, or on the financial position and rights of holders of that financial instrument, must disclose the characteristics of the transaction to the public as soon as possible.*

If confidentiality is temporarily necessary to carry out the transaction and if the person mentioned in the preceding sentence is able to ensure such confidentiality, he may assume responsibility for deferring disclosure of those characteristics".

In a recent decision, the AMF upheld a complaint against a company on the grounds of these provisions for failing to disclose the preparation of a stakebuilding in the share capital of another listed company through cash-settled equity derivatives.

In its decision, the AMF noted that:

"*Taken in isolation, none of these facts contravened financial disclosure rules: [total return swaps] are not subject to the regulations on crossing of shareholding threshold disclosure […]*"

but the AMF went on to state that:

"*this mechanism [of total return swaps] was used in such a way as to by-pass unfairly the provisions intended to guarantee the financial disclosure that is essential for the proper working of the market, thus demonstrating legal fraud*."

Therefore, beside the threshold disclosure obligations provided for by the Commercial Code, the provisions of Article 223-6 of the General Regulation create a general obligation to disclose as soon as possible to the public any stakebuilding transaction that could have a material impact on the stock price if it was known by the public.

Insider dealing

An individual (for example, directors or advisers of a stakebuilder) may commit a criminal and/or civil offence if he comes into possession, by reason of his profession or position, of inside information, or if he knows that information he has received is inside information, in each case relating to a target or its securities, and he carries out, or encourages another to carry out, directly or through an intermediary, one or more transactions in the relevant securities before such information has been made public. In addition, if a person in possession of inside information obtained in the course of his/her duties communicates such information to a third party outside of the normal course of business, this can also be an offence.

Knowledge of an intended stakebuilding exercise by a stakebuilder may be inside information from an inside source if that information has not been made public and, were it to be made public, it would be likely to have a significant effect on the price of the shares.

Case law suggests that no breach of the General Regulation is committed if the dealings are made for 'legitimate reasons' (for example, to ensure the success of a subsequent offer) and that the stakebuilder itself may be entitled to deal in shares of the target if the only inside information of which it is aware is knowledge of its own intentions. However, it is generally considered dangerous to rely too heavily on this exception – particularly if one of the reasons for the stakebuilding is to reduce the cost of the acquisition. Stakebuilding in the context of a hostile offer should in particular be reviewed on a case by case basis in light of existing case law.

In any event, the stakebuilder may not deal in shares of the target if it has other inside information obtained from an inside source. Such other inside information could include information given to it by the target during a due diligence or other pre-bid process.

Market abuse

A person commits the offence of market manipulation when he knowingly participates or attempts to participate, directly or indirectly, in the market in order to disrupt that market's regular operation by misleading others. Parties must bear the rules (referred to below) in mind during a stakebuilding process, as with other on-market operations, and will need to take advice on a case by case basis as to whether they can make purchases.

Under the General Regulation which has brought the Market Abuse Directive into French law, "market manipulation" covers:

- transactions or orders to trade:
  - which give, or are likely to give, false or misleading signals as to the supply of, demand for or price of financial instruments; or
  - which secure, by the actions of a person or persons acting in collaboration, the price of one or more financial instruments at an abnormal or artificial level,

  unless the person who entered into the transactions or issued the orders to trade establishes that his reasons for so doing are legitimate and that these transactions or orders to trade conform to accepted market practices on the regulated market concerned; and
- transactions or orders to trade which are intended to deceive the market. Examples of such behaviour are:
  - securing a dominant position over the supply of or demand for a particular financial instrument that fixes, directly or indirectly, its purchase or sale prices or otherwise creates unfair trading conditions for that financial instrument; or
  - the buying or selling of financial instruments at the opening or closing of the market with the aim of affecting the price of such financial instruments on that market or that misleads other investors who are buying or selling such financial instruments on the basis of that day's opening or closing prices.

Consequences of stakebuilding

If a stakebuilder (alone or with persons acting in concert with it) acquires interests in 30% or more of a target it must make a bid to acquire all other shares. This is called a "mandatory bid".

Where a mandatory bid is required, the stakebuilder will not be free to set the consideration of the offer.

The stakebuilder should also be aware of the possible effect of stakebuilding on the consideration of a subsequent voluntary bid launched before the 30% threshold is crossed.

Mandatory bids

The General Regulation contains provisions that require a person who (together with any party acting in concert with it) acquires 30% or more of the equity securities or voting rights in a target to make an offer to acquire all its equity share capital.

The obligation to make a mandatory bid is not triggered by a stakebuilder obtaining irrevocable undertakings to accept an offer or options to buy shares.

There are certain limited circumstances in which the AMF may waive the requirement to make a mandatory offer.

Where parties are acting in concert, their obligation to make a mandatory bid will be joint and several.

Price

Pursuant to Article 231-8 of the General Regulation, if a stakebuilder acting alone or in concert, has purchased, for cash, in the twelve months before an offer is filed securities giving it more than 5% of the shares or voting rights of the target, the offer must include a full cash option. This rule may also apply to mandatory bids.

Where a mandatory bid is required, the offer price cannot be less than the highest price paid for target shares by the stakebuilder in the 12-month period preceding the event that gave rise to the obligation to file the offer. The AMF, however, now has the power to grant exemptions from this requirement and to authorise the use of the multi-criteria approach when there has been an obvious change in the characteristics of the target or of the target shares market. For example, this may be where (i) events likely to have a significant influence on the value of the target shares have occurred in the 12 months prior to the launching of the bid; (ii) the target faces well known financial difficulties; or (iii) the highest price referred to above was offered in the context of an acquisition that was part of a wider transaction. In the foregoing cases, or in the absence of any acquisition by the stakebuilder in the 12 months prior to the commencement of the offer period, the price is determined using the multi-criteria approach.

Chapter 3 : Germany

The regulatory landscape

"Securities Trading Act" means the German Securities Trading Act (*Wertpapierhandelsgesetz*).

"FFSA" means the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* - otherwise know as BaFin).

"Inside information" means any specific information about circumstances that are not publicly known and that relate to one or more issuers of securities or to securities directly and that may, where publicly disclosed, have a significant impact on the market price of the securities concerned. Inside information is deemed to have such potential impact if a reasonable investor would take account of the information in any decision to invest or divest. Inside information also specifically includes any information that is not publicly known and that relates to purchases or selling orders of third parties for financial instruments or for derivatives relating to commodities, if market participants would generally expect to be able to obtain the relevant information in accordance with the applicable market rules.

"Takeover Act" means the Act on Acquisition of Securities and Takeovers (*Wertpapiererwebs- und Übernahmegesetz* – otherwise known as WpÜG).

"Takeover Regulation" means the Offer Regulation (*WpÜG – Angebotsverordnung*) relating to the Takeover Act.

Disclosure under the Securities Trading Act

Voting shares

Under Sections 21 and 22 of the Securities Trading Act any person must notify the target and the FFSA as soon as such person's direct or indirect shareholding reaches, exceeds or falls below the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of the voting rights (not the share capital; preference shares with no voting rights are not included in the calculation of the relevant thresholds).

The notification obligation is not only triggered if the relevant thresholds are reached or crossed as a result of a sale or purchase of shares, but also for any other reasons, including changes in the total number of voting shares, or mergers.

In calculating the thresholds, a person must include among other things voting rights from:

- shares owned by a subsidiary,
- shares owned by a third party but held for its account,
- shares held by a third party as collateral, unless the third party is entitled to exercise the voting rights attached to those shares, and shares held by a third party who has granted the relevant person a type of charge giving the relevant person the economic benefit of the shares,
- shares for which it has the power to unilaterally acquire title to shares (*dingliche Option*),
- shares for which it has obtained proxies from other shareholders, unless it has received specific instructions how to exercise voting rights, and
- shares held by or attributed to others with whom he is acting in concert (see "Acting in concert" below).

Call options and similar instruments

Under Section 25 of the Securities Trading Act, a person must notify a company and the FFSA when it directly or indirectly holds financial instruments that entitle it under a binding agreement to acquire shares in the company so that any of the thresholds of 5% (but not 3%), 10%, 15%, 20%, 25%, 30%, 50% or 75% of the target's shares would be reached or crossed.

"Financial instruments" include transferable securities, options, futures, swaps, forward rate agreements and other derivative contracts (for example, CFDs), but only if they entitle the holder to acquire the underlying shares.

From early 2012, disclosure rules will also apply to so-called "other instruments" which do not qualify as financial instruments but which give the right to acquire shares along with the attached voting rights. These include among other things claims of the lender under a securities lending and the claims of the initial seller under a repurchase agreement.

Pursuant to the prevailing opinion shared by BaFin, the above disclosure rules generally do not apply to cash-settled total return swaps provided they do not entitle to the acquisition of the share.

Voting rights from shares are added to the financial instruments or other instruments for the purposes of determining whether a relevant threshold under Section 25 of the Securities Trading Act has been reached or crossed.

CFD's and similar instruments

From early 2012 disclosure requirements will also apply to financial instruments or other instruments that enable the holder or any third party to acquire shares. A person must notify a company and the FFSA when he directly or indirectly holds instruments that enable him to acquire shares in the target so that he would reach, exceed or fall below 5% (but not 3%), 10%, 15%, 20%, 25%, 30%, 50% or 75% of the target's shares. It will be irrelevant whether an underlying agreement provides for cash settlement instead of share settlement.

These requirements will apply in particular to CFDs, swaps, including cash-settled return swaps, call options with cash settlement. They will also apply to financial instruments that refer to a basket or an index. Using a trustee or a proxy will not exempt a person from fulfilling the disclosure requirements.

Significant shares

A person who acquires 10% or more of the voting shares in a target must (within 20 trading days) inform the target about its intentions in making the acquisition (including whether it has any strategic goals or aims to realise profits from his holding) and whether it intends to:

- acquire additional voting rights within a period of 12 months,
- influence the composition of the management or supervisory boards of the target, or
- propose changes to the capital structure, including the target's dividend policy.

If the stakebuilder's investment objectives change during the period of its investment, the change must also be disclosed within 20 trading days. The stakebuilder's obligation is to make disclosure to the target, which is then itself obliged to publish the stakebuilder's disclosure or to announce any non-compliance. It is possible for targets to provide in their articles of association that the disclosure obligations relating to material investments should not apply to investments in their shares, but this is not common practice.

The Securities Trading Act does not currently provide for any sanctions in the case of non-compliance with the specific disclosure obligations for stakebuilders holding significant shares, but this is likely to be reviewed by the legislator.

Acting in concert

The Securities Trading Act and the Takeover Act have the same definition of "acting in concert". A stakebuilder is deemed to act in concert with another shareholder if it, or any of its subsidiaries, co-ordinate their actions in a specific manner in respect of the target, either on the basis of an agreement or otherwise. The co-ordination must either relate to an agreement on the exercise of their target voting rights generally, or require the parties to co-ordinate their actions with the objective of permanently and substantially changing the overall direction of the target's business.

Co-operation by target shareholders to preserve the *status quo* of the target's business would, under the amended Act, not qualify as acting in concert. Co-ordination on specific, individual issues only will not be sufficient to amount to acting in concert.

The definition does not include co-ordination on the acquisition of a target's shares within the definition of acting in concert. Therefore, shareholders who co-ordinate with respect to the simultaneous purchase of a target's shares will continue to be outside the scope of "acting in concert" unless they have plans to change the target's business direction after the purchase.

If two or more shareholders are deemed to act in concert, the aggregate voting rights attaching to their shares will be attributed to each of the relevant concert parties individually.

Where parties are acting in concert, voting rights are aggregated and may thereby (i) trigger an obligation to make a mandatory bid if the 30% threshold is crossed, or (ii) trigger a disclosure obligation.

Mandatory takeover bid

A mandatory bid requirement is triggered where a party holds 30% or more of the voting rights in a target. This does not apply to CFDs referenced to the shares. Shares not held by the relevant party itself are attributed to the party under the criteria as explained in "Disclosure under the Securities Trading Act – Voting Shares" above.

If the relevant threshold of voting rights is reached jointly by parties acting in concert, each of the concert parties will be under an obligation to make a mandatory bid.

Consequences of stakebuilding

The manner in which a stakebuilder has built up its stake prior to filing voluntary or mandatory bid has an impact on the minimum offer price and the eligible consideration.

Consequences on minimum offer price

In general, a stakebuilder making a voluntary, or a mandatory bid must always offer a minimum price, which needs to be "adequate"; the adequacy to be determined on the basis of the Takeover Regulation.

If the stakebuilder is making a voluntary bid that is not intended to acquire control, it is free to offer whatever price it wishes. As a matter of practice, however, the offer price may have to be at a premium to the required minimum in order to guarantee a successful bid.

The Takeover Regulation provides that the offer price for a voluntary or mandatory bid is generally adequate if it is not less than the higher of:

- the highest price agreed or paid by the stakebuilder (or its concert parties) for shares of the target during the six months prior to the publication of the offer document, and
- the average market price (weighted in relation to turnover) of the target shares during the three months prior to publication of the decision to make an offer, or (in the case of a mandatory bid) publication of the acquisition of control, as the case may be.

If the stakebuilder chooses to extend the offer to securities other than shares (for example, convertible bonds in the target) and if those securities are listed securities, the same rule applies to the price offered for such securities.

Cash offer requirement

The types of consideration that may generally be offered comprise cash (in euros only) or shares (either ordinary or preference shares) or a combination of cash and shares. If shares are offered, and there is no cash alternative available, the shares offered must be traded on a liquid market within the EEA. If the stakebuilder provides a cash alternative, it is also free to offer shares that are listed outside the EEA, so long as they are liquid. These restrictions do not apply to offers that are not intended to acquire control.

In the case of either a voluntary or a mandatory bid, cash consideration (or a cash alternative) must be offered if the stakebuilder (and its concert parties) have acquired at least 5% of the shares or voting rights in the target during the period starting six months prior to the announcement of the decision to make an offer and ending at the end of the offer period.

A stakebuilder is never obliged to offer shares (as it would be in certain circumstances in the UK) and, although "mix-and-match" elections are technically possible, in practice they are not used in Germany.

Insider dealing

An individual (for example, a director or an adviser of a stakebuilder) may commit an administrative or even criminal offence if they carry on any of the following prohibited activities:

- using 'inside information' in order to purchase or sell insider securities, on their own account or on account of a third party,
- making inside information available to a third party, or
- recommending to a third party, on the basis of inside information, a purchase or sale of insider securities, or inducing a third party to make such sale or purchase in any other manner.

The Securities Trading Act defines "insider securities" as financial instruments (securities, money market instruments, derivatives and subscription rights for securities) that are:

- admitted to trading on a German stock exchange or included on the regulated market or the regulated unofficial market,
- admitted to trading on an organised market in another EU or EEA Member State, or
- whose price depends directly or indirectly on the price of any such financial instruments.

The Securities Trading Act also prohibits any person who knows that an offer is in contemplation from dealing in target shares prior to the announcement of the offer. This means that a director, adviser or employee of a stakebuilder who is aware of a proposed offer would not be able to deal in target shares. There is no explicit statutory exemption relating to information about a potential offeror's own intention to make a bid. In the context of stakebuilding, however, the general view in doctrine is that purchases made by a stakebuilder to facilitate a bid, in the knowledge that the bid is in contemplation, would not violate the provisions of the Securities Trading Act.

If a stakebuilder gains further information during the course of the process (for example, through due diligence) it is not clear from the wording of the Securities Trading Act whether it may continue to acquire shares on the basis of that information. In its "Guidelines for Issuers" the FFSA expresses the view that, if information gathered during the conduct of due diligence causes a potential acquiror to pursue a transaction and acquire further shares, the insider dealing prohibition might be breached if the acquiror had not intended to submit a takeover offer from the outset. However, this view has not yet been confirmed by the courts. It is also generally accepted that, where a party intends to make a takeover bid (or enter into a merger) from the outset, and the due diligence merely confirms this intention, acquiring shares in the target in furtherance of the initial plan will not be prohibited, even after the receipt of due diligence information.

Market abuse

Section 20a of the Securities Trading Act provides:

- a prohibition against making false or misleading statements (including concealing facts that may have an impact on the price of financial instruments, including securities), and
- a prohibition against trades or orders for shares or financial instruments that may give a false or misleading impression to the market as to the price, demand or supply of shares or financial instruments are also prohibited. This includes "wash trades" (that is to say, transactions designed to create the false appearance of high transaction volumes in a specific share), pre-arranged trades, circular trading or "scalping" (that is to say, a public recommendation of shares with low liquidity by a person who has purchased a stake in the target with the aim of boosting the share price by the positive recommendation and then selling thereafter).

The offence of market manipulation does not require proof of intention.

Chapter 4 : Italy

The regulatory landscape

"CFA" means the Consolidated Financial Act of 1998.

"CFA Rules" means Consob Regulation 11971/1999.

"concert parties" means persons cooperating on the basis of an agreement (written or oral, valid or void) whose purpose is to acquire, strengthen or maintain control over a listed company or to oppose a tender offer. At any rate, the following are considered concert parties: (i) those being a party to a shareholders' agreement; (ii) an entity (or individual), its controller and the companies it controls; (iii) companies subject to common control; and (iv) a company and its directors and senior management.

"inside information" means undisclosed precise information concerning one or more listed companies or listed financial instruments that, if disclosed, could significantly affect the price of such financial instruments.

"Consob" means the Italian Authority on capital markets and listed companies.

"offer period" means the period during which shareholders can accept the tender offer launched by a bidder. Such period shall be agreed between the bidder and the company managing the relevant stock market; in any case, the offer period shall usually last for: (i) no less than 25 and no more than 40 market days, in the case of a mandatory bid; and (ii) no less than 15 and no more than 25 market days, in the case of a voluntary bid.

"shareholders' agreement" means any agreement that: (i) obliges the parties to consult each other before exercising voting rights in listed companies, or companies controlling listed ones; or (ii) sets limits on the transfer of the relevant shares, or of financial instruments that entitle holders to buy or subscribe for such shares; or (iii) provides for the purchase of shares or financial instruments as referred to in point (ii) above; or (iv) has as its object or effect the exercise, jointly or otherwise, of a dominant influence on such companies; or (v) requires the parties to support or hinder an offer, including any agreement that obliges the parties not to accept an offer being made to them by an offeror.

Disclosure under CFA and Consob Regulation

Disclosure to Consob and to the target must be made by a stakebuilder:

- whenever in aggregate its holding reaches, exceeds or falls below the following thresholds: 2%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 66.6%, 75%, 90% and 95% of voting rights in the target,
- whenever it holds financial instruments that, pursuant to a binding agreement, grant the stakebuilder the right to acquire voting shares, on the holder's own initiative and through a physical settlement, and such "potential" holding reaches, exceeds or falls below the following thresholds: 2%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. If the acquisition of shares is conditional upon the exercise of conversion rights or warrants, such shares are included in the "potential" holding only if the purchase can take place within 60 days, and
- whenever it holds a "potential" holding, or an actual share holding, exceeding 2% of the target's share capital, as well as financial instruments that, pursuant to a binding agreement, grant the right to sell voting shares, on the holder's own initiative and through a physical settlement, and the underlining shares reach, exceed or fall below the following thresholds: 2%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.

Disclosure obligations must be complied with by the ultimate controller of the relevant stakebuilder; for example, if the latter is a fully owned subsidiary, the disclosure form shall be filed by its controlling entity or person.

Any shareholders' agreement, in whatever form, must be disclosed to Consob and to the public. If such obligation is not complied with, the relevant voting rights cannot be exercised.

Disclosure in relation to a potential bid

In the case of rumours of a potential bid, associated with a distorted trading of the relevant financial instruments, Consob may require that a stakebuilder releases to the public clarifications and information. Consob may also (and generally does) require that such clarifications and information are provided to the potential target, its management or audit corporate bodies, holders of shareholdings exceeding 2% and parties to a disclosed shareholders' agreement (see "Disclosure under CFA and Consob Regulation" above).

A stakebuilder can oppose Consob's requests if it deems that by providing such information it could suffer damage. If within seven days Consob does not reply, the objection is deemed accepted.

Restrictions on stakebuilding

Stakebuilding by a future bidder may give rise to:

- disclosure obligations for relevant shareholdings (see paragraph "Disclosure under CFA and Consob Regulation" above),
- an obligation to make a mandatory bid (see "CFA obligations to make a mandatory bid" below), and
- certain conditions regarding the terms of the bid as referred to below (for example, with regard to the offer price or the obligation to increase it in certain cases).

The stakebuilder must also have regard to the rules on insider dealing and market abuse mentioned below.

CFA and Consob Regulation consequences of stakebuilding

In the case of a voluntary bid, the bidder can freely set the offer price.

In the case of a mandatory bid, the bidder must launch the offer at not less than the highest price paid by it (or anyone acting in concert with it) within the 12-month period preceding the disclosure of its intention to make the bid. The offer price can be paid, totally or partially, in cash or by way of security exchange. In this latter case, a cash alternative must be offered whenever:

- the bidder offers unlisted financial instruments, or
- in the period mentioned above and during the offer period, the bidder (or anyone acting in concert with it) has acquired shares of the target representing more than 5% of the share capital, paying a cash consideration for them.

In any event, the offer price can be paid by way of exchange of listed securities only if, in the 12 months preceding such bid, the bidder has paid for target's shares by way of a security exchange.

CFA obligations to make a mandatory bid

The CFA provides for mandatory bid obligations if the shares directly or indirectly held and granting the right to vote for the appointment or removal of directors or cross certain thresholds of the target's share capital.

In particular, a mandatory bid must be launched whenever, as a consequence of one or more purchases, a person's holding reaches or exceeds the 30% threshold.

Mandatory bid obligations apply to persons acting in concert whenever, in aggregate, they reach or cross this threshold (exemptions may apply if the persons act in concert because of a shareholders' agreement).

No mandatory bid obligation is triggered if the 30% threshold is reached (or crossed) as a result of a previous bid and in other specific cases (including, without limitation, whenever another shareholder can exercise the majority of votes in the target's general meeting, or the threshold is reached or crossed as a consequence of a merger between two or more entities approved by the shareholders of the entity whose shares would otherwise constitute the subject matter of a mandatory offer and on the basis of "industrial" grounds).

The mandatory bid must comply with certain special rules. These include:

- if the consideration is totally or partially paid through an exchange of financial instruments, in certain cases a cash alternative must be offered by the bidder, and
- the bid must be at not less than the highest price paid by the bidder (or anyone acting in concert with it) within the 12-month period preceding the disclosure of its intention to make the bid.

Insider dealing

Criminal and administrative penalties are applied if someone holding inside information because of its membership in a managing or auditing corporate body of an issuer, its ownership of issuer's shares, or its job or service:

- sells or purchases, directly or indirectly, on its own behalf or on behalf of third parties, financial instruments on the basis of such inside information,
- communicates such inside information, for reasons other than its job or service, or
- recommends or convinces someone to make one of the transactions mentioned above.

Market abuse

Criminal penalties are applied if someone discloses false information or makes mock transactions or other devices that can significantly alter the price of listed financial instruments.

Administrative penalties are applied if someone discloses information or rumours, through the media, that are false or misleading and may provide a false or misleading impression about listed financial instruments.

Proposals for reform

Consob has issued two consultation papers, the first in October 2010 and the second in February 2011, on CFA Rules concerning tender offers. The proposed new regulation will have an impact on among other things:

- the definition of "acting in concert", which should set out: (i) situations in which such an "acting in concert" is presumed (although rebuttal is possible), for example, the submission of a resolution to appoint the majority of directors; and (ii) cases not amounting to "acting in concert", for example, the submission of minority shareholders' resolution for the appointment of one or more (but not the majority) of directors,
- the calculation of the offer price, for example in the case of a mandatory bid such calculation should take into consideration the strike (or reference) price of instruments underlying derivative instruments as well as the paid, or received, price for the acquisition of a long position. Moreover, the offer price should be increased if the bidder - or those acting in concert with him - acquire long positions whose underlying instruments are those for which the offer is launched, either during the tender offer period or during the six months following its closure, and
- the calculation of the 30 and 5% thresholds triggering mandatory bid obligations, which should take into consideration the shares underlying derivative instruments granting a long position (but irrespective of the cash or physical settlement).

Chapter 5 : The Netherlands

The regulatory landscape

"AFM" means the Dutch Financial Markets Authority (*Autoriteit Financiële Markten*).

"Civil Code" means the Dutch Civil Code (*Burgerlijk Wetboek*).

"EEA" means the European Economic Area.

"Decree on Public Offers" means the Decree on Public Offers (*Besluit openbare biedingen Wft*).

"Exemption Decree" means the Exemption Decree on Public Offers (*Vrijstellingsbesluit overnamebiedingen Wft*).

"Exemption Regulation" means the Exemption Regulation of the Dutch Financial Markets Supervision Act (*Vrijstellingsregeling Wft*).

"FMSA" means the Financial Markets Supervision Act (*Wet op het financieel toezicht Wft*).

"Offer Rules" means the rules in relation to public offers, as regulated by Part 5 of the FMSA, the Decree on Public Offers, the Exemption Decree and the Exemption Regulation.

"acting in concert" means, for the purposes of the FMSA, co-operating pursuant to a formal or informal agreement or understanding to obtain or consolidate control of a target or to frustrate the successful outcome of a bid for a target. A wide category of persons are deemed to be acting in concert, including directors, controlled persons and persons under common control, and their respective associated companies.

Disclosure obligations

Notifications to the AFM pursuant to the FMSA

Pursuant to the FMSA, any person who, directly or indirectly, acquires or disposes of an interest in the capital or voting rights of a target must immediately notify the AFM if, as a result of such acquisition or disposal, the percentage of capital interest or voting rights held by such person reaches, exceeds or falls below 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95% of the outstanding shares or voting rights of the target.

A bill is being prepared to reduce the 5% threshold to 3%. The draft bill also provides that if a person reaches or exceeds the 3% threshold, it must in addition disclose its views regarding the strategy of the company. It is currently expected that this bill will enter into force on 1 January 2012.

A notification requirement also applies if a person's capital interest or voting rights reaches, exceeds of falls below one of these percentage points as a result of a change in the target's total share capital or voting rights.

A target is required to notify the AFM immediately of a change in its total share capital or voting rights if its share capital or voting rights change by 1% or more since the target's previous notification. The target must furthermore notify the AFM quarterly, within eight days after the end of the relevant quarter, if its share capital or voting rights have changed by less than 1% in that quarter.

Every holder of 5% or more of a company's share capital or voting rights whose interest at year end (midnight on 31 December of the relevant year) differs (for any reason) from its last notification to the AFM must notify the AFM of such change within four weeks after the relevant year end.

Controlled entities (within the meaning of the FMSA) do not have notification obligations under the FMSA, as their direct and indirect interests are attributed to their ultimate parent. Any person may qualify as a parent for the purposes of the FMSA, including an individual. A person who has a 5% or larger interest in a company's share capital or voting rights and who ceases to be a controlled entity for these purposes must immediately notify the AFM of this change, as all notification obligations under the FMSA will then become applicable to that former controlled entity.

The AFM does not issue separate public announcements of the notifications it receives. It does, however, keep a public register of all such notifications on its website (www.afm.nl). Third parties can request to be notified automatically by e-mail of changes to the public register in relation to a particular company's shares or a particular notifying party.

Calculation percentage

To calculate the percentage of capital interest or voting rights, the following interests must be taken into account:

- the shares, or the voting rights attributable to shares, directly held by a person,
- the shares, or the voting rights attributable to shares, held by such person's subsidiaries, by a third party for such person's account or by a third party with whom such person has concluded a verbal or written voting agreement (including a discretionary power of attorney),
- the shares, or the voting rights attributable to shares, which such person, or any subsidiary or third party referred to above, may acquire pursuant to an option or other right held by such person (or, for example, through convertible bonds), and
- the voting rights of another person with whom such person has entered into an agreement on the "long-term joint policy on the exercise of voting rights" in the target.

Contracts for difference

In January 2010, CESR launched a consultation on proposals to extend the scope of the Transparency Directive so that disclosures of major shareholdings will be required to include interests in certain other instruments that create a similar economic effect to the direct holding of shares.

These are instruments that create a long economic exposure to a company without giving the instrument holder legal title to, or rights to acquire, the underlying shares, and would include CFDs, equity swaps and certain types of options.

CESR has proposed the changes because it believes that holders of such instruments may have the opportunity to exercise *de facto* control over the voting rights of the underlying shares and should be subject to the same transparency as shareholders.

In September 2009, the Ministry of Finance published a draft bill introducing a notification requirement for instruments that create a long economic exposure to a company. The legislative process regarding this bill has been postponed until further notice. It is uncertain if or when this bill will be adopted, but this may depend on the outcome of the CESR discussions.

Stakebuilding before an offer

A potential bidder may stakebuild but its directors and employees, and those of its advisers and funders, who are aware of that intention may not deal.

Stakebuilding is permissible in the Netherlands, provided that:

- the bidder does not have inside information on the target;
- the bidder observes the rules on disclosure of substantial shareholdings, and
- no contractual standstill obligation applies.

Mandatory offer

Subject to certain disclosure obligations below, there are no special rules that apply to the purchase of a large stake in a target, provided that such purchase results in the purchaser holding less than 30% threshold of the voting rights in the target.

Once a purchase results in the purchaser, alone or acting in concert, holding 30% or more of the voting rights in the target the mandatory offer rules apply. A mandatory offer will not be required if the stake is reduced below the 30% within 30 days and provided that the stakeholder has not exercised its voting rights or sold shares to a person that is exempted from a mandatory offer under the FMSA.

The Exemption Regulation contains certain limited exemptions to the obligation to making a mandatory offer.

Price

Dutch case law suggests that a different price may be paid for a large stake (below 30% of voting rights) than the price that is offered to the other shareholders in a subsequent voluntary offer.

After the initial public announcement of an offer, the "best price" rule applies and the price paid to a single shareholder in an off-market purchase after that announcement is the minimum price that may be offered in the public offer.

If a mandatory bid is made, the bid price must not be less than the highest price paid by the stakebuilder (or any person acting in concert with it) for relevant securities of the target in the year preceding the mandatory offer.

Insider trading

Individuals (including a director or an adviser of the offeror) may commit a criminal offence under the FMSA if they carry on any of the following prohibited activities:

- using inside information in order to purchase or sell securities in the company to which the inside information relates,
- providing inside information to a third party, or
- recommending to a third party, on the basis of inside information, a purchase or sale of securities in the company to which the inside information relates, or inducing a third party to make such a sale or purchase.

No shares in the target may be purchased by the offeror if the offeror has inside information regarding the target.

While information about a potential public offer typically constitutes inside information, the offeror's own intention to make or consider an offer does not constitute inside information and does not in itself restrict the offeror from purchasing shares in the target.

If the offeror has other knowledge that could qualify as inside information, it may not purchase any shares in the target until that information has been made available to the market by the target.

Market manipulation

The FMSA prohibits actions that are liable to distort the securities markets and also makes it a criminal offence to spread misleading information to the public regarding the demand for or the price of securities when the person doing so knows (or should know) that the information is false or misleading.

Chapter 6 : Spain

The regulatory landscape

"CNMV" means the *Comisión Nacional del Mercado de Valores*, the Spanish Securities and Exchange Commission.

"Concert or concerted action" is deemed to exist when two or more persons cooperate pursuant to an agreement (which may be express, implicit, oral, or written) in order to obtain control of a listed company. The Royal Decree presumes that concert exists when the persons in question have entered into a shareholders' agreement (*pactos parasociales*) mentioned in the Securities Market Act, as long as such agreement is intended to establish a common policy as to the management of the company or is aimed at exercising significant influence thereon. The parties to an agreement that, while having the same purpose, governs voting rights on the board of directors or executive committee of the company are also presumed to be acting in concert.

"Royal Decree" means the Royal Decree 1066/2007, of 27 July 2007 on rules applicable to takeover bids for securities.

"Securities Market Act" means the Spanish Securities Market Act (Law 24/1988, of 28 July 1988).

"Transparency rules" means the Royal Decree 1362/2007, of 19 October 2007 which develops Law 6/2007 of 12 April, amending the Securities Market Act providing for the reform of the rules on the transparency of issuers.

Significant shareholding disclosure under the Transparency rules

Disclosure must be made by a stakebuilder to the target and the CNMV whenever a holding in a target reaches, exceeds or falls below 3%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 60%, 70%, 75%, 80% and 90% of the total voting rights in a company.

The same obligation will apply to any person who holds, acquires or transfers, directly or indirectly, other financial instruments that entitle the acquisition at the discretion of the holder of ordinary shares already issued, such as transferable securities, options, futures, swaps, forward rate agreements and other derivative contracts.

For stakebuilders residing in a tax haven or a territory that has not entered into exchange of information provisions with Spain, disclosure is required when the holding reaches 1% and its successive multiples of the total voting rights of the relevant listed company.

Directors and senior managers of the target (together with certain connected persons) must disclose to the CNMV and the target any transactions involving shares, voting rights or financial instruments that entitle the holder to acquire or transfer ordinary shares in the target.

Where the relevant transaction is carried out by a subsidiary or vehicle, the reporting obligation falls on the ultimate parent company of the group. The relevant notice must refer to the aggregate shareholding of the group in the target, breaking down the chain of control.

Notification must be made within four trading days.

Short-selling disclosure obligations

Investors will be required to disclose their short positions on any share or *cuota participativa* (non-voting stock issued by Spanish savings banks), admitted to trading in Spanish official regulated markets to the CNMV when the short position exceeds 0.2% of the share capital (or *cuotas*) admitted to trading, and to also disclose the reduction below that threshold once the position is disclosed. Moreover, new disclosures must be made when the short position previously disclosed is increased or decreased by up to 0.1% of the share capital.

CNMV will publish on its web page, on an individual basis, all the notifications received of short positions which exceed 0.5% of the issuer's share capital admitted to trading, and will include the identity of the holder.

CNMV will also publish an aggregate of the short positions disclosed but not yet published for each issuer (namely, short positions held between 0.2% and 0.5% of the share capital), updated at least every two weeks.

Disclosure under the Royal Decree

A bidder (or a person acting in concert with it) must disclose to the CNMV any purchase of target shares made outside the terms of the bid or the bid procedure, including the prices paid and agreed upon, and may not transfer shares in the target company until the bid is settled.

The shareholders of the target must notify the CNMV:

- any acquisition that results in their holding reaching or exceeding 1% of the voting rights in the target, and
- any increase or decrease in their stake, for holders of 3% or more of the voting rights in the target.

These obligations will be applicable from the publication of the announcement of the bid until its settlement or withdrawal.

Restrictions on stakebuilding

If a bid is in contemplation, stakebuilding by the bidder may give rise to:

- the disclosure obligations mentioned above,
- certain consequences regarding the terms of any subsequent bid as referred to below, and
- an obligation to make a mandatory bid for all of the shares in the target in certain circumstances as referred to below.

The stakebuilder and its funders and advisers and their respective directors and employees must also have regard to the rules on insider dealing and market abuse mentioned below.

Under the current Spanish regulations on takeover bids, a bidder may not acquire shares in the target with special terms that are not offered to all other shareholders in the target if a bid is subsequently made.

Shares acquired prior to a bid do not count towards:

- the 50% threshold necessary to avoid the launch of a mandatory bid, and
- the 90% threshold necessary to acquire compulsorily any minority that does not accept a bid.

Consequences of stakebuilding

Floor price

If a bid is made after stakebuilding, the bid price must not be less than the highest price paid by the bidder (or any person acting in concert with it) during the 12 months preceding the public announcement of the offer, subject to certain adjustments.

Cash offer requirement

If a bid is made after stakebuilding, the bidder must provide a full cash alternative as consideration under that bid where:

- a mandatory bid is required as referred to below, or
- the bidder (and its concert parties) has acquired 5% or more of the target for cash generally during the preceding 12 months.

Obligation to make a mandatory bid

If a stakebuilder (alone or with persons acting in concert with it) acquires directly or indirectly a percentage of voting rights equal to or greater than 30% (or having acquired a percentage of less than 30% of the voting rights, it appoints, in the 24 months following the date of acquisition of said percentage, a number of directors who, together with those already appointed, if any, represent more than half of the members of the target company's board of directors), it must launch a takeover bid to acquire all other shares, pre-emptive rights and securities convertible into or exchangeable for shares of the target company. This is called a "mandatory bid".

There are certain cases in which, while the circumstances triggering the obligation to make a takeover bid are present, the Royal Decree gives the CNMV the option of expressly waiving such obligation in respect of the recipient at its request and on a case-by-case basis, provided the conditions established in the Royal Decree are met.

The 30% threshold can be reached:

- by means of the acquisition of shares or other securities that directly or indirectly confer voting rights in the target,
- through agreements with shareholders or other holders of those securities, or
- as a result of other situations of equivalent effect such as indirect control acquired through mergers, share capital decreases, treasury stock variations of the target or securities exchange or conversion, etc., unless within the three following months the excess over 30% of the voting rights is disposed of, and as long as the voting rights of such excess are not exercised.

A mandatory bid must comply with certain special rules. These include the following:

- the bid must be in cash or be accompanied by a full cash alternative, and
- the bid must be at not less than the highest price paid by the bidder (or anyone acting in concert with it) generally within the preceding 12 months.

Furthermore, a mandatory bid may not be subject to any condition, other than the obtaining of antitrust clearances.

Insider dealing and market abuse

Any person or entity holding inside information must refrain from trading on the securities or financial instruments to which the information relates, passing on such information to third parties, except in the ordinary course of his or her employment, or recommending to a third party the purchase or transfer of the securities or instruments to which the inside information relates based on the inside information.

Activities that may affect the free setting of prices in the market, including transactions or orders to trade that provide misleading signals about the demand, supply or price of a security or financial instrument or secure the price of such security or instrument at an abnormal level, the use of deceptive devices and the intentional dissemination of false or misleading information regarding securities or financial instruments are banned.

To comply with these provisions, the Securities Market Act contains certain measures regarding the management and processing of inside information.

In particular, an individual or a company may commit a criminal offence if:

- it has spread news or rumours that contain false financial information, provided that:
  - the news or rumours are spread in the full knowledge that the information provided is false (the administrative infringement only requires that the offender "knew or should have known" and that "false or deceitful evidence" is spread);
  - the conduct is carried out with the specific aim of altering or preserving the trade value; and
  - the benefit generated for the perpetrator of the criminal offence or for a third party, or the damage caused, exceeds €300,000, or
- it has used inside information and:
  - carried out transactions or given instructions that may give misleading indications (or false indications in the administrative infringement) regarding the offer, demand or price of securities (being the difference between the administrative infringement and the criminal offence being that the latter requires the use of insider information); or
  - attained a dominant position in the market as a consequence of using such insider information (the administrative infringement makes reference to transactions or orders that preserve prices at abnormal or artificial levels).

Knowledge of an intended stakebuilding exercise by a stakebuilder may be inside information from an inside source if that information has not been made public and, were it to be made public, it would be likely to have a significant effect on the price of the shares. The information obtained in the course of a due diligence or other pre-bid process may also be inside information.

Market abuse

The prohibitions against market abuse can be breached in a number of circumstances, including:

- insider dealing, and
- dealing on the basis of information that is not generally available to the market where the dealing is likely to be regarded by a regular user of the market as a failure to observe the standard of behaviour reasonably expected of such a person.

Chapter 7 : The United Kingdom

The regulatory landscape

"FSA" means the Financial Services Authority. The FSA is the main financial services regulator in the UK.

"Panel" means the Panel on Takeovers and Mergers. The Panel is the independent body that administers the Takeover Code.

"DTRs" means the Disclosure Rules and Transparency Rules issued by the FSA.

"Takeover Code" means the City Code on Takeovers and Mergers. The Takeover Code is the main source of regulation for takeovers in the UK. It is the spirit of the Takeover Code that is important and there is flexibility available in its application provided certain general principles continue to be respected. If in doubt, relevant matters should be discussed with the Panel.

"acting in concert" means, for the purposes of the Takeover Code, co-operating pursuant to a formal or informal agreement or understanding to obtain or consolidate control of a target or to frustrate the successful outcome of a bid for a target. A wide category of persons are deemed to be acting in concert, including directors, pension funds, controlled persons and persons under common control, and their respective associated companies.

"offer period" broadly means, for the purposes of the Takeover Code, the period from the time when the first announcement is made of a possible bid (by any person, whether or not a particular stakebuilder) until the later of (i) the first closing date of the bid and (ii) the date on which the bid becomes or is declared unconditional as to acceptances or lapses.

Disclosure under the DTRs

Disclosure must be made by a stakebuilder:

- whenever a holding in a target reaches, exceeds or falls below 3%,
- whenever a holding in a target above 3% increases or decreases through a 1% threshold,
- whether or not a bid for the target is in contemplation, and
- in a prescribed manner and within two trading days.

In calculating the holdings of a stakebuilder, all indirect holdings must be aggregated. The indirect holdings of a stakebuilder include:

- those held by others with whom there is an agreement to exercise a common policy regarding the management of the target, and
- those held by controlled persons, including subsidiary undertakings.

In some but not all circumstances interests held under contracts for difference are included.

Disclosure under the Takeover Code

During an offer period in relation to a target, various persons must make disclosure of their opening positions and any subsequent dealings in the shares of that target.

These rules apply whether it is the actions of the stakebuilder or an unrelated third party that have triggered the commencement of the offer period.

Once an offer period commences, a stakebuilder must make a public announcement of its opening position if:

- its identity as a potential bidder has been publicly disclosed, or
- it is interested in 1% or more of the shares of the target (whether or not the stakebuilder is a potential bidder or its identity has been publicly disclosed).

The opening position announcement by the stakebuilder must:

- contain details of the stakebuilder's interests and short positions in, or rights to subscribe for, shares of the target,
- contain details of any arrangement, formal or informal, to which the stakebuilder is a party that may be an inducement to deal or refrain from dealing in shares of the target,
- contain the same information in relation to persons acting in concert with it, and
- be in a prescribed form and be made within 10 business days of the obligation arising.

However, if the stakebuilder announces an intention to make a bid, the opening position announcement must be made at the same time as that announcement.

Once an offer period commences, if a stakebuilder is required to make an opening position announcement the stakebuilder must also make a dealing disclosure if it (or anyone acting in concert with it) subsequently deals in shares of the target. If a stakebuilder was not required to make an opening position disclosure at the start of the offer period but through subsequent dealing(s) it becomes interested in 1% or more of the shares of the target during the course of an offer period, the stakebuilder must make a dealing disclosure. Any subsequent dealings above the 1% level must also be disclosed.

The content and other requirements for a dealing disclosure are similar to those for an opening position announcement, but depending on the circumstances:

- it may also need to include further information relating to contracts for difference, and
- it must be made no later than a particular time on the business day following the dealing.

The rules referred to above in fact apply not only to shares in the target but also to certain other securities of the target.

If a bidder is offering securities as consideration under its bid, the disclosure rules referred to above also apply to interests and dealings in shares and other securities of that bidder.

Takeover Code restrictions on stakebuilding

If a bid is in contemplation, a potential bidder may stakebuild but its directors and employees, and those of its advisers and funders, who are aware of that intention may not deal.

Stakebuilding by the bidder may give rise to:

- the DTR disclosure obligations mentioned above,
- the Takeover Code disclosure obligations mentioned above if the target is in an offer period (whether triggered by an announcement by the stakebuilder or a third party),
- certain Takeover Code consequences regarding the terms of any subsequent bid as referred to below, and
- an obligation under the Takeover Code to make a mandatory bid for all of the shares in the target in certain circumstances as referred to below.

The stakebuilder and its funders and advisers and their respective directors and employees must also have regard to the rules on insider dealing and market abuse mentioned below.

Under the Takeover Code, a bidder may not acquire shares in the target with special terms that are not offered to all other shareholders in the target if a bid is subsequently made. This means for example that the bidder cannot:

- agree to pay extra if the final bid price is higher, nor
- agree to sell assets of the target to a selling shareholder (unless a number of conditions are met).

Although shares acquired prior to a bid may assist the bidder to obtain 50% on any subsequent bid, any shares so acquired:

- cannot be voted in favour of a court approved scheme of arrangement (if the bid is implemented in that manner rather than a general offer to acquire shares), and
- do not count towards the 90% threshold necessary to acquire compulsorily any minority that does not accept a bid.

Takeover Code consequences of stakebuilding

Floor price

If a bid is made after stakebuilding, the bid price must not be less than the highest price paid by the bidder (or any person acting in concert with it):

- during the preceding three months prior to the offer period, or
- prior to that at the discretion of the Panel (for example if shares were acquired from directors of the target).

The bid price must also not be less than the highest price paid by the bidder (or any person acting in concert with it) for shares in the target generally during the preceding 12 months prior to the offer period:

- where a mandatory bid is required as referred to below, or
- where the bidder (and its concert parties) have acquired 10% or more of the target for cash during those 12 months.

"For cash" (for the purposes of the 'floor price' test above and the 'cash offer requirement' provisions below) can include acquisitions made through an exchange of securities in certain circumstances.

Cash offer requirement

If a bid is made after stakebuilding, the bidder must provide cash, or a full cash alternative, as consideration under that bid where:

- a mandatory bid is required as referred to below,
- the bidder (and its concert parties) have acquired 10% or more of the target for cash generally during the preceding 12 months, or
- the Panel otherwise considers it appropriate (for example, where there have been cash purchases from directors of the target).

Securities offer requirement

If a bid is made after stakebuilding, the bidder must normally provide securities, or a securities alternative, as consideration under that bid where the bidder (and its concert parties) have acquired 10% or more of the target during the preceding three months in exchange for securities.

Such securities must be offered on the basis of the same number of securities for each target share.

Takeover Code consequences of public statements made in connection with stakebuilding

Generally, the Panel will hold a stakebuilder to any public statements made by it during the course of stakebuilding.

For example, if a stakebuilder states:

- that it is not intending to make a bid, it will not generally be permitted to make a bid, or
- that it is considering making a bid at a particular price, it will not generally be permitted to make a bid at a lower price,

unless certain specified events occur (for example, a bid by another person or a recommendation by the board of the target).

If a target is the subject of rumour or speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the stakebuilder's actions that have led to the situation the stakebuilder may be required to make a public announcement. The Panel should be consulted.

Takeover Code obligation to make a mandatory bid

The Takeover Code imposes certain limitations on the manner in which a person may acquire interests in 30% or more of a target.

However, if a stakebuilder (alone or with persons acting in concert with it) does acquire interests in 30% or more of a target it must make a bid to acquire all other shares. This is called a "mandatory bid".

The Panel may waive this requirement in certain limited circumstances, but the Panel must be consulted in advance.

A mandatory bid must comply with certain special rules. These include the following:

- the bid must be in cash or be accompanied by a full cash alternative,
- the bid must be at not less than the highest price paid by the bidder (or anyone acting in concert with it) generally within the preceding 12 months, and
- the bid cannot require more than 50% acceptances (including the bidder's stake) before it is unconditional as to acceptances.

Furthermore, the general rule is that a mandatory bid may not be subject to other conditions, although special rules apply in relation to certain regulatory matters.

Insider dealing and market abuse

An individual may commit a criminal offence if:

- he has inside information about a target from an inside source, and
- he deals in the shares of that target.

Knowledge of an intended stakebuilding exercise by a stakebuilder may be inside information from an inside source if that information has not been made public and, were it to be made public, it would be likely to have a significant effect on the price of the shares.

The individuals concerned may include:

- directors or employees of the stakebuilder, and
- directors or employees of the entities that are the advisers or funders of the stakebuilder.

An offence may also be committed if an individual with inside information about a target from an inside source encourages a third party to deal. This may include:

- friends or family of the individual,
- other entities under the same control as the stakebuilder, and
- other entities that are the advisers or funders of the stakebuilder.

There is a special defence that entitles the stakebuilder itself to deal in shares of the target, if the only inside information of which it is aware is knowledge of its own intentions.

This defence does not permit the stakebuilder to deal in shares of the target if it has other inside information obtained from an inside source. Such other inside information could include information given to it by the target during a due diligence or other pre-bid process.

Market abuse

The prohibitions against market abuse can be breached in a number of circumstances, including:

- insider dealing, and
- dealing on the basis of information that is not generally available to the market where the dealing is likely to be regarded by a regular user of the market as a failure to observe the standard of behaviour reasonably expected of such a person.

There is, however, a safe-harbour for genuine stakebuilding.

But the safe-harbour does not extend to dealings in derivatives designed to hedge a bidder's downside rather than facilitate a bid.