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2016/2017

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GUIDE TO PUBLIC TAKEOVERS IN EUROPE

CONTENTS

Each sections is divided into country-specific sections for France, Germany, Italy, the Netherlands, Spain and the United Kingdom.

Section 7 (*Antitrust*) also has a separate EU section.

Important Note

This guide is intended to provide a summary overview of certain important aspects of the law and regulation governing takeover offers in the seven jurisdictions which it covers. The information contained in this guide is not intended to be used and must not be used as legal or taxation advice, either on general questions of takeover law and regulation or on questions relating to any specific transaction.

The firms listed at the front of this guide would be pleased to provide advice upon request for general queries relating to takeover law and regulation, as well as advice on specific transactions.

The information contained in this guide is given as at June 2016. Updates to the information contained in this guide may be requested from the relevant firms; however, the firms are under no obligation, and have no responsibility, to provide updates of any such information in the absence of a specific and agreed request.

DEFINITIONS AND GLOSSARY

France

"AMF" means the Financial Market Authority (*Autorité des Marchés Financiers*)
"*avis de dépôt*" means the notice of filing of an offer published by the AMF
"*avis d'ouverture*" means the opening notice of an offer published by the AMF
"*Code Monétaire et Financier*" means the French Monetary and Financial Code
"*comité d'entreprise*" or "Works' or Workers' Council" means a body elected by, and representing, the company employees
"Competition Authority" means the French competition authority (*Autorité de la Concurrence*)
"CVG" means a contingent value right (*certificat de valeur garantie*)
"*décision de conformité*" means the clearance of an offer by the AMF
"*délit de manipulation de cours*" means market manipulation
"DGCCRF" means the Directorate General for Competition
"Euronext" means Euronext Paris S.A., the company which manages the French stock exchange
"FMCR" means the French Merger Control Regulation
"French Commercial Code" means the French Code de Commerce
"General Regulation" means the *règlement* general of the AMF
"French Tax Code" means the French Code general des impôts
"*intérêt social*" means the general or corporate interest of a company
"Market Manager" means the market authority (such as Euronext) that runs a regulated market or a multilateral trading facility, or a regulatory authority with a role in decentralised trading
"Non-Cooperative Jurisdiction" means a "non-cooperative state or territory" (*Etat ou territoire non coopératif*) as set out in the list referred to in Article 238-0 A of the French Tax Code, as such list is amended from time to time
"*note d'information*" means the offeror's offer prospectus or the target's offer document, as the case may be
"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
"*offre publique d'échange*" or "OPE" means an exchange offer

"*offre publique de retrait*" or "OPR" means a buy-out offer
"*offre publique simplifiée*" means a simplified offer procedure
"*options de souscription et d'achat d'actions*" means stock options
"pre offer period" means the period (if any) from (i) the publication by the AMF of the main features of the proposed offer after the offeror has made such features public and notified them to the AMF to (ii) the beginning of the offer period or, if the draft offer is not filed (i.e. because the offeror decides not to proceed), the publication by the AMF of the offeror's failure to file the draft offer
"*retrait obligatoire*" means a mandatory squeeze-out offer
"securities exchange offer" means an offer in respect of which the offer consideration consists of securities or a mix of cash and securities
"*société anonyme*" means a limited company
"*société en commandite* par actions" means a limited partnership with share capital
"Takeover Law" means the law adopted on 31 March 2006 which implements the Takeover Directive
"tender period" means the period during which target shareholders can tender their shares, which commences with the published opening of the offer by the AMF and ends with the closing of the offer
"*titres de participation*" means shares which qualify as long-term investments
"*visa*" means the formal approval of an offer prospectus given by the AMF

Germany

"Takeover Act" means the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs-und Übernahmegesetz- WpÜG*)
"*Aktiengesellschaft*" or "AG" means a German stock corporation
"*Beirat*" means the advisory council of the FFSA
"*Beherrschungsvertrag*" means a domination agreement
"Commercial Code" means the German Commercial Code (*Handelsgesetzbuch*)
"Corporate Governance Code" or "CGC" means the German Corporate Governance Code (*Deutscher Corporate Governance Kodex*)
"FCO" means the Federal Cartel Office (*Bundeskartellamt*)
"FFSA" means the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*)
"Foreign Trade Act" means the German Foreign Trade Act (*Außenwirtschaftsgesetz, AWG*)
"IIT" means Individual Income Tax
"KGaA" means a partnership limited by shares (*Kommanditgesellschaft auf Aktien*)
"Regulation" means the Offer Regulation (*WpÜG-Angebotsverordnung*)
"RETT" means Real Estate Transfer Tax
"Securities Prospectus Act" means the German Securities Prospectus Act (*Wertpapierprospektgesetz*)
"Securities Trading Act" means the German Securities Trading Act (*Wertpapierhandelsgesetz*)
"Stock Corporation Act" means the German Stock Corporation Act (*Aktiengesetz*)

"**Takeovers Senate**" means the competent appellate court for disputes in matters of takeovers (*Wertpapiererwerbs- und Übernahmesenat*)
"**Transformation Act**" means the German Act on Corporate Transformations (*Umwandlungsgesetz*)

Italy

"**AGCM**" means the Competition and Market Supervision Authority
"***Borsa Italiana***" means the organisational company of the Italian Stock Exchange
"**CONSOB**" means the National Commission for Companies and the Stock Exchange
"**Consolidated Financial Act**" or "**CFA**" means the Italian Legislative Decree No. 58 of 24 February 1998
"**enhanced voting rights**" or the "**enhancement of voting rights**" refer to the increase of voting rights, up to two for each share, conditional upon (i) the issuer's by-laws so providing; and (ii) uninterrupted ownership of the relevant shares for at least 24 months as from the date of registration of the holder in the relevant company registry. The enhanced voting rights are lost in the case of the transfer of the relevant shares (except for succession of merger/de-merger of the relevant holder) or change of control of the relevant holder; in case of a gratuitous share capital increase, newly issued shares assigned in proportion to shares bearing enhance voting rights will bear enhanced voting rights as well. Shares with enhanced voting rights remain ordinary shares and do not constitute a separate category of shares
"**Italian Stock Exchange**" means Borsa Italiana S.p.A.
"**Listed Italian Company**" means an Italian company listed on an Italian regulated market/a company having its corporate seat in Italy and its shares listed on an EU regulated market
"**multiple-voting shares**" refer to separate category of shares regulated under the Italian Civil Code that can be issued only by non-listed companies; a listed company can maintain/issue such shares only if its by-laws provided for such shares prior to listing or in case of merger/de-merger
"**Regulation**" means CONSOB Regulation No. 11971 of 14 May 1999
"**Resolutions**" means the resolutions and notices issued by CONSOB from time to time in order to deal with takeover issues
"**SMEs**" means small and medium-sized enterprises, having shares listed and having: (i) a turnover – even before listing - up to EUR 300 million; or (ii) a market capitalization lower than EUR 500 million. Issuers of listed shares which exceeded both of the aforementioned limits for three consecutive years, lose their qualification as SMEs
"**Voting Securities**" means shares and financial instruments (whether listed or unlisted) which give the right to vote at ordinary and/or extraordinary shareholders' meetings

The Netherlands

"**ACM**" means the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt*)
"**AFM**" means the Dutch Financial Markets Authority (*Autoriteit Financiële Markten*)
"**Civil Code**" means the Dutch Civil Code (*Burgerlijk Wetboek*)

"**Competition Act**" means the Dutch Competition Act (*Mededingingswet*)
"**Decree on Public Offers**" means the Decree on Public Offers (*Besluit openbare biedingen Wft*)
"**Enterprise Chamber**" means the Enterprise Chamber of the Court of Appeal of Amsterdam (*Ondernemingskamer*)
"**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*)
"**Merger Rules**" means the merger rules issued by the Social Economic Council (*SER Besluit Fusiegedragsregels 2015*)
"**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
"**Works Councils Act**" means the Dutch Works Councils Act (*Wet op de ondernemingsraden*)

Spain

"**CDT**" means the Convention for the Avoidance of Double Taxation
"**CNMC**" means the National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*)
"**CNMV**" means the Spanish Securities and Exchange Commission
"**co optación**" means a board direction nomination
"**Corporations Act**" means the Reinstated Text of the Spanish Companies Act, approved by Royal Legislative Decree 1/2010 of 2 July
"**Criminal Code**" means the Criminal Code, Organic Law 10/1995
"**Iberclear**" means the Management Company of the Securities Clearing Settlement and Registry Systems
"**NRIT**" means Non-Resident Income Tax
"***procedimiento concursal***" means insolvency proceedings
"**Royal Decree**" means the Royal Decree 1066/2007
"**Securities Act**" means the Reinstated Text of the Spanish Securities Market Act, approved by Royal Legislative Decree 4/2015 of 23 October
"**Spanish Stock Exchanges**" means the Barcelona, Bilbao, Madrid and Valencia Stock Exchanges

United Kingdom

"**AIM**" means the alternative investment market of the LSE
"**BIS**" means the UK Department of Business, Innovation and Skills
"**CA06**" means the Companies Act 2006
"**CGT**" means capital gains tax
"**CJA**" means the Criminal Justice Act 1993
"**Code**" means the City Code on Takeovers and Mergers

"**Competition Commission**" means the UK competition authority, which has jurisdiction to take final decisions on substantive antitrust issues

"**CMA**" means the Competition and Markets Authority

"**Cross-Border Merger Regulations**" means The Companies (Cross-Border Mergers) Regulations 2007

"**DTRs**" means the Disclosure Rules and the Transparency Rules of the UKLA

"**FCA**" means the Financial Conduct Authority (which replaced the Financial Services Authority on 1 April 2013)

"**FSMA**" means the Financial Services and Markets Act 2000

"**loan note alternative**" means an alternative to a cash offer represented by loan notes

"**LSE**" means the London Stock Exchange

"**offer period**" means the period that commences when the first announcement is made of an offer or a possible offer and ends when an announcement is made that the offer has become/is declared unconditional as to acceptances (or the first closing date of the offer, if later), or that all announced offers have been withdrawn or have lapsed

"**Opening Position Disclosure**" means a public opening position disclosure by a party to an offer under Rules 8.1 and 8.2 of the Code

"**Panel**" means the Panel on Takeovers and Mergers

"**plc**" means a public limited company

"**principal trader**" means a person who is registered as a market-maker with the LSE, or is accepted by the Panel as a market-maker, or is an LSE member firm dealing as principal in order book securities

"**quantified financial benefits statement**" means either (i) a statement by an offeror or target quantifying any expected financial benefits of a proposed takeover or merger; or (ii) a statement by the target quantifying any expected benefits from cost saving measures and/or any alternative transaction proposed to be implemented if the offer is withdrawn or lapses

"**RIS**" means a Regulatory Information Service

"**Rule 2.7 announcement**" means a full formal announcement of an offer in accordance with the Code

"**scheme of arrangement**" is a statutory court process which can be used to effect an acquisition of a target company

"**Section 793 notice**" means a statutory notice which a company may issue to find out whether a party holds any of its shares

"**securities exchange offer**" means an offer in which the consideration includes securities of the offeror, other than non-convertible loan notes

"**UKLA**" means the FCA acting in its capacity as the UK listing authority

"**UKLA Rules**" means the Listing Rules, the Prospectus Rules, the Disclosure Rules and the Transparency Rules of the UKLA

General

"**CESR**" means the Committee of European Securities Regulators

"**CFDs**" means contracts for differences

"**Commission**" means the European Commission

"**Cross-Border Merger Directive**" means the European Directive on Cross-Border Mergers of Limited Liability Companies (Directive 2005/56/EC), which was required to be implemented into national law by Member States by 15 December 2007

"**EC Merger Regulation**" means Council regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings

"**EEA**" means the European Economic Area

"**ESCB**" means the European System of Central Banks

"**EU**" means the European Union

"**EU Member State**" or "**Member State**" means a member state of the European Union (or of the EEA, where applicable)

"**Euro**" or "**€**" means the single, shared currency of the Member States participating in the third stage of the European economic and monetary union

"**European Company**", "**Societas Europaea**" or "**SE**" means a company formed under the European Company Statute

"**European Company Directive**" means Council directive 2001/86/EC of 8 October 2001 supplementing the European Company Regulation with regard to the involvement of employees, which was required to be implemented into national law by Member States by 8 October 2004

"**European Company Regulation**" means Council regulation (EC) No. 2157/2001 of 8 October 2001 on the statute for a European company, which came into force on 8 October 2004

"**European Company Statute**" means the European Company Regulation, as supplemented by the European Company Directive

"**inside information**" means information of a precise nature which has not been made public relating, directly or indirectly, to one or more issuers of financial instruments or one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. Information shall be deemed to be of a precise nature if: (i) it refers to a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to occur; and (ii) it is specific enough to enable a conclusion to be drawn as to the possible effect of the circumstances or events referred to under (i) above on the prices of the financial instruments or related derivative financial instruments. Information would be likely to have a significant effect on price if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions

"**Market Abuse Directive**" means European Parliament and Council directive 2003/06/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), which was required to be implemented into national law by Member States by 12 October 2004

"**Market Abuse Regulation**" means European Parliament and Council regulation 596/2014/EU of 16 January 2014 on market abuse and repealing the Market Abuse Directive and the directives 2003/124/EC, 2003/125/EC and 2004/72/EC from 3 July 2016

"**MBO**" means an instance whereby the managers and/or executives of a company form part of a consortium making a takeover bid for that company

"**Phase I**" means a first phase investigation by the European Commission under the EC Merger Regulation

"**Phase II**" means a second phase investigation by the European Commission under the EC Merger Regulation

"**Prospectus Directive**" means European Parliament and Council directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading, which was required to be implemented into national law by Member States by 1 July 2005, as amended

"**Prospectus Regulation**" means Commission regulation (EC) No. 809/2004 of 29 April 2004 implementing the Prospectus Directive

"**Takeover Directive**" means European Parliament and Council directive 2004/25/EC of 21 April 2004 on takeover bids, which was required to be implemented into national law by Member States by 20 May 2006

"**Transparency Obligations Directive**" means European Parliament and Council directive 2004/109/EC, which was required to be implemented into national law by Member States by 20 January 2007

"**Revised Transparency Obligations Directive**" means European Parliament and Council directive 2013/50/EU amending the Transparency Obligations Directive 2004/109/EC of 22 October 2013, the Prospectus Directive 2003/71/EC of 4 November 2003 and the Commission Directive 2007/14/EC of 8 March 2007, whereby the Amendment Directive was required to be implemented into national law by Member States by 1 November 2015.

"**UK**" means the United Kingdom

"**US**" or "**USA**" means the United States of America

Introduction

This guide summarises the main characteristics of the French, Dutch, German, Italian, Spanish and UK laws and regulations applying to public takeover offers as they stood at June 2016.

The guide has been updated to reflect legal and regulatory changes made to the national takeover regimes since it was last published in April 2013.

The Takeover Directive has been implemented in all of the countries which are covered. Its aim is to provide equivalent protection throughout the EU for minority shareholders of companies listed on an EU regulated stock exchange in the event of a change of control, and to provide for minimum guidelines on the conduct of takeover bids. However, the Takeover Directive makes some of its provisions – relating to defensive measures and voting rights/restrictions – optional, which means that, even after implementation, different regimes exist in different countries.

Against this background, the intention is that this guide will not only be of practical use for users, but also that an understanding of how particular jurisdictions have changed their legal/regulatory systems and practices will be of additional help to users of this guide in understanding the ongoing implications of the Takeover Directive.

Summary of Changes

France

- The “Florange Law”, enacted in March 2014, has entailed significant amendments to public takeover regulations in France.
- The new regulations have introduced a compulsory minimum acceptance threshold of 50% for voluntary and mandatory takeover bids - as a result, a tender offer will be deemed to lapse if, at the closing of the offer, the offeror (acting alone or in concert) holds less than 50% of the share capital or the voting rights of the target company.
- The threshold that triggers a mandatory offer for investors holding, directly or indirectly, between 30% and 50% of the share capital or voting rights of a listed company has been lowered. Such investor will now be under an obligation to file an offer if, in any 12-month period, this investor acquires more than 1% of the share capital of the company. Previously, the obligation to file an offer was triggered if the investor acquired more than 2% of the share capital of the company in any 12-month period.
- The Florange Law has abandoned the “passivity rule” during the offer period: the board of a French listed company which becomes the target of a hostile offer is now able to take frustrating action as part of its defence strategy, without the prior approval of its shareholders.
- The new legal framework reinforces the role of the Works’ Council of the target of a public bid, by replacing the prior information right of the target’s Works’ Council with a full information-consultation procedure.
- Automatic double voting rights have been introduced for registered shares that have been held for more than two years. The shareholders may however decide to opt out by amending the company’s articles of association to provide that the automatic double voting right shall not apply.

Germany

- The key changes made since April 2013 comprise modifications of the disclosure requirements in the Securities Trading Act and of the attribution of shares in the Takeover Act due to the implementation of the Revised Transparency Obligations Directive.
- With regard to the Securities Trading Act, the implementation of the Revised Transparency Obligations Directive mainly concerns the amendment of disclosure requirements for holders of shares conferring voting rights and other instruments.
- The Market Abuse Regulation supersedes the respective national provisions of the Securities Trading Act relating to insider dealing, the unlawful disclosure of inside information and market manipulation. The respective provisions of the Market Abuse Regulation become effective as of 3 July 2016.

Italy

- The Italian legislator has modified some of the provisions on takeovers contained in the ICFA and in the Regulation.
- The threshold for mandatory takeover bids has been reduced from 30% to 25% (although the 30% threshold has been maintained for SMEs).
- The thresholds for mandatory takeover bids now takes into account new provisions on enhanced voting rights and multiple-voting shares.

The Netherlands

- The amended Offer Rules that came into force on 1 July 2012 have introduced a number of changes.
- The amended Offer Rules have introduced a "put up or shut up" rule, which allows the AFM to set a six week deadline for potential offerors to either announce a bid or announce that they have no intention of making a bid, but only at the request of the target.
- Only minor changes were made in Dutch takeover law and regulation since the last update of 2013.
- The lowest threshold for giving notice to the AFM in case of acquiring an interest in the capital of a listed company has been amended from 5% to 3%.
- A trend in the market is visible to increasingly opt for "pre-wired" post-closing restructuring mechanisms.

Spain

- There have been no material changes in Spanish takeover law and regulation.

United Kingdom

- A change has been made to company (rather than takeover) law, the effect of which is that offerors who use a scheme of arrangement, instead of a contractual offer, are no longer able to use a reduction or cancellation scheme of arrangement which meant that no stamp duty was payable on the purchase of the target company's shares. Instead, a transfer scheme incurring a stamp duty charge of 0.5% of the consideration may be used.
- Only minor changes have been made to UK takeover law and regulation since the last update of 2013.

Brief Summary of the Key Provisions of the Takeover Directive

General

- The Takeover Directive applies to all companies governed by the laws of an EU Member State at least some of whose securities are listed on an EU regulated stock exchange. The exceptions are collective investment companies and the Central Banks of Member States.
- General Principles: The Takeover Directive states some general principles:
  - equivalent treatment of all shareholders;
  - rights of minorities to be safeguarded;
  - target shareholders must be given sufficient time and information to be able to decide whether to accept an offer;
  - the target board must give its views on the effect of the implementation of an offer, including on employment;
  - the target board must act in the interests of the target company as a whole;
  - the target board must not deny holders of securities the right to decide on the merits of the offer;
  - false markets must not be created;
  - an offeror should only announce a bid when it has the cash to implement it; and
  - the target should not be subject to a bid for too long.

  The Takeover Directive contains minimum requirements to achieve these principles, but allows Member States to impose more stringent measures. Not all of the general principles have been fully translated into rules. The application of most of the Directive is mandatory, but Member States may opt out of the provisions relating to frustrating action and multiple and restricted voting rights.
- Competent Authority: Each Member State must designate a competent authority to supervise takeovers. In general, a target company will be subject to regulation in the state in which it has its registered office if it has securities listed on a regulated market in that state.

  However, jurisdiction may be shared between competent authorities in different states where, for example, a company has its registered office in one state but its shares are only admitted to trading in another state.

  (Companies with a registered office outside the EU will be regulated by the Member State in which they first listed securities in the EU.)

Mandatory Provisions

- Compulsory Offers: Where a person (or a group of persons acting in concert) acquires a controlling stake in a target company, it must make an offer to all other shareholders at the "equitable price". The level constituting "control" will be defined by the state in which the target company has its registered office.

The “equitable price” is the highest price paid by the offeror (or its concert parties) during a period fixed by the competent regulator. That period must be between 6 to 12 months prior to the bid. An offeror who purchases shares during the offer period will trigger a requirement to increase the offer price, if it is lower than the price paid in the market. The competent regulator also has power to increase or reduce the equitable price.

Consideration under a compulsory offer may consist of:

- cash; or
- securities; or
- a combination of the two.

However, a full cash alternative must be provided:

- where any consideration securities are not liquid securities listed on a regulated market; or
- where the offeror has purchased in cash more than 5% of the voting shares of the target during the 6 to 12 month period fixed by the competent regulator plus the offer period; or
- in all compulsory offers, if the rules of the Member State so provide.

- Offer Documents: An offer document, containing certain specified information, must be despatched to target shareholders. Employees of both companies must be informed. The offer document can be used in all other Member States without change, except that it may sometimes be required by the relevant state to deal with local issues, such as different methods of acceptance and any different tax consequences.

  Target companies must publish a document giving their views on the bid, including its impact on employees.
- Offer Period: An offer, unless the regulator agrees or provides otherwise, must remain open for acceptance for at least two weeks, but no longer than 10 weeks.
- Squeeze-out: Each Member State is required to introduce a squeeze-out right to remove a minority post-bid. One of two types of right must be introduced:
  - where an offeror holds 90% (or, at the option of the Member State, a higher percentage up to 95%) of the target voting shares; or
  - where an offeror acquires 90% of the voting shares which are the subject of the offer.

  The squeeze-out consideration must be the same as under the offer, although Member States can require a cash alternative.

  There should also be a reciprocal right for a target shareholder to require an offeror which could exercise a squeeze-out to buy its shares.

Optional Provisions

- Opt Outs and Reversible Opt Ins: Member States may opt out of the frustrating action and voting rights provisions described in this section in respect of companies with their registered offices in that state. If a state does opt out, it must allow companies in its jurisdiction to opt back in by shareholder resolution. A company opting back in may (if the rules of the Member State allow it to) elect to disapply the opt in if it is the subject of

an offer from a company which itself does not apply the full provisions of the Takeover Directive.

- Frustrating Action: Target companies shall not take action to frustrate a bid without shareholder approval.
- Poison Pills: Where a company puts in place any of a specified list of poison pills (whether or not during an offer period) it must present an explanatory report to shareholders at each annual shareholder meeting and include details in annual reports.
- "Breakthrough": During an offer period:
  - any restrictions on transfers of shares may not be applied in respect of the offeror; and
  - any restrictions on voting rights and the use of multiple voting rights do not apply at any general meeting to approve any frustrating action.

Once an offeror has acquired 75% of the voting rights in the target, any special arrangements for appointing board members cease to apply and multiple voting rights cease to operate.

Shareholders deprived of rights under these provisions are entitled to compensation on an equitable basis.

These requirements do not apply to state-held "golden shares".

SECTION ONE: REGULATORY FRAMEWORK

France

1. What regulates takeovers?

1.1. The General Regulation

The main source of regulation in France is the General Regulation issued by the AMF, which has a regulatory (rather than a statutory) status. The General Regulation sets out the rules governing (i) tender offers made by persons acting alone or in concert for equity or debt securities traded on French regulated markets; (ii) buy-out offers (see paragraph 1 of section 2 below), buy-out offers followed by a squeeze-out, and squeeze-outs following offers made on organised multilateral trading facilities (e.g. Alternext); and (iii) public offers made for target securities where, within three years prior to the offer, the target has been de-listed from a regulated market and subsequently traded on an organised multilateral trading facility, such as Alternext.

These rules establish the general procedure for tender offers, with a view to ensuring that such offers are conducted in an orderly fashion and in the best interests of investors and the market. The aim is to ensure that all parties to a tender offer comply with the principles of shareholder equality, market transparency and integrity, fair trading and fair competition.

1.2. The French Commercial Code

The French Commercial Code also contains specific provisions relevant to takeovers, including restrictions on defensive measures, disclosure obligations in relation to acquisitions of shares and a prohibition on financial assistance by a company in connection with the purchase of its own shares.

1.3. The French Monetary and Financial Code

The French Monetary and Financial Code contains the key principles governing tender offers made by persons acting alone or in concert for equity or debt securities traded on French regulated markets.

It also contains provisions on insider dealing and market manipulation, which may be relevant in the context of a bid.

It also contains provisions on foreign investments in France which may prevent or delay a takeover by a company incorporated outside France. Any acquisition of shares (either directly or indirectly) by a non-French acquiror in a French-incorporated company carrying out "sensitive activities" in France must receive prior authorisation from the French Finance Minister. The term "sensitive activities" is broadly defined and includes, but is not limited to, activities relating to: private security; gambling; research, development and production of products and services relating to defence against terrorism and the use of toxic or pathogenic agents; authorised equipment for mail interception and communication detection; information systems security; double usage technology and cryptology; national defence; and delivery of services and/or equipment to the Defence Ministry; activities in the areas of supply of energy, water, network and transportation services, and operating networks and electronic communication services, and the operation of installations, and in each case where an activity is of vital importance to public order, public safety or national defence interests and the protection of public health. The list of strategic activities is more extensive for non-European offerors than for European offerors.

2. Who regulates takeovers?

2.1. The AMF

The "collège" of the AMF is made up of 16 members, each elected for a five year term. These members represent various interest groups (such as the French Central Bank), and include a certain number of representatives of the Minister for the Economy.

Through the General Regulation, the AMF:

– sets the rules governing public tender offers involving securities traded on French regulated markets (and on other organised markets in France, if requested by the relevant Market Manager);
– establishes the requirements for mandatory offers and squeeze-out procedures; and

– oversees compliance with these rules, including reviewing (and approving or rejecting) public tender offers.

The AMF is also required to ensure the protection of investors in French public companies and the adequacy and sufficiency of information given to investors. This gives the AMF a role in policing takeover offers – in particular, in reviewing and approving documentation.

2.2. The Paris Court of Appeal

The Paris Court of Appeal has specific jurisdiction to hear appeals against individual decisions of the AMF in a takeover context.

3. To whom do the rules apply?

When determining whether or not the General Regulation applies, it is the nature of the target or potential target which is relevant, and not the nature of the offeror. The value of the offer and the number of shareholders in the target company are also irrelevant.

French takeover regulation will govern all aspects of an offer if the target has its registered office in France and is admitted to trading on a regulated market in France.

There are also detailed rules relating to shared jurisdiction with the relevant supervisory authority of another Member State, which apply where a company has its registered office in France, but its securities are admitted to trading on a regulated market in one or more other Member States, or where a company has its registered office in another Member State, but its securities are admitted to trading on a regulated market in France.

The exact application of those rules should always be checked in each individual circumstance. In general, procedural matters will be dealt with in accordance with the takeover regulation of the Member State where the target is listed, while issues more directly relevant to the target's constitution (e.g. mandatory bid obligations, employees, squeeze-outs etc.) will be dealt with in accordance with the regulation of the Member State where the target has its registered office.

If the securities of the target company are not listed on a regulated market within the EEA (e.g., the company is unlisted or is only listed in the US), the General Regulation does not apply, even if the target company is domiciled in France.

However, the AMF may also apply the General Regulation (except for rules regarding mandatory offers and the squeeze-out procedures) if the target is domiciled outside the EEA but listed on a regulated market in France (with a primary or secondary listing). There are no special rules applicable where the target is larger than the offeror.

4. What happens if you break the rules?

If non-compliance with the General Regulation occurs before the offer is approved by the AMF, it may result in the AMF rejecting the offer.

Furthermore, the AMF has the general right to seek an injunction in order to prohibit actions which may prejudice investors' interests or violate applicable rules. It can also impose fines and refer certain cases to the judicial or disciplinary authorities (such as the banking or insurance regulatory authorities).

Under the French Commercial Code, an offeror who is obliged to make a mandatory bid but fails to make that offer may be deprived of its voting rights in relation to the shares it has acquired.

A party who suffers damages as a result of a breach of the applicable rules may also claim damages under civil law against the defaulting party.

Germany

1. What regulates takeovers?

1.1. The Takeover Act

The main source of regulation in Germany is the Takeover Act. Its objective is to create a comprehensive legal framework that enables public takeovers to be conducted fairly and transparently. The Takeover Act is also designed to protect the interests of minority shareholders and employees of target companies. It contains, inter alia, provisions on mandatory bids, consideration and squeeze-out procedures, and requirements in relation to the contents of the offer document.

1.2. The Regulation

The Federal Ministry of Finance has adopted a number of regulations pursuant to the Takeover Act, one of which contains important provisions governing the contents of an offer document, the consideration payable in a takeover bid and exemptions from the obligation to make a mandatory bid.

1.3. The Stock Corporation Act

The Stock Corporation Act contains a number of relevant provisions, including those relating to the implementation of measures that may be employed as defences against hostile takeovers.

1.4. The Corporate Governance Code

The CGC has no statutory basis, but provides guidance for the management and supervision of German listed companies and sets out recognised corporate governance standards. Listed companies are required under the Stock Corporation Act to declare once a year if and to what extent they observe the recommendations of the CGC, and, if those recommendations are not complied with, to set out the specific reasons for such non-compliance. The CGC provides regulations and best practice rules on issues such as the compensation of executive and non-executive directors, and the treatment of conflicts of interest. These rules may indirectly have an impact in a takeover situation.

1.5. The Securities Trading Act

The Securities Trading Act contains provisions relating to insider dealing, which make dealing in securities based on inside information an administrative and/or a criminal offence. It also contains provisions dealing with market manipulation. Most importantly in the context of a planned takeover, the Securities Trading Act

contains extensive disclosure requirements both for the holders of (i) voting shares and (ii) financial or other instruments conferring a unilaterally exercisable right to acquire voting shares or relating to voting shares and having similar economic effect as instruments conferring a right to acquire voting shares. Furthermore, disclosure is required with regard to the aggregated holding of shares conferring voting rights and such instruments (see section 3 for details). The Securities Trading Act also places an obligation on listed companies to publish certain price-relevant information. The scope of sanctions triggered by a breach of the disclosure requirements has been substantially broadened by the implementation of the Revised Transparency Obligations Directive. The breach of the disclosure requirement entails not only the loss of rights pertaining to shares, the FFSA may also impose significant fines on a legal entity subject to such disclosure requirements of up to €10 million and 5% of the annual consolidated turnover of the group to which such legal entity belongs. Additionally, the FFSA publishes actions taken and fines imposed resulting from non-compliance with the disclosure requirements on its webpage (so-called “naming and shaming”).

1.6. Market Abuse Regulation

The Market Abuse Regulation establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation as well as measures to prevent market abuse to ensure the integrity of financial markets in the EU and to enhance investor protection and confidence in those markets. It thereby supersedes the respective national provisions of the Securities Trading Act relating to insider dealing, the unlawful disclosure of inside information and market manipulation. Yet, the extensive disclosure requirements of the Securities Trading Act for holders of shares conferring voting rights and financial or other instruments remain unaffected by the coming into effect of the Market Abuse Regulation on 3 July 2016 (see paragraph 1 of section 3 for details).

1.7. Transformation Act

The Transformation Act contains the mechanics for a process of statutory merger between two German companies or, following the implementation of the European Merger Directive, between a German corporation and a foreign corporation incorporated under the laws of another Member State, which can be an alternative to a takeover offer (see paragraph 2 of section 2 below), or an alternative to a squeeze-out process (see paragraph 1 of section 12 below).

1.8. Stock Exchange Act/Securities Prospectus Act

The Stock Exchange Act and the Securities Prospectus Act set out the rules dealing with prospectus requirements, which would be applicable when issuing new shares as consideration for a takeover offer.

1.9. Commercial Code

The Commercial Code sets out extensive disclosure obligations for publicly listed companies in Germany that are relevant in an offer situation. These obligations relate to the structure of a company's share capital, any statutory provisions and provisions under the company's articles relating to the nomination and dismissal of members of the management board, and certain categories of agreements that may frustrate a takeover offer, including agreements among shareholders on the exercise of voting rights and the transfer of shares (to the extent these agreements are known to the management board) and any material agreements of the company that contain a change of control clause.

1.10. Foreign Trade Act/Foreign Trade Ordinance

Under the Foreign Trade Act and the Foreign Trade Ordinance, the government has the power to assess and, in certain narrow circumstances, prohibit the acquisition of German companies in order to safeguard public order and security. The Foreign Trade Act had previously applied only to protect certain industries sensitive to national security (primarily the weapons industry and encryption companies) from takeovers by particular foreign buyers without government consent.

However, under the applicable Foreign Trade Act and Foreign Trade Ordinance, the Federal Ministry of Economics and Technology (*Bundeswirtschaftsministerium*) has a right to review and potentially to prohibit the acquisition of any domestic company by a non-EU purchaser. A relevant acquisition will be subject to review and consent if the buyer is an investor based outside the European Free Trade Association ("EFTA"), or if the buyer is an EU or EFTA resident in which a non-EU/EFTA resident investor holds 25% or more of the voting rights, and circumstances indicate an intention to circumvent the Ministry's review. The right to review is triggered if such a buyer acquires at least 25% of the voting rights of a domestic German company. The calculation of the 25% threshold thereof must include the voting rights of third parties in which the acquirer holds at least 25% of the voting rights who have shares in the domestic company, or with which the acquirer has concluded an agreement on the joint exercise of voting rights. The purchase may be prohibited or made subject to conditions to the extent required to safeguard German public order or security. If the purchase is prohibited, the Ministry can, in particular, prohibit or restrict the exercise of voting rights belonging or attributable to a non-EU acquirer, or appoint a trustee to bring about the unwinding of a completed acquisition.

The Federal Ministry of Economics and Technology must decide whether or not to conduct an in-depth review of the transaction within three months from either (i) the signing of the transaction; (ii) the publication of the decision to make a public

takeover bid; or (iii) the announcement of an acquisition of control. If the Ministry decides to conduct an in-depth review, it will inform the acquiror and require the submission of additional documentation; upon receipt of the full documentation, the Ministry must complete its review within a further two-month period. If no decision to conduct such a review has been made within the initial three-month period, the transaction is deemed cleared.

A prospective acquiror may apply in advance for a certificate of non-objection. The application must be accompanied by a general description of the planned transaction, the acquiror and its business activities. In the case of a voluntary application for a certificate of non-objection, the Ministry must decide within one month from receipt of the application whether or not to conduct an in-depth review. If no such decision has been made within the one-month period, the transaction is deemed cleared.

2. Who regulates takeovers?

2.1. The FFSA

The FFSA is the authority responsible for supervising compliance with the Takeover Act. It has investigatory powers regarding potential breaches of the Takeover Act and is able to impose fines for non-compliance. The FFSA is also responsible for approving prospectuses for the listing of securities and the public offering of securities.

The FFSA has an advisory council, the Beirat, consisting of representatives of issuers, institutional and private investors, employees and academics. The council is involved in the supervisory process and advises the FFSA, particularly with regard to the adoption of regulations governing the supervisory activities of the FFSA. It has been instrumental in consultations on new legislative initiatives – for example, in the context of the implementation of the Market Abuse Directive and the Takeover Directive – but has otherwise as yet had little direct involvement in takeover regulation.

2.2. Takeover Senate

The Takeover Senate of the Higher Regional Court (*Oberlandesgericht*) of Frankfurt am Main has specific jurisdiction to hear appeals against decisions of the FFSA. However, the jurisdiction of the Takeover Senate does not extend to civil law disputes which may arise in a takeover situation, where the competent regional courts have exclusive jurisdiction irrespective of the value of the matter in dispute.

3. To whom do the rules apply?

When determining whether or not the Takeover Act applies, it is the nature of the target or potential target company which is relevant, not the nature of the offeror. The value of the offer and the number of shareholders in the target company are also irrelevant for determining the applicability of the Takeover Act.

German takeover regulation will govern all aspects of a bid if the target has its registered office in Germany and its securities are admitted to trading on an “organised market” in Germany. An “organised market” comprises the regulated market section (*regulierter Markt*) of each German stock exchange (e.g. the General Standard and the Prime Standard of the Frankfurt Stock Exchange). It does not include the unregulated market sector (*Freiverkehr*) of the German stock exchanges (e.g. the Open Market of the Frankfurt Stock Exchange), where securities can be traded without an official listing. Takeover regulation applies to shares or convertible securities in targets which have the legal form of a stock corporation (*Aktiengesellschaft, AG*), a Societas Europaea (SE) or (much less frequently) a partnership limited by shares (*Kommanditgesellschaft auf Aktien, KGaA*).

There are also detailed rules relating to shared jurisdiction with the relevant supervisory authority of another Member State, which apply where a company has its registered office in Germany, but its securities are admitted to trading on a regulated market in one or more other Member States, or where a company has its registered office in another Member State, but its securities are admitted to trading on a regulated market in Germany.

The exact application of those rules should always be examined in view of the individual circumstances. In general, procedural matters will be dealt with in accordance with the takeover regulation of the Member State where the target is listed, while issues more directly relevant to the target’s constitution (e.g. mandatory bid obligations, employees, squeeze-outs etc.) will be dealt with in accordance with the regulation of the Member State where the target has its registered office.

If the securities of the target company are not listed on a regulated market within the EEA (for example, the company is unlisted or is listed only in the US), the Takeover Act does not apply even if the target company is domiciled in Germany. The Takeover Act also does not apply if the target’s shares are listed in Germany but the target is domiciled outside the EEA.

There are no special rules applicable if the target is larger than the offeror.

A bid by a publicly listed company for its own shares (e.g. in connection with a buy-back programme) is not governed by the provisions of the Takeover Act.

4. What happens if you break the rules?

If a party fails to make a mandatory offer in violation of a respective legal duty (see paragraph 3 of section 2 below), certain rights, including voting rights, attached to the target shares held by that party are suspended by law until the mandatory offer is made. Any resolutions passed as a result of the exercise of those voting rights will be voidable. In addition, the party failing to make a mandatory offer is required to pay interest to all minority holders, based upon the amount of consideration that would be payable in the takeover bid.

In addition, the Takeover Act authorises the FFSA to impose certain statutory sanctions should the offeror or any other person violate the duties and obligations imposed on them by the Takeover Act. The sanctions available to the FFSA include the right to prohibit a takeover offer, in which case all transactions entered into pursuant to the offer are void and the offeror is prohibited from renewing its offer for a period of one year. The FFSA is also entitled to impose fines, in certain cases up to €1 million, for failure to comply with the Takeover Act. Other sanctions apply to insider dealing and market manipulation offences.

Non-compliance with the Takeover Act may also result in claims for damages by the target company's shareholders.

Italy

1. What regulates takeovers?

1.1. The Consolidated Financial Act ("CFA")

The CFA is the statute that provides a legal framework for listed companies and contains, inter alia, rules on tender and exchange offers which are designed to protect minority shareholders and financial investors, as well as enhance the market for corporate control. The Takeover Directive has been implemented in Italy through the CFA.

1.2. The Regulation

The Regulation was introduced by CONSOB, which is the regulatory authority of Italian listed companies and the Italian Stock Exchange and is also responsible for supervising takeover bids. The purpose of the Regulation is, inter alia, to implement the CFA provisions on tender and exchange offers. The Regulation, its amendments and other similar regulatory provisions are all approved by CONSOB using the rule-making power delegated to it under the CFA.

1.3. Resolutions

Resolutions are issued by CONSOB by reference to specific bids or enquiries made by listed companies or other interested parties. Although not legally binding, they can provide useful interpretations to guide parties seeking to comply with the applicable rules on takeover bids.

2. Who regulates takeovers?

2.1. CONSOB

CONSOB is the regulatory authority responsible for ensuring compliance in takeover situations with the provisions of the CFA and its implementing rules.

CONSOB also conducts special investigations into potential infringements of insider dealing and market manipulation law.

CONSOB is a public entity which has full regulatory independence in respect of matters reserved to it by law. It is composed of five commissioners (including the chairman) appointed by the President of the Italian Republic upon designation of the Prime Minister. Each commissioner's term lasts seven years and cannot be renewed.

2.2. Other authorities

Depending on the particular circumstances and nature of the target company, other public authorities may become involved in the takeover process; for example, the Bank of Italy (in relation to banks and financial institutions), the Institute for the Supervision of Insurance Companies (in relation to insurance companies) or other specific regulatory authorities existing in particular sectors (e.g. telecommunications, publishing etc.).

3. To whom do the rules apply?

When determining whether the Italian takeover rules apply, it is the characteristics of the target or potential target company and its securities/investors which are relevant, not the nature of the offeror.

Italian takeover rules (other than those relating to mandatory offers) apply to every tender or exchange offer to acquire financial products (a broad definition that includes both shares and other types of securities), provided that such offer is addressed to more than 150 investors resident in Italy and exceeds an overall value of €5 million. These general rules governing public offers relate to both listed and unlisted target companies, and can be interpreted very widely. There are some specific exemptions included in the Regulation or special sets of rules; for example, separate rules relating to debt securities.

In addition, Italian takeover regulation (including provisions on mandatory offers) will govern all aspects of an offer if the target has its registered office in Italy and is admitted to trading on a regulated market in Italy.

There are also detailed rules relating to shared jurisdiction with the relevant supervisory authority of another Member State, which apply where a company has its registered office in Italy, but its securities are admitted to trading on a regulated market in one or more other Member States, or where a company has its registered office in another Member State, but its securities are admitted to trading on a regulated market in Italy.

The exact application of those rules should always be checked in each individual circumstance. In general, procedural matters will be dealt with in accordance with the takeover regulation of the Member State where the target is listed, while issues more directly relevant to the target's constitution (e.g. mandatory bid obligations, employees, squeeze-outs etc.) will be dealt with in accordance with the regulation of the Member State where the target has its registered office.

Where the securities of an Italian target company are not listed on a regulated market within the EEA (for example, the company is unlisted or is only listed in the US), the application of the rules should be checked on a case-by-case basis. Where the

securities of the target company are listed in Italy but the company is domiciled outside the EEA, the rules catching offers to more than 150 investors in Italy will generally apply (see above), but again specific advice should be taken.

There are no special rules applicable where the target is larger than the offeror.

4. What happens if you break the rules?

A number of remedies and sanctions are available to CONSOB in order to ensure compliance with the applicable rules.

For example, CONSOB may: (i) suspend an offer when it has reasonable grounds for suspecting that a breach of the rules has occurred; (ii) suspend an offer for a 30-day period where new, undisclosed information needs to be disclosed to the shareholders of the target company so that they are able to reach a properly informed decision on the offer; and (iii) cancel an offer in the case of a confirmed breach of the rules.

A person found to be in breach of the obligation to launch a mandatory bid is required to sell all shares owned in excess of the relevant 25% (or 30%, as the case may be) or 90% threshold within 12 months (see paragraph 3 of section 2 below). In addition, CONSOB has the power to order the person in breach to launch a mandatory bid at a price determined by CONSOB. Until the sale of the excess shares is completed, or the mandatory bid is finally launched, the voting rights attached to all of the target shares owned by the offeror will be suspended. Any resolution passed as a result of a positive vote by a shareholder whose voting rights are subject to suspension can be declared void by the competent court.

In addition, administrative sanctions (e.g. fines) can be imposed by CONSOB where there is a failure to launch a mandatory offer, and in a number of other cases. CONSOB also has the power to carry out enforcement investigations.

Minority target shareholders have also been successful in claiming damages against a shareholder who crossed the mandatory offer threshold but did not make a bid for the target company. Italian Courts have in the past awarded damages in such cases equal to the difference between the price at which the mandatory bid should have been made and the market price of the target's shares at the time the obligation to make a mandatory bid was triggered.

The Netherlands

1. What regulates takeovers?

1.1. Offer Rules

Public offers are primarily regulated by Part 5 of the FMSA. The FMSA sets out rules of conduct that apply generally to participants in the Dutch securities markets. It contains rules on mandatory and voluntary public offers, but also covers market abuse, insider trading and the disclosure of voting rights and capital interests in listed companies. Further detailed rules relating to public takeovers are contained in royal and ministerial decrees, including the Decree on Public Offers, the Exemption Decree and the Exemption Regulation.

The AFM issues interpretations of the Offer Rules from time to time. These interpretations do not have the force of law, but in practice participants rely upon them.

1.2. Civil Code

Matters of Dutch corporate law are primarily governed by Book 2 of the Civil Code. The Civil Code contains specific provisions relevant to takeovers, including provisions relating to takeover defences, inquiry proceedings (*enquêteprocedure*) and squeeze-outs.

1.3. Works Councils Act; Merger Rules

The role of employees in takeovers is regulated by the Works Councils Act and the Merger Rules. These regulations generally oblige the boards of the companies involved in a takeover to seek the advice of relevant works councils and to consult with relevant trade unions.

1.4. Competition Act; sector-related laws

Other laws that regulate takeovers include the Competition Act, which applies to mergers and acquisitions which are not subject to EU merger control rules, and various sector-related laws, such as the Telecommunications Act, the Electricity Act, the Gas Act and the FMSA (which, as well as containing general rules on public takeovers, also contains rules specifically regulating companies providing financial services).

2. Who regulates takeovers?

2.1. AFM

The AFM is the authority responsible for ensuring compliance with the Offer Rules. The AFM is an autonomous government agency and the main regulator of conduct on the Dutch financial markets.

The AFM has extensive statutory powers to obtain information, examine documents and give instructions to the parties involved in a public takeover. In particular, it has the task of reviewing the offer document for compliance with the Offer Rules (see paragraph 2 of section 10 below).

The AFM may also impose sanctions and remedies. Further details of these are given in paragraph 1 of section 3 below. The AFM has the authority to grant exemptions from certain Offer Rules, but only if the relevant Offer Rule cannot reasonably be complied with and the objective of the relevant rule is satisfied in some other way.

The AFM does not have a wide discretion in interpreting and applying the Offer Rules and it does not have any legislative power. The AFM occasionally publishes non-binding interpretations that set out the view of the AFM on particular issues relating to public offers. It may also issue guidelines. Interested parties, such as the offeror, the target company and the shareholders of the target company, may appeal certain decisions of the AFM before the administrative courts.

2.2. Enterprise Chamber of the Court of Amsterdam

The Enterprise Chamber has authority to decide on a number of issues relating to public offers, including the requirement to make a mandatory offer in certain circumstances and the assessment of the equitable price for the securities in a mandatory offer (see paragraph 4 below). However, once a bid has been made, whether it is voluntary or mandatory, supervision of the bidding process is exercised by the AFM.

The Enterprise Chamber is also the competent court in inquiry proceedings and squeeze-out proceedings (see section 12 below).

Other civil and corporate law disputes that may arise in the context of public takeovers fall generally within the jurisdiction of the relevant district court.

3. To whom do the rules apply?

When determining whether or not the Offer Rules apply, it is generally the nature of the target or potential target company and not the nature of the offeror which is relevant. The value of the offer and the number of shareholders in the target company are also irrelevant.

The Offer Rules (and the relevant provisions of the Civil Code) will generally govern all aspects of an offer if the target company is incorporated (i.e. has its statutory seat) in the Netherlands and its shares are admitted to trading on a regulated market in the Netherlands.

The Offer Rules also generally apply to (i) public offers made for non Dutch companies incorporated outside the European Union but with their shares admitted to trading on a regulated market in the Netherlands; and (ii) public offers made for non Dutch companies incorporated within the European Union but with their shares admitted to trading on a regulated market in the Netherlands, provided that the shares have not been admitted to trading in the country where the company has its corporate seat and that (in the case of multiple listings) the shares were first admitted to trading in the Netherlands.

The exact application of the rules should always be checked in each individual circumstance. Generally, the Offer Rules apply in full, but corporate law matters (e.g. employees, squeeze-outs etc.) continue to be determined by the law of the place of a company's incorporation.

In situations where the relevant takeover falls within the authority of the competent regulator of another Member State, which supervises the public offer process and approves the offer document, but the target company has a secondary listing on a regulated market in the Netherlands, the approved offer document may be passported into the Netherlands. The AFM may then request the inclusion of additional information in the offer document, such as an explanation to shareholders in the Netherlands of how to tender their shares in the offer, and a Dutch translation of the offer document.

The Offer Rules do not apply to public offers for securities of Dutch companies which are not admitted to trading on a regulated market, nor to public offers for securities of Dutch companies whose securities are admitted to trading on a Dutch non-regulated market such as Alternext Amsterdam. Such offers may, however, be subject to other Dutch securities laws under the FMSA and the laws and regulations referred to in paragraph 1 above.

There are no special rules applicable where the target is larger than the offeror.

4. What happens if you break the rules?

Compliance with the Offer Rules is generally monitored by the AFM. There are a number of remedies and sanctions which may be imposed by the AFM in order to ensure compliance with these rules. These include requiring the parties involved in the public offer process to follow a particular course of action (such as making additional public disclosures or accepting a "shut-up" period of six or nine months), imposing enforcement fines or administrative penalties, and making public announcements of such fines or penalties.

The rules regarding the obligation to make a mandatory offer, and the price which must be paid in that offer, are not enforced by the AFM. These rules may be enforced by interested parties (including shareholders of the target company) by filing a request with the Enterprise Chamber. The judgment whether a mandatory bid is required and the review of the "equitable price" to be paid fall within the powers of the Enterprise Chamber. If a person is under an obligation to make a mandatory offer but does not comply, the Enterprise Chamber may take steps, at the request of an interested party, which may include suspending the voting rights of the prospective bidder in the target, ordering the reduction of its shareholding, or suspending or nullifying any resolutions that may have been passed by the general meeting of shareholders after the obligation to make a mandatory bid arose.

A breach of certain Offer Rules is also a criminal offence, which may be prosecuted by the public prosecutor. Other civil law remedies may be available as well.

Spain

1. What regulates takeovers?

1.1. The Securities Act

The Securities Act sets out the rules of conduct that apply generally to participants in the Spanish securities market. Law 6/2007 implemented the Takeover Directive in Spain in the previous version of the Securities Act.

1.2. The Royal Decree

The Royal Decree contains more detailed rules developing the principles set out in the Securities Act.

The Securities Act and the Royal Decree together prescribe certain requirements for the making of mandatory offers and contain procedural rules relating to both voluntary and compulsory tender offers. The rules are intended to protect minority shareholders, and also to ensure that offers are conducted fairly and transparently, and with the minimum possible disruption to the securities market.

1.3. The Criminal Code

The Criminal Code contains provisions relating to insider dealing and market abuse.

1.4. The Corporations Act

Provisions of the Corporations Act may be relevant in assessing the target board's response to a takeover bid and, in particular, whether takeover defences are permissible in any situation.

2. Who regulates takeovers?

The CNMV is the authority responsible for administering and supervising compliance with the provisions of Spanish securities law.

The CNMV was created by the previous version of the Securities Act with the aim of creating an independent regulator for the securities market. It is governed by a Board of seven members, comprising government appointees (including the Chair and Vice-Chairpersons), together with the Deputy Governor of the Bank of Spain and the Vice-Minister of the Treasury and Financial Policy. The CNMV has a status similar to that of most central banks.

The CNMV has inspection powers regarding potential breaches of the Securities Act and may impose fines for infringements (although sanctions for "very serious" infringements may only be imposed by the Minister of Economy).

3. To whom do the rules apply?

When determining whether or not Spanish takeover law applies, it is the nature of the target or potential target company which is relevant, rather than the nature of the offeror. The value of the offer and the number of shareholders in the target company are also irrelevant.

Spanish takeover regulation will govern all aspects of an offer if the target has its registered office in Spain and is admitted to trading on a regulated market in Spain.

There are also detailed rules relating to shared jurisdiction with the relevant supervisory authority of another Member State that apply where a company has its registered office in Spain, but its securities are admitted to trading on a regulated market in one or more other Member States, or where a company has its registered office in another Member State, but its securities are admitted to trading on a regulated market in Spain.

The exact application of those rules should always be checked in each individual circumstance. In general, procedural matters will be dealt with in accordance with the takeover regulation of the Member State where the target is listed, while issues more directly relevant to the target's constitution (e.g. mandatory bid obligations, employees, squeeze-outs etc.) will be dealt with in accordance with the regulation of the Member State where the target has its registered office.

If the securities of the target company are not listed on a regulated market within the EEA (for example, the company is unlisted or is only listed in the US), but the Company has its registered office in Spain, Spanish takeover law will be applicable to a limited extent and will determine, among other things, the percentage of capital that gives control and the information to be provided to the company's employees. On the other hand, certain provisions of Spanish takeover law (i.e. the more procedural provisions relating to matters such as the consideration to be offered) will apply if the target is domiciled outside the EEA but listed on a regulated market in Spain.

There are no special rules applicable where the target is larger than the offeror.

4. What happens if you break the rules?

The Securities Act provides for fines to be imposed in certain circumstances on a party which breaches its provisions. Fines may be imposed by the CNMV, except in the case of "very serious" infringements where responsibility lies solely with the Minister of Economy.

The maximum fine applicable to “very serious” infringements is either five times the profit obtained by the infringement or, if that criterion is not relevant, the highest of the following: (i) 5% of the equity value of the party in breach; (ii) 5% of the funds involved in the infringement; and (iii) €600,000.

The Securities Act also sets out other sanctions which may apply to the managers of the party in breach or to securities firms acting on behalf of such party.

In addition, the voting rights attached to any target shares acquired in breach of the compulsory takeover requirements set forth in the Royal Decree will be suspended. Any resolutions passed as a result of the votes attaching to such shares are void and the CNMV may request the annulment of any such resolution.

A breach of the provisions on market abuse and insider trading in the Criminal Code will also be a criminal offence, which may be prosecuted through the courts.

United Kingdom

1. What regulates takeovers?

1.1. The Code

The main source of regulation in the UK is the Code, which has a statutory basis under CA06. (It also has a statutory basis in relation to the Isle of Man, Jersey and Guernsey.)

The Code is based on a number of general principles (taken from the Takeover Directive), which set standards of good commercial behaviour to ensure the fair and equal treatment of shareholders. The Code also contains a number of detailed Rules, which are required by CA06 to give effect to the relevant provisions of the Takeover Directive. It is the spirit and not the letter of the Code that is important and the general principles will therefore apply in situations which are not expressly covered by the Rules. This flexibility also means that the Rules can be relaxed where circumstances so require (so long as the general principles in the Takeover Directive continue to be respected).

The Panel is authorised by CA06 to give binding rulings on the interpretation, application or effect of the Rules. Past rulings by the Panel on the Code also provide guidance on the ongoing interpretation of the Code.

1.2. The UKLA Rules

The UKLA Rules may be relevant whenever one of the parties to a takeover is listed, or is seeking a listing, on the Main Market of the LSE. If the offeror is premium listed, the UKLA Rules will require it to obtain consent from its own shareholders if the takeover is a comparatively large acquisition. In addition, if the offeror is offering its own listed securities as consideration, the UKLA Rules and the Prospectus Regulation will prescribe the contents of the prospectus (or equivalent document) to be published.

The UKLA Rules also require disclosure of certain interests in voting shares (see paragraph 4 of section 3 below).

1.3. The CA06

This statute contains a number of relevant provisions, including those relating to compulsory acquisitions of minority shareholdings in UK targets (see section 12 below).

1.4. The CJA

This statute contains insider dealing provisions which make certain dealings in securities while in possession of inside information a criminal offence.

1.5. The FSMA

This statute contains a number of relevant provisions, including those prohibiting behaviour which amounts to "market abuse" and those regulating the manner in which "financial promotions" concerning investments are made.

2. Who regulates takeovers?

2.1. The Panel

The Panel is an independent body, predominantly made up of representatives of financial institutions and professional bodies, which issues, amends and administers the Code. It is the UK supervisory body for the purposes of the Takeover Directive, with statutory functions set out in CA06.

The day-to-day work of the Panel is carried out by the Executive, which is headed by the Director General. The Executive is responsible for the monitoring of all matters which are subject to the Code, and is available for consultation and to give rulings on points of interpretation before or during relevant transactions.

Any appeal from a decision of the Executive is made initially to the Hearings Committee of the Panel, and subsequently to the Takeover Appeal Board.

2.2. The FCA

As of 1 April 2013, the Financial Services Authority ceased to exist and was replaced by three new regulatory bodies which regulate financial services in the UK. The FCA inherited the majority of the Financial Services Authority's market regulatory functions (including its role as the UKLA) and is the most directly relevant in the context of a takeover.

As well as administering the UKLA Rules, the FCA may also discipline "authorised persons" (e.g. the financial adviser to an offeror) for any breach of the Code by themselves or their client (see paragraph 4 below). It will also have a role in approving the takeover if the target itself operates certain types of regulated business (e.g. a bank or a life insurance business).

3. To whom do the rules apply?

3.1. The Code

When determining whether or not the Code applies, it is generally the nature of the target or potential target company which is relevant, not the nature of the offeror. The value of the offer and the number of shareholders in the target company are also irrelevant, although the Panel may grant a waiver where the number of shareholders is very low.

UK takeover regulation will govern all aspects of a bid if the target: (i) is a public company (e.g. a UK "plc"), a Societas Europa, or (in certain circumstances – see below) a private company; (ii) has its registered office in the UK, the Channel Islands or the Isle of Man; and (iii) at present is either admitted to trading on a regulated market or multilateral trading facility in the UK (or a stock exchange in the Channel Islands/Isle of Man) or is considered by the Panel to have its place of central management and control in the UK, the Channel Islands or the Isle of Man. The Code generally applies to private companies only where the equity share capital has, at any time during the 10 years prior to the offer, been to some degree publicly listed, offered or traded.

There are also detailed rules relating to shared jurisdiction with the relevant supervisory authority of another Member State, which apply where a company has its registered office in the UK, but its securities are admitted to trading on a regulated market in one or more other Member States, or where a company has its registered office in another Member State, but its securities are admitted to trading on a regulated market in the UK.

The exact application of those rules should always be checked in each individual case. In general, matters relating to consideration and procedure will be dealt with in accordance with the takeover regulation of the Member State where the target is listed, while issues more directly relevant to the target's constitution (e.g. mandatory bid obligations, employees, squeeze-outs etc.) will be dealt with in accordance with the regulation of the Member State where the target has its registered office.

If the securities of a UK target company are not listed on a regulated market within the EEA (i.e. the company is unlisted or is only listed in the US, for example), then the Code will still apply where the target company meets the Code criteria set out above. If the company is domiciled outside the EEA but listed on a UK regulated market, the Code will not apply.#

The Code does not apply to offers for open-ended investment companies, or, in most circumstances, to offers for non-voting, non-equity share capital.

3.2. The UKLA Rules/Statutes

The UKLA Rules apply to companies admitted to the official list maintained by the UKLA. The Rules place more obligations on companies with a "Premium" listing than on those with a "Standard" listing. Companies listed on other markets (e.g. AIM) are subject to the rules applicable to those markets. The statutes referred to in paragraph 1 above are of varying application, depending on the nature of the companies concerned and/or their listing venues.

4. What happens if you break the rules?

There are a number of remedies and sanctions available to the Panel to ensure compliance: the Panel may publicly or privately censure the person in breach, or report the offender to another regulatory authority, or require that the offender take some remedial action, depending on the nature of the breach. The Panel has the power to issue rulings restraining actual or likely breaches of the Code or requiring the payment of compensation to target shareholders, or seek orders from a court to enforce the Code.

The Panel may also "cold shoulder" an offeror or target in breach of a provision of the Code. This involves publication of a statement that the offending party is someone who is not likely to comply with the Code. The rules of the FCA and certain professional bodies generally oblige their members not to act for the offending party in such circumstances, so "cold shouldering" effectively means withdrawing the privileges of access to the financial markets from the party in breach.

If the target is listed, it is also a criminal offence to breach the Code requirements prescribing the contents of the offer document and of the target's response (or "defence") document. The offence is committed by the bidder and/or its directors, or by the directors of the target, if they knew or were reckless as to whether the document failed to comply and also failed to take all reasonable steps to ensure that it did comply.

The FCA may separately take enforcement action against a person authorised by the FCA who contravenes the Code or a Panel ruling. Such action might include public/private censure, fines and/or the removal of authorisation.

In its role as the UKLA, the FCA also has the power to publicly censure or fine a listed company, and in many cases other persons involved (which may include senior managers and directors) for breaches of the UKLA Rules. The FCA also has the ultimate ability to suspend or cancel a company's listing on the Official List and the power to censure, impose a penalty on, or suspend, the sponsor of a listed company.

Breach of other relevant statutes may also constitute an offence, which may be prosecuted through the courts. There may also be other remedies available for injured

parties (e.g. restitution orders where a party has caused financial loss through committing market abuse).

SECTION TWO: TYPES OF BIDS

France

1. What are the different types of bid?

A bid may be either voluntary or mandatory. A mandatory bid is required when a person comes to own shares or voting rights in a company listed on a French exchange that exceed a certain percentage of the share capital or voting rights (see paragraph 3 below).

Partial offers may also be available in certain limited circumstances, but are generally not possible under French law and, to our knowledge, have never been used in France (see paragraph 5 of section 14 below).

A bid may also be either hostile or recommended by the board of the target company. A voluntary offer which is recommended by the target board of directors, with no competing offer, is the most common and straightforward type of bid.

The offeror may also give the target's shareholders the option of selling their shares to the offeror after the main offer has closed (a "CVG"), provided that (i) the option is exercisable within a reasonable time; (ii) it constitutes an alternative to the main bid; and (iii) it is unconditionally guaranteed by the bank sponsoring the offer. This may give shareholders extra time to make up their minds about the offer (see paragraph 2 of section 5 below).

A further distinction can be drawn among "normal offers", "simplified offers" and "buy-out offers". The difference here is in the manner in which the offer is made.

In terms of process, the simplified offer procedure (*offre publique simplifiée*) and the buy-out offer procedure (*offre publique de retrait*) are simpler and shorter than the procedure governing a normal public tender offer. The distinguishing features of these simplified procedures are that (i) they are in most cases performed through direct purchases on the market at the price offered, as opposed to through a centralised procedure; and (ii) they remain open for only a limited number of days (at least 10

trading days, or 15 trading days if non-cash consideration is offered, as compared with 25 to 35 trading days for the normal takeover procedures; see section 9 below).

1.1. Simplified offer procedure

The simplified offer procedure may be authorised by the AMF in the following circumstances:

– the offer is made by a person who already holds, directly or indirectly, alone or in concert, 50% or more of the target company's capital and voting rights;
– the offer is made by a person who, following an acquisition, holds, directly or indirectly, alone or in concert, 50% or more of the target company's capital and voting rights;
– the shares to which the offer relates, when added to the voting equity securities or voting rights of the target company already held (directly or indirectly) by the offeror, constitute no more than 10% of the voting equity securities or voting rights of the target company. It should be noted that offers for less than 100% of a target (i.e. partial offers) may only be made using the simplified offer procedure. Such partial offers can only be made for 10% or less of the voting rights of a company and are extremely rare in France;
– the offer is made by a person, acting alone or in concert, in respect of investment certificates and voting certificates (i.e. where the target company has divided the rights attaching to its shares – an unusual circumstance);
– a repurchase offer by a company for its own securities;
– the offer is made by a company for securities that are convertible or exchangeable into, or otherwise give access to, its equity; or
– the offer is made by a company, offering to acquire equity securities or debt securities that give access to its equity, in exchange for debt securities which do not give access to its equity.

1.2. Buy-out offer procedure

The buy-out offer procedure is applicable in cases where any person, acting alone or in concert, holds at least 95% of a target company's voting rights, whether the offer is voluntarily filed by the majority shareholder or imposed on the majority shareholder(s) by the AMF at the application of any minority shareholder. The AMF will rule on such an application in the light of, inter alia, the state of the market for the target securities and any other relevant information provided by the applicant.

Minority shareholders also have a right to be bought out where a *société anonyme* (public limited company) is being converted into a *société en commandite* par actions (limited partnership with share capital).

The AMF must also be notified by persons controlling a company (i.e. generally owning 50% or more of the voting rights) in the following circumstances, so that it can decide whether a buy-out offer should be made:

– where those in control of the company intend to ask an extraordinary general meeting of shareholders to approve one or more significant amendments to the company's articles; in particular, provisions concerning the company's legal form, or the disposal and transfer of equity securities or attached rights; and/or
– where those in control of the company decide in principle (A) to proceed with the merger of that company into a company that controls it; (B) to sell or contribute all or most of the company's assets to another company; (C) to change fundamentally the company's business; or (D) to suspend the payment of dividends for a period of several financial years.

The AMF will evaluate the consequences of any proposed changes in the light of the rights and interests of the holders of the company's equity securities/voting rights, and will, on this basis, decide whether a buy-out offer should be made.

When a buy-out offer is filed with the AMF, the offeror must specify whether the squeeze-out procedure will be implemented automatically upon closure of the offer, or whether the offeror reserves the right to elect whether or not to apply the procedure (see section 12 below).

2. What are the different structures for a bid?

In structural terms, a bid can only be carried out by the offeror making an offer to acquire the shares held by the target company's shareholders. In this case, the target company shareholders are asked to accept the offer being made to them by the offeror.

Another way to combine two companies is to go through a merger. A statutory merger of two separate entities generally requires approval by the shareholders of each of the participating companies. Where just the two merging parties are involved, the offeror and the target effectively become one company as a result of the statutory merger, and the target shareholders become shareholders in the offeror company.

Such a merger can be achieved between two French companies, or where the 'offeror' is incorporated in another Member State under the European Company Statute. Since the implementation of the Cross-Border Merger Directive in France, it is also possible to carry out a cross-border merger if the two companies are incorporated in EEA Member States, irrespective of whether they are merging into a European Company or not.

Mergers have not generally been used as an alternative to public takeovers. However, a merger may be an alternative to the implementation of a squeeze-out following an offer (see paragraph 1 of section 12 below).

3. What triggers a mandatory bid?

The General Regulation contains provisions which require a person who (together with any party acting in concert with it – see paragraph 4 below) holds 30% or more of the equity securities or voting rights in a target company to make an offer to acquire all the equity share capital. Such threshold is determined in accordance with the rules which apply to disclosure obligations (see paragraph 4 of section 3 below).

In all cases, the following financial instruments must be taken into account to determine whether the 30% threshold is crossed:

- bonds exchangeable for shares;
- futures; and
- options (whether exercisable immediately or at a future date), provided that, where the exercise of an option is conditional on the target share price reaching a level specified in the option contract, it will only need to be taken into account once that level is reached.

The same rule applies to a person who already holds, directly or indirectly, between 30% and one half of the equity securities or voting rights in the target if either that person, or any person acting in concert with them, acquires a further 1% or more of the equity securities or voting rights in the target within a period of less than 12 consecutive months.

The obligation to make a mandatory bid is not triggered by an offeror obtaining irrevocable undertakings to accept an offer (e.g. in preparation for launching a tender offer).

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

- The AMF may authorise, on published terms, a temporary crossing of the 30% threshold, if the purpose of the excess holding is not to gain or increase control of the target company, and is in any case disposed of within six months. The shareholder must undertake not to exercise the voting rights attaching to the excess shares before they are resold.
- (a) The AMF may decide that there is no requirement to file a proposed tender offer if the thresholds mentioned above are exceeded by one or more persons as a result of their becoming concert parties with:

  - one or more shareholders who already hold, alone or in concert, the majority of the target company's capital or voting rights, provided that such shareholders remain predominant; or
  - one or more shareholders who already hold, alone or in concert, between 30% and one-half of a company's capital or voting rights, provided that (1) such larger shareholders maintain a larger holding, and (2) the smaller shareholders do not themselves reach the 30% threshold, or cross the 1% threshold over the 12-month period referred to above.

In all of the above cases, as long as the balance of shareholdings within a concert party is not altered significantly relative to the situation at the time the concert party initially came together, there should be no need to make a public offer, subject to requesting and receiving a waiver from the AMF.

The AMF may also waive the requirement for a mandatory offer if:

- the acquisition of the shares was by way of a gift or a distribution of assets in proportion to the target shareholders' rights;
- the acquisition of the shares was by way of subscription to a capital increase by a target company in financial difficulty, subject to the approval of a general meeting of its shareholders;
- the acquisition of the shares was by way of a merger or an asset contribution subject to the approval of a general meeting of shareholders;
- the acquisition of the shares was by way of a merger or asset contribution subject to the approval of the general meeting of shareholders, combined with an agreement between shareholders of the companies concerned establishing a concert party;
- the threshold was exceeded by virtue of a reduction in the total number of equity securities or voting rights in the target company;
- any shareholder (on its own or together with its concert parties, and including the potential offeror) already holds half of the voting rights in the target company;
- any shareholder (on its own or together with its concert parties) already holds 50% of the voting rights in the target company as a result of an offer made pursuant to the standard procedure (see paragraph 1 of section 2 above);
- the threshold was exceeded by virtue of an intra-group restructuring or other such disposal of equity securities or voting rights between companies or persons in the same group;
- the threshold was exceeded due to the acquisition of control of a company which directly or indirectly holds more than 30% of the capital or voting rights of another company whose equity securities are admitted to trading on a regulated market in a Member State of the European Union or a State party to the EEA agreement, including France, and which does not constitute an essential asset of the company of which control has been acquired;

- the threshold was exceeded by virtue of a merger or a contribution of a company which directly or indirectly holds more than 30% of the capital or voting rights of a company under French law whose equity securities are admitted to trading on a regulated market in a Member State of the European Union or a State party to the EEA agreement, including France, and which does not constitute an essential asset of the merged or contributed company; or
- the threshold was exceeded due to the allocation of double voting rights between 3 April 2014 and 31 December 2018.

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

4. What causes third parties to be counted as "concert parties"?

Persons "act in concert" or become "concert parties" if they enter into an agreement (whether formal or informal) with a view to (i) acquiring or selling voting rights; or (ii) exercising voting rights, in either case in order to implement a common policy with respect to the target company; or otherwise (iii) obtaining control over the target company.

The existence of such an agreement may in some cases be inferred from circumstantial evidence. The AMF has previously held that several shareholders who argued that they had built stakes in a company independently were in fact acting in concert. In reaching this decision, the AMF took into account a number of facts and circumstances, including the timing of their purchases and the overall similarity of their behaviour. This approach has been confirmed by the Paris Court of Appeal and by the Supreme Court.

There are also a number of categories of persons who will be presumed to be acting in concert unless the contrary is shown. These are:

- a company, the chairman of its board of directors and its chief executive officer;
- a company and the entities it "controls". Control arises where a party, either directly or indirectly, or pursuant to a voting agreement, holds shares conferring more than 50% of the voting rights in a company, or where it in practice casts more than 50% of votes at shareholder meetings (and this is presumed to be the case if the party holds more than 40% of the voting rights and no other shareholder holds a larger percentage);
- entities controlled by the same person;
- the stockholders of a *société par actions simplifiée* and the entities which it controls; and
- the trustee (*fiduciaire*) and the beneficiary of a trust (*bénéficiaire d'un contrat de fiducie*) if such beneficiary established the trust.

Under French law, a company and the members of its board of directors (other than its chairman and CEO) are not presumed to be acting in concert with each other.

The formation of a group deemed to be acting in concert will of itself trigger an obligation to make a mandatory bid if the parties' shareholdings in the target in aggregate exceed the relevant threshold(s), unless either of the exemptions referred to in paragraph 3, bullet point (a) above applies.

Where a takeover offer is under consideration, two other categories of concert party may be relevant. First, persons who have entered into an agreement with the offeror to take control of the target are considered to be acting in concert with the offeror. Second, persons who have entered into an agreement with the target company aimed at frustrating an offer are considered to be acting in concert with the target. These two categories do not trigger any obligation to make a mandatory bid, but they trigger all the other obligations applicable to concert parties, including the joint disclosure of shareholdings and the restrictions on trading in target securities during the offer period and any pre-offer period (see section 3 below).

5. Can an indirect acquisition trigger a mandatory bid?

An indirect acquisition may trigger a mandatory bid.

This may occur where an offeror (together with any of its concert parties) launches an offer for a company to which the French takeover rules apply (Company A), which itself holds more than 30% of the capital or voting rights in the target company (Company B), being a company whose equity securities are traded on a European regulated market or on an equivalent market in a country outside the European Union. In such case, notification of the offer for the shares of Company A to the AMF must include an offer prospectus or a draft offer prospectus with respect to Company B, as well as any other document from the authority with jurisdiction to supervise the bid on Company B, demonstrating that an offer to acquire the shares of Company B has been or will be launched.

This may also occur where Company B is a French company and an offeror:

– acquires "control" of Company A, within the meaning of the legislation applicable to Company A; or
– ends up holding more than 30% of Company B's equity securities or voting rights as a result of a merger with, or asset contribution by, Company A.

The AMF may waive the requirement to make a mandatory offer in these circumstances where:

– the holding of shares in Company B does not constitute an "essential asset" of Company A; or
– the shareholding in Company B is an essential asset of Company A, but one or more members of the concert party acquiring control of Company A already held such control, and they remain pre-dominant within the concert party.

Whether a shareholding constitutes an "essential asset" is an issue which is judged on a case-by-case basis by the AMF, and does not only depend on the relative size or value of Company A's shareholding in Company B.

6. Do different rules apply to voluntary and mandatory bids?

6.1. Consideration

An offeror making a voluntary offer generally has a very wide choice in respect of the consideration to be offered to the target company's shareholders (see section 5 below). Such consideration may consist of cash and/or securities.

The Takeover Law provides that a cash alternative must be offered where the offeror (and/or its concert parties) has purchased securities carrying 5% or more of the share capital or of the voting rights of the target for cash over the period of 12 months before the filing of the offer. This applies to voluntary offers as well as mandatory offers. However, given the nature of a mandatory bid, it means in particular that mandatory offers will almost always have to be in cash (unless the controlling stake was acquired in return for liquid securities admitted to trading on a regulated market in a Member State).

A cash alternative must also be offered where the securities offered as consideration are not admitted to trading on a regulated market in a Member State.

The price offered by the offeror in a voluntary bid is no longer subject to AMF review, except where a fairness opinion is required (see paragraph 5 of section 10 below). With respect to the price offered in a mandatory offer, the Takeover Law provides that it cannot be less than the highest price paid by the offeror (and/or its concert parties) in respect of any acquisition of the target's shares in the 12 months immediately preceding the event that triggers the mandatory bid. The AMF has the power to grant exemptions to this requirement under the General Regulation (see section 5 below).

6.2. Conditions

In France, there is a general principle that offers should be unconditional. Thus, for example, an offer may not be conditional upon (i) the offeror obtaining financing

for the transaction or (ii) the absence of material adverse changes in relation to the offeror, the target or the market.

However, pursuant to the recently enacted Florange Law, all offers (voluntary and mandatory) shall be declared void if the bidder does not obtain at least 50% of the share capital or voting rights of the target in the offer.

In addition to this legal threshold, the bidder in a voluntary offer may set a higher threshold (e.g. two-thirds of the capital or the voting rights of the target (corresponding to majority requirements in AGMs and EGMs). By contrast, a mandatory bid may not be conditional upon a higher acceptance threshold.

Germany

1. What are the different types of bid?

A bid may be either voluntary or mandatory. A mandatory bid is required if a party acquires voting rights in a relevant target (see paragraph 3 of section 1 above) which exceed a certain threshold (see paragraph 3 below).

A voluntary bid may not qualify as a "takeover" bid. A "takeover" bid is made with the intention of acquiring control of a target; i.e., the offer is made by an offeror who has less than 30% of the voting rights of the target prior to the bid and may acquire control (more than 30% of the voting rights) as a consequence of the bid. A voluntary bid is not a "takeover" bid if the offeror merely intends to acquire a shareholding of less than 30% or to increase its shareholding having already acquired 30% control (e.g. through a previous takeover bid or prior to the implementation of the Takeover Act).

A bid may also be either hostile or recommended by the board of the target company. A voluntary takeover bid that is recommended by the target board of directors, with no competing offer, is the most common and straightforward type of bid.

Neither mandatory bids nor voluntary takeover bids may be restricted to a certain percentage of the target's share capital. Any takeover bid must be made for the whole of the target's share capital. However, voluntary bids not made with the intention of acquiring control (see paragraph 5 of section 14 below) may be restricted to a specified percentage.

2. What are the different structures for a bid?

In structural terms, a bid is carried out by the offeror making an offer to acquire the shares held by the target company's shareholders. In the case of an offer, the target company shareholders are asked to tender their shares in return for the consideration offered to them by the offeror.

Another way to combine companies is to go through a statutory merger. In the case of a statutory merger, either the assets and liabilities of the target company are transferred by law to the offeror company or both the target company and the offeror company are merged into a newly formed entity. In the first case, the target shareholders become shareholders in the offeror company. In the second case, both target and offeror shareholders all become shareholders in the newly formed entity. A statutory merger requires approval by at least a 75% majority of the votes cast at shareholders' meetings of each of the participating companies that are subject to German law. If a company participating in a merger is a corporation subject to a foreign jurisdiction, the laws of that jurisdiction would apply. The articles of association of the companies involved

may provide for even higher majority requirements. The offeror and the target effectively become one company as a result of the statutory merger.

A merger can be achieved between two German companies. Following the implementation of the EU Cross-Border Merger Directive into the German Transformation Act, it is now also possible to merge a German corporation with a company incorporated in another Member State.

Mergers have not often been used as an alternative to public takeovers, essentially because all minority shareholders of the merged target must be offered shares in the surviving entity. However, a merger may be an alternative to (or may be combined with) an offer in order to achieve full integration of the operations of two entities.

Statutory mergers are not governed by the provisions of the Takeover Act, but by the Transformation Act and the Stock Corporation Act.

3. What triggers a mandatory bid?

A mandatory bid is triggered by a party gaining "control" over the target company. Such control is deemed to arise with a holding of shares carrying 30% or more of the voting rights of the target company, directly or indirectly, alone or together with any party acting in concert (see paragraph 4 below).

The relevant threshold of 30% will not only be triggered by shares directly held by the offeror, but also by shares held:

– by a subsidiary of the offeror;
– by a third party "acting for the account" of the offeror;
– by a third party to whom the shares have been transferred as collateral, unless the third party is entitled to exercise the voting rights attached to those shares and has confirmed its intention to use the voting rights independently from the instructions of the offeror;
– by a third party who has granted the offeror a usufruct (*Nießbrauch*), which gives the offeror the economic benefit, in respect of the shares;
– by a third party if the offeror can acquire the shares by unilateral notice (e.g. if a purchase option provides for the mechanics of automatic transfer solely upon notice by the offeror to the third party);
– by the offeror as a trustee, if the offeror can exercise the voting rights under the shares at its discretion and without instruction;
– by a third party if the offeror is able to exercise voting rights from the shares by virtue of an agreement concerning the temporary transfer of voting rights without a transfer of the respective shares against consideration; or
– by the offeror as trustee, provided that the offeror holds the voting rights and has declared his intention to exercise them.

All shares held by a subsidiary are attributed to the offeror, even if it owns less than 100% of such subsidiary.

In addition, any shares in the target company held by a third party with whom the offeror is acting in concert in respect of the target are attributed to the offeror in full (see paragraph 4 of this section).

Special rules apply for securities services providers (*Wertpapierdienstleistungsunternehmen*) and capital management companies (*Kapitalverwaltungsgesellschaften*).

The rules on mandatory offers apply regardless of whether the party acquires existing or newly issued shares. However, a mandatory bid is not triggered by a mere holding of rights to acquire shares. Therefore, the obtaining of irrevocable undertakings (see paragraph 5 of section 4 below) or options to buy shares would not trigger the obligation to make a mandatory bid, provided any such option only provides for an undertaking to transfer shares, not an automatic transfer of the shares upon unilateral notice by the option holder (see above). The same would usually apply to CFDs over shares, provided again that the contract in question does not provide for an automatic transfer of title to the shares at the unilateral notice of any party to the CFD.

If control has been acquired as a result of a voluntary takeover bid, no additional mandatory bid is required. However, a statutory merger may give rise to the obligation to make a mandatory bid if the controlling shareholder of one of the two entities involved gains "control" over the surviving entity as a result of the merger. The FFSA may be asked to waive this obligation, although it has refused to do so in the past.

Exemptions from the obligation to make a mandatory bid may be made subject to certain conditions. The FFSA may, upon application, consider a waiver of the requirement to make a mandatory bid, inter alia, if:

– the shares are held on a short-term basis;
– the shares are acquired through inheritance;
– the presumption that a 30% shareholding confers controlling power does not hold true, either because another person holds a larger stake in the target, or because high turnouts at the last three general meetings mean that the offeror's shareholding cannot be expected to represent a simple majority at future votes;
– the controlling shareholder has acquired control as a result of a reduction in the total number of voting rights;
– the transfer takes place only to secure a claim against the transferor (e.g. under a share pledge);
– the acquisition was part of a rescue restructuring of the target;

- the control threshold has been exceeded inadvertently and the relevant shareholder reduces its holding of voting rights to a percentage below 30% immediately after filing for the exemption; or
- control over the target has been acquired indirectly, via the acquisition of another company whose shareholding in the target accounts for less than 20% of its total assets in its balance sheet (see paragraph 5 below).

No outside shareholder may appeal or challenge in court a waiver granted by the FFSA.

If the party acquiring the 30% shareholding is the subsidiary of a parent company, both the parent and the subsidiary are technically under an obligation to make the mandatory offer. The Takeover Act is silent as to which company will be required to make this bid and which company will be exempted; this can pose difficult questions for acquisition vehicle structures. In these cases, it is recommended to seek clarification from the FFSA in advance.

4. What causes third parties to be counted as “concert parties”?

A shareholder is deemed to act in concert with another shareholder if it, or any of its subsidiaries, co-ordinate their actions in a specified manner in respect of the target, on either the basis of an agreement or any other arrangement. The co-ordination must either relate to an agreement concerning the exercise of their target voting rights generally, or must otherwise 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-ordination on specific, individual issues only will not be sufficient to amount to acting in concert.

The present definition of acting in concert was introduced into the Takeover Act under the German Risk Limitation Act (*Risikobegrenzungsgesetz*), which came into force in mid-2008. The Risk Limitation Act was a specific response by the German government to the activities of certain financial investors, such as private equity funds and hedge funds, and was aimed at increasing transparency generally in the securities market.

Prior to the adoption of the Risk Limitation Act, “acting in concert” was defined very widely and applied wherever two or more shareholders co-ordinated their conduct in respect of a target company, on the basis of either an agreement or any other arrangement. Despite this wide wording, the courts and the FFSA in practice adopted a relatively narrow interpretation, requiring a co-ordination of the exercise of shareholder rights in respect of the target company – in particular, the exercise of voting rights at the target company’s shareholder meetings.

On this basis, it had proved difficult for the FFSA to secure sufficient evidence that parties were in fact acting in concert. In connection with the implementation of the Takeover Directive, the Takeover Act had already been amended to enlarge the

investigative powers of the FFSA. The FFSA may now request information and documentation from any person if there is a suspicion of undisclosed acting in concert or a breach of the Takeover Act. In addition to this, the new definition now enlarges the instances where shareholders may be deemed to act in concert significantly beyond the co-ordination of voting rights.

Under the amended provisions of the Takeover Act, any co-ordination between shareholders aimed at a fundamental change in the target's business model such as, for example, a sale of a material business unit will qualify as "acting in concert". Activist shareholders seeking to influence the management of a company directly, outside shareholder meetings, will therefore have to bear in mind the risk of triggering a mandatory bid obligation.

However, even under the new law, co-ordinated action with respect to individual shareholder resolutions on different subjects, or repeated resolutions on one subject (e.g. with respect to the nomination of a candidate for the supervisory board of the target), will not usually qualify as acting in concert. More importantly, the explanatory statement to the Risk Limitation Act provides that co-ordination among supervisory board members who may be related to, or may have been elected by, significant shareholders or groups of shareholders will not be regarded as acting in concert.

In addition, the Takeover Act still 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 purchase of a company's shares will continue to be outside the scope of "acting in concert", unless they have plans to change the target company'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. Consequently, if the aggregate voting rights held by the concert parties exceed 30% of the total voting rights of the target, each concert party will be under an individual obligation to make a bid. Since this would be confusing for shareholders, a single offer should be agreed between the concert parties and an exemption for the remaining parties should be sought from the FFSA.

Cooperation by target shareholders to preserve the status quo of the target company's business would, under the amended Takeover Act, not qualify as acting in concert.

5. Can an indirect acquisition trigger a mandatory bid?

An indirect acquisition may trigger a mandatory bid. This occurs where an offeror acquires "control" of a company (Company A) which itself already holds shares in the target company (Company B). The offeror is generally deemed to have acquired "control" of Company A if it holds more than 30% of the voting rights in Company A (if

Company A is listed), or otherwise owns or controls more than 50% of the voting rights. If the shares held by Company A in Company B, aggregated with any other shares in Company B held or deemed held by the offeror itself, constitute a controlling shareholding, this would give rise to a mandatory bid obligation for the offeror.

The FFSA may grant an exemption from this obligation if the book value of Company A's shareholding in Company B accounts for less than 20% of the book value of the assets of Company A.

The existence of a publicly listed subsidiary to which the Takeover Act applies may therefore act as a deterrent against making an offer for the parent.

6. Do different rules apply to voluntary and mandatory bids?

Voluntary takeover bids and mandatory bids are effectively governed by the same procedural rules.

However, voluntary bids may be made subject to certain objective conditions, whereas mandatory bids may not be made subject to conditions, other than a condition relating to necessary regulatory clearances (e.g. antitrust clearances).

Italy

1. What are the different types of bid?

   Tender and exchange offers can be either voluntary or mandatory.

   Voluntary takeover offers can be used to purchase any kind of security included in the definition of financial products.

   A mandatory takeover bid is required when a person, by purchasing Voting Securities' or following the enhancement of voting rights, has acquired more than a certain percentage of: (i) the Voting Securities carrying voting rights to appoint or remove the directors or the supervisory board of a Listed Italian Company (i.e. an Italian company listed on an Italian regulated market); or (ii) the target's voting rights (see paragraph 3 below).

   A bid may also be either hostile or recommended by the management of the target company. A voluntary offer which is recommended by the target's management, with no competing offer, is the most usual and straightforward type of bid.

   A bid may also be either for 100% of a target's share capital or for another specified percentage (see paragraph 5 of section 14 below).

2. What are the different structures for a bid?

   In structural terms, a bid can only be carried out by an offeror making an offer to acquire the securities held by the target company's shareholders. In this case, the target company shareholders are asked to accept the offer being made to them by the offeror.

   As a separate matter, there is a statutory merger and a consolidation procedure available. The statutory merger process involves the absorption of one company by another, with the first company losing its legal identity and the second retaining its own name and identity and acquiring all the assets and liabilities of the first company. The consolidation process involves a merger of the two participating companies into a new company, with both merging companies ceasing to exist as a result.

   Implementation of either process requires shareholder approval (with a supermajority of two-thirds of the share capital represented at the meeting voting in favour) from each participating company. Neither process will trigger a mandatory offer, as long as the process is:

   – approved by the shareholder meeting of the 'target' company whose shares would otherwise be the subject of an offer; and in particular

– approved by a majority (of 50% plus 1 vote) of the "non-interested" shareholders (i.e. shareholders other than (a) any shareholder that would cross the mandatory bid threshold as a result of the merger; and (b) the shareholder – or the shareholders acting in concert - holding the highest number of shares in the 'target' company, provided that such shares represent more than 10% of its share capital).

Mergers have not often been used as an alternative to public takeovers. A merger is also not generally an alternative to a squeeze out.

The provision on tender offers in the Regulation do not apply to statutory mergers.

3. What triggers a mandatory bid?

3.1. Different types of mandatory bid

Mandatory offers are required in the following four separate cases:

3.1.1. Offer for all the outstanding Voting Securities of a Listed Italian Company

Any person who (alone or with any concert party) acquires, by purchasing Voting Securities' or following the enhancement of' voting rights, 25% or more of (i) the issued Voting Securities which carry voting rights to appoint or remove the board of directors or the supervisory board of a Listed Italian Company, or (ii) the target's voting rights, must launch an offer for all the remaining Voting Securities within 20 days from the date on which the threshold was exceeded.

A mandatory offer may also be triggered by a share buy-back that leaves a shareholder with an interest of 30% or more in the target, unless the shares repurchased are held by the target company and count for the threshold calculation (see paragraph 3.2 below).

For Listed Italian Companies which are SMEs, the above mentioned 25% threshold is increased to 30%. The by-laws of SMEs may set different a threshold, even though it must be comprised between 25% and 40%.

(As set out in the glossary, "Voting Securities" are shares and financial instruments that give the right to vote at ordinary and/or extraordinary shareholders' meetings.)

3.1.2. Incremental offer

The same rule also applies to any person who (alone or with any concert party) already owns more than 25% (or 30%, in the case of SMEs) of the Voting Securities which carry voting rights to appoint or remove the board of directors or the supervisory board of a Listed Italian Company, or 25% (or 30%, in the case of SMEs) of the target's voting rights, but does not own the majority of voting rights generally exercisable at a meeting of ordinary shareholders in that company. If that person acquires a further shareholding representing more than 5% of the target company's Voting Securities, which carry voting rights to appoint or remove the board of directors or the supervisory board, or further voting rights representing more than 5% of the target's voting rights, within a 12-month period (either through direct acquisition, by exercise of subscription/conversion rights acquired during the period or as a result of the enhancement of voting rights), such person must launch a mandatory offer for all the remaining Voting Securities.

SMEs' by-laws may exclude the application of this rule until the date of the shareholder meeting convened to approve the financial statements for the fifth financial year following the listing.

However, a shareholder who (i) owns more than 45% of the Voting Securities which carry voting rights to appoint or remove the board of directors or the supervisory board of a target company; and (ii) has not purchased any such Voting Securities in the preceding 12 months, is free to increase its shareholding in the company by any amount without incurring any obligation to launch an offer.

3.1.3. Chain principle offer

See paragraph 5 below.

3.1.4. Sell-out

See paragraph 1.2 of section 12 below regarding the right of the minority shareholders to sell their Voting Securities to a major shareholder in certain circumstances.

3.2. Calculation of the relevant thresholds

A mandatory offer can be triggered by a subscription for new shares, an enhancement of voting rights or a conversion of securities.

With reference to the various mandatory offer situations, shares indirectly owned through fiduciaries or other intermediaries would always be counted for the purpose of determining the relevant thresholds, and a person's shareholding would also be aggregated with those of its concert parties (see paragraph 4 below).

For the purposes of calculating the 25% (or 30%, as the case may be) and 5% thresholds referred to above, derivative financial instruments which give a long position over the target's Voting Securities are also taken into account and are treated as if the underlying Voting Securities had been purchased by the long party. There are some limited exceptions to this rule; for example, where these instruments are traded on a regulated market. The obligation to make a mandatory bid may therefore be triggered by a potential offeror's purchase of call options at a fixed exercise price which, irrespective of whether the call option is exercised or not, gives that party a long economic exposure to the underlying Voting Securities.

The above mentioned thresholds are generally calculated by taking into account all of the target's outstanding Voting Securities which carry voting rights to appoint or remove the board of directors or the supervisory board of a Listed Italian Company. If the target's by-laws allow the enhancement of voting rights or the target has issued shares with multiple voting rights, the relevant thresholds are calculated by determining the proportion between the number of voting rights, which can be exercised with respect to the appointment or removal of the board of directors or the supervisory board, held by the offeror and the overall number of voting rights that may be exercised within the target. In any event, for the purposes of the thresholds' calculation, the shares held by the target (or their associated voting rights) do not count, unless they have been acquired by virtue of a shareholder resolution approved by the majority of shareholders, other than the shareholder holding the highest number of shares in the target (provided that such stake is above 10% of its share capital). In addition, shares held by the target (or their associated voting rights) will also be included in the above mentioned calculation if they have been purchased by the target in order to complete an extraordinary transaction (e.g. to be exchanged as part of a merger) or for the purposes of a management compensation plan.

The obligation to make a mandatory bid is not triggered by an offeror obtaining irrevocable undertakings to accept an offer or options to subscribe for unissued shares or to buy shares, except where the offeror has options granting the buyer a long economic exposure over the underlying Voting Securities – e.g. options that provide for the purchase of existing shares at a pre-determined price, and not (for example) at current market value.

3.3. Exemptions

A mandatory takeover offer is not required if:

- in the case of paragraphs 3.1.1. and 3.1.3. above, the relevant thresholds are exceeded as a consequence of:
  - a previous cash and/or exchange offer for 100% of the Voting Securities of the target provided that, in the case of an exchange offer, the consideration consists of securities listed on Member State regulated markets or has a cash alternative; or
  - a previous partial voluntary offer for not less than 60% of the target's Voting Securities, provided that all the following conditions are met:
    - during the offer and the 12-month period preceding the offer, the offeror (and its concert parties) did not purchase, directly or indirectly, any stake in the target exceeding 1% of its issued Voting Securities;
    - the partial offer was conditional upon the approval of the majority of the target company's holders of Voting Securities, excluding the offeror and any shareholders (and their concert parties) owning (directly or indirectly) more than 10% of the target's issued Voting Securities; and
    - CONSOB has granted an exemption to the mandatory offer rule after verifying the existence of the conditions referred to in paragraphs (1) and (2) above;
- another shareholder of the target company, or other target shareholders acting in concert, already own more than 50% of the voting rights of the target company exercisable at ordinary shareholders' meetings;
- the relevant thresholds have been exceeded as a result of a share issue carried out by the target company in the context of insolvency proceedings, or a pre-insolvency reorganisation plan agreed with the company's creditors. Provided that no purchases of Voting Securities have been made in the preceding 12 months, the same exemption applies in the case of a share issue carried out in the context of a restructuring plan for the purposes of re-establishing the financial stability of the target company. In situations of financial distress, the exemption may still apply even when these requirements are not complied with, provided that there is an approval by the majority of "non-interested" shareholders (i.e. shareholders other than (a) the shareholder that would be crossing the relevant threshold; and (b) the shareholder holding the highest number of shares in the relevant company, provided that such represent more than 10% of its share capital);
- the relevant transaction takes place between a company and its controlled subsidiaries, or between subsidiaries of the same controlling company (control for this purpose being the ownership of the majority of voting rights at ordinary shareholders' meetings);

- in the cases described in paragraphs 3.1.1. to 3.1.3. above, the relevant threshold has been exceeded as a consequence of the exercise of options, or subscription or conversion rights, originally issued to the exercising party;
- in the cases described in paragraphs 3.1.1. and 3.1.2. above, the 25% (or 30%, as the case may be) and 5% thresholds have been exceeded, provided that the purchaser undertakes to sell the excess securities (to anyone other than its related parties) or to reduce the excess voting rights within 12 months and not to exercise the voting rights attached to them in the meantime;
- in the cases described in paragraphs 3.1.1. and 3.1.2. above, the 25% (or 30%, as the case may be) and 5% thresholds have been exceeded as a result of the purchase of derivative instruments and the purchaser undertakes to sell the excess securities (to anyone other than its related parties) within six months and not to exercise any voting rights with respect to shares exceeding the relevant threshold in the meantime;
- in the cases described in paragraphs 3.1.1. to 3.1.3. above, the relevant threshold has been exceeded as a consequence of a merger or de-merger approved by the shareholders' meeting of the target company, with the positive vote by the majority of "non-interested" shareholders (i.e. excluding the vote of (a) the shareholder who crosses the relevant threshold as a consequence of the merger; and (b) the shareholder holding (also together with concert parties) the highest number of shares in the target company (provided that such shares represent more than 10% of its share capital);
- in the cases described under paragraphs 3.1.1. to 3.1.3. above, the relevant threshold has been exceeded through the acquisition of Voting Securities by way of gift or succession; or
- for target companies whose by-laws allow the enhancement of voting rights or allowed the issue of shares with multiple voting rights, when a shareholder's voting rights exceeds the thresholds referred to in paragraphs 3.1.1. and 3.1.2. above (referred to voting rights) due to a reduction of the overall voting rights to appoint or remove the board of directors or the supervisory board of the target company (provided that such shareholder does not own, individually or in concert with others, a number of shares which per se exceeds the 25/30% thresholds referred to in paragraphs 3.1.1. and 3.1.2. above).

4. What causes third parties to be counted as "concert parties"?

As a general rule, any parties that cooperate on the basis of an agreement which is aimed at either (i) acquiring, maintaining or consolidating control over a company with listed shares; or (ii) interfering with the completion of an offer for such a company, are presumed to be acting in concert (and therefore qualify as "concert parties" under the CFA), save as otherwise specified by CONSOB in the Regulation. For the purposes of this definition, an agreement may be written or oral, express or implicit, and does not even need to be legally enforceable.

In addition, the following categories of persons are deemed to be acting in concert:

- parties bound by shareholders' agreements (whether written or oral, and even if such agreements are in fact not enforceable) as defined in Article 122 of the CFA (i.e. agreements that (i) oblige the parties to consult each other before exercising voting rights in companies with listed shares, or in companies that control such listed companies; or (ii) set limits on the transfer of the relevant shares, or of financial instruments that entitle holders to buy or subscribe for such shares; or (iii) provide for the purchase of shares or financial instruments as referred to in subparagraph (ii); or (iv) have as their object or effect the exercise, jointly or otherwise, of a dominant influence on such companies; or (v) require the parties to support or hinder an offer for listed shares, including agreements that oblige the parties not to accept an offer being made to them by an offeror);
- a person and the companies "controlled" by it pursuant to article 93 of the CFA (i.e. where the person holds a majority of voting rights in a company, or holds voting rights that give it a dominant influence, or where the person can exercise dominant influence under a contractual agreement);
- companies under common control (i.e. companies controlled by the same company); and
- a company with its directors and/or general managers.

CONSOB has also established a series of rebuttable presumptions relating to acting in concert, including the following:

- an individual and his or her spouse or relatives, as well as an individual and his or her financial advisers, are presumed to be acting in concert; while
- shareholders that enter into an agreement for the appointment of minority directors (i.e. directors who are required by law to be appointed from a short-list submitted by the minority shareholders), or shareholders cooperating for the sole purpose of preventing the approval of specific resolutions (e.g. on related party transactions or management compensation), will not be presumed to be acting in concert.

The obligation to launch a mandatory offer is triggered when the parties acting in concert cross the 25% (or 30%, as the case may be) threshold because of purchases of shares made by one or more of them or because of the enhancement of voting rights affecting one or more of them. All concert parties are jointly and severally obliged to launch an offer.

In the case referred to in (a) above, purchases of Voting Securities in the target company made by concert parties during the 12 months preceding the execution of the shareholders' agreement, or at the time of execution of that agreement, will also be taken into account when assessing the application of the mandatory offer provisions. Therefore, the obligation to make a bid may be triggered by parties simply entering into

a concert party agreement, to the extent that their aggregate shareholding crosses the 25% (or 30%, as the case may be) threshold as a result of purchases made in the preceding 12-month period.

5. Can an indirect acquisition trigger a mandatory bid?

An indirect acquisition may trigger a compulsory "chain principle" offer. This occurs when one or more concert parties (Purchasers) acquire a stake in a company (Company A) which in turn holds Voting Securities in a listed company (Company B), or interests in other holding companies owning Voting Securities in Company B, and the Voting Securities in Company B indirectly owned by the Purchasers (alone or combined with other Voting Securities in Company B directly owned by them) exceed the 25% (or 30%, as the case may be) threshold. The stake acquired in Company A must: (i) if Company A is listed, consist of Voting Securities carrying voting rights to appoint or remove the directors or the supervisory board of a Listed Italian Company that exceed the 25% (or 30%, as the case may be) threshold; or (ii) if Company A is unlisted, represent a controlling stake. The relevant thresholds may be exceeded also as a result of the enhancement of voting rights.

However, Voting Securities in Company B indirectly owned by the Purchasers are only taken into consideration for these purposes if Company A's assets are predominantly represented by:

– shareholdings in listed companies; or
– shareholdings in other holding companies, provided that the assets of such holding companies are in turn predominantly constituted by shareholdings in listed companies.

"Predominance" is presumed when at least one of the following conditions is met: (i) the book value of the listed shareholdings represents more than one-third of the net assets, and exceeds the value of every other fixed asset, recorded in the balance sheet of Company A; or (ii) the value of the listed shareholdings represents more than one-third of the purchase price paid for the securities in Company A and constitutes the principal component of such price. Where the assets of Company A are predominantly constituted by shareholdings in listed companies, the obligation to launch an offer applies only in respect of listed companies in which Company A's direct or indirect interests represent at least 30% of the aggregate value of all Company A's direct or indirect listed interests.

The existence of a listed subsidiary which may trigger an obligation to launch a mandatory offer therefore acts as a deterrent against making an offer for the parent.

6. Do different rules apply to voluntary and mandatory bids?

6.1. Consideration

An offeror making a voluntary bid has a wide choice of what consideration to offer the target company's shareholders (see section 5 below).

By contrast, there are certain rules governing the type and amount of consideration that must be offered in a mandatory offer, depending on the specific type of mandatory offer concerned (see also section 5 below).

In particular, in a general mandatory offer (see paragraphs 3.1.1. and 3.1.2. above), the consideration must generally be at least equal to the highest price paid by the offeror and its concert parties for the relevant class of target securities over the 12-month period preceding the announcement of the bid (or, if there have been no purchases for value in that period, the weighted average market price over the previous 12 months).

In addition, a cash alternative must be made available in a mandatory offer where the offeror (and its concert parties) have, in the 12-month period preceding the announcement of the offer, paid cash for securities that carry at least 5% of the voting rights at a shareholders' meeting of the target company – which will almost invariably be the case where the offeror has crossed the relevant thresholds for mandatory offers. In other cases, consideration may include securities or may consist entirely of securities.

6.2. Conditions

A voluntary bid can have a number of conditions attached to it. A discussion of the usual conditions included in a voluntary bid, and the circumstances in which they can be invoked, is included in section 6 below.

By contrast, a mandatory offer cannot be subject to any conditions.

The Netherlands

1. What are the different types of bid?

A bid may be a full bid, a partial bid or a tender bid. A full bid may be either voluntary or mandatory (see paragraphs 3, 5 and 6 below).

A full voluntary bid is a public offer at a particular price or exchange ratio that is made for all securities in the target company of a particular category or class. A mandatory bid is required when a party, individually or jointly with others, acquires a certain percentage of the voting rights in a listed company (see paragraph 3 below). A mandatory bid requires a public offer to be made for all shares of all classes in the target company, and all depository receipts for target shares which have been issued with the cooperation of the target, at a specified "equitable price" (see paragraph 1 of section 5 below).

An offer may also be for less than 100% of the securities in the target company of a particular category or class. Such an offer will be a partial bid or a tender bid. A partial bid is a public offer for less than 30% of the voting rights in the target company at a specified offer price. A tender bid is a public offer for less than 30% of the voting rights in the target company, where the offeror invites the holders of securities in the target company to tender their securities and to state the consideration they would like to receive.

Any bid may be hostile, recommended by the board of the target company or subject to further negotiations. A full voluntary offer that is recommended by the target board of directors, with no competing offer, is the most common and straightforward type of bid.

2. What are the different structures for a bid?

In structural terms, a takeover of a public company in the Netherlands can be carried out primarily by the offeror making an offer to acquire the shares held by the target company's shareholders. In the case of a public offer, target shareholders are asked to tender their shares in return for the consideration offered to them by the offeror.

Another way to combine two companies is to go through a statutory merger under the Civil Code. In the case of a statutory merger, either the assets and liabilities of the target company are transferred to the offeror company or the assets and liabilities of both the target company and the offeror company are transferred to a newly formed entity. In both cases, the assets and liabilities are transferred by operation of law pursuant to a statutory process. In the first case, the target shareholders become shareholders in the offeror company. In the second case, both the shareholders of the target and offeror companies become shareholders in the newly formed entity. The offeror and the target effectively become one company as a result of a statutory merger.

A merger can be carried out between two Dutch companies. Following the implementation of the EU Cross-Border Merger Directive in the Netherlands, Dutch companies are also able to undertake a statutory merger with companies in other EEA Member States.

A statutory merger requires, as a minimum under the law, the approval of the shareholders of the target company and, if the offeror is a Dutch NV, the offeror. The necessary approval is either: (i) if the shareholders present at the relevant meeting hold, in aggregate, 50% or more of the company's share capital, a majority of the votes at that meeting; or (ii) if the shareholders present at the relevant meeting hold, in aggregate, less than 50% of the company's share capital, a two-thirds majority of the votes at that meeting. Furthermore, under the articles of association of many listed companies, a proposal for a statutory merger may only be made to the target company shareholders by the managing and supervisory boards of that target company (i.e. it cannot be proposed directly to the target company shareholders by the offeror or by any shareholder of the target).

Takeovers by means of a statutory merger (including a cross-border merger) are relatively rare in the context of listed companies. Concerns have been raised that an offeror can use the statutory merger mechanism to "squeeze out" target company shareholders who reject (or would have rejected) a public offer bid. Statutory mergers have, for example, been used to squeeze out minority shareholders in a target company in cases where that minority held in excess of 5% of the voting rights of the target company following a public offer. In the context of a public bid however, there have been recent public offers in the Netherlands where a cross-border merger or triangular legal merger was "pre-wired" (pre-agreed) between bidder and target company (see paragraph 1 section 12 below).

The Offer Rules do not apply to a statutory merger.

3. What triggers a mandatory bid?

Under the FMSA, a mandatory bid is triggered by a person, or a group of persons acting in concert, obtaining "control" over the target company by acquiring at least 30% of the voting rights in the target.

A mandatory offer will not be required if, within 30 days following the acquisition of control, the controlling party reduces its stake below the 30% voting rights threshold, provided that the voting rights held by that controlling party have not been exercised during this period and the shares are not sold to another controlling shareholder of the company. The Enterprise Chamber may extend this period by an additional 60 days.

Depository receipts for shares which have been issued with the cooperation of the target company and which are traded on a stock exchange will generally be treated as

"voting rights" for these purposes, because holders of depository receipts for shares in listed companies are in principle entitled to vote the underlying shares and to receive a power of attorney from the administration office to allow them to exercise this right.

However, the administration office has a statutory power that allows it to refrain from granting a power of attorney in the event of a hostile offer, or where otherwise required to fend off a perceived threat to the target company. If this power is exercised, a holder of depository receipts representing 30% or more of a target's shares would not be required to make a mandatory bid until the power of attorney is eventually granted to such holder.

This could, in theory, mean that a holder of depository receipts is initially obliged to launch a mandatory bid, after which the administration office could refuse to grant, or withdraw, a power of attorney to vote the underlying shares, which would remove the ability of that holder to use the voting rights attached to those underlying shares. Ultimately, the Enterprise Chamber would have to determine whether the offeror would have to proceed with the mandatory offer.

The Offer Rules contain a substantial number of exemptions to the obligation to make a mandatory offer. The obligation to make a mandatory bid does not apply to a party that:

- acquires control of an open-ended investment fund;
- acquires control by declaring unconditional a public offer for all the shares (and depository receipts for shares) in the target company, but only if this results in such party being able to exercise more than 50% of the voting rights at a general meeting of the target company;
- is an independent legal person (in the Netherlands this will generally be a foundation) which, after the announcement of a public offer by another party, subscribes for protective preference shares in a target for a maximum period of two years (see paragraph 2 of section 13 below);
- is an administration office which has issued depository receipts for shares in the target;
- acquires control through a transfer of shares within a group;
- acquires control of a target company which has been granted suspension of payments or which has been declared bankrupt;
- acquires control by hereditary succession;
- acquires control simultaneously with one or more other parties, generally by acting in concert, in which case the party that can exercise the greatest number of voting rights will be obliged to make a mandatory bid;
- has control at the point in time that the shares are for the first time admitted to trading on a regulated market;
- is a depository of shares, provided such depository is not entitled to exercise the voting rights attached to the shares at its own discretion; or

– acquires control by entering into a marriage or a registered partnership with a person who already has control over the company.

A person who already held control over a company on 28 October 2007, the date that the Offer Rules came into force, is not under an obligation to make a mandatory offer. This also applies if any such pre-existing control is increased. This exemption now also applies to any consortium of parties, acting in concert, that held control over a company on the relevant date, and any person(s) joining such consortium afterwards. To qualify for this exemption, the consortium needs to have had uninterrupted control since 28 October 2007, and any person joining the consortium may not "unilaterally control" any voting by the consortium, nor have an intention to increase its stake.

A person who acquires 30% or more of the voting rights in a listed company is also exempt from making a mandatory bid if the general meeting of shareholders of the target company approves the acquisition within a three-month period preceding the acquisition. Such approval requires a majority of 90% of the votes cast by independent shareholders, which excludes the acquiring party or parties acting in concert with the acquiring party. This exemption may, for example, be of use if a large block of target shares is acquired in exchange for the sale of an asset to the target company.

Financial institutions that acquire control following an underwriting of a share issue are also exempted from the obligation to make a mandatory offer, provided that this is for a maximum period of one year, and they do not exercise the voting rights attaching to their acquired securities.

In addition, shareholders that irrevocably undertake to tender their shares in an offer, and to vote in favour of relevant shareholder resolutions once the offer becomes unconditional, no longer risk becoming subject to a requirement to make a mandatory offer.

Finally, the Enterprise Chamber may, at the request of the target company or its shareholders, exempt a party from making a mandatory offer if the financial situation of the target company justifies the obtaining of control without the making of a public offer. For example, this would cover a situation where a company in financial difficulties issues an equity stake of 30%+ to a bank which is providing financing support, where that bank would not be involved if it were required to make a mandatory offer.

4. What causes third parties to be counted as "concert parties"?

For parties to be counted as "concert parties" for the purposes of the mandatory offer rules, they must take actions that are aimed at (i) obtaining control of a target; or (ii) frustrating an announced takeover of a target in cooperation with the target company. Whether a person is a concert party is therefore a factual matter and depends on the surrounding circumstances. Shareholders will not be considered to be acting in concert

merely because they are interacting for the purposes of dialogue with the target board, or to initiate changes in corporate governance. However, certain types of person are always deemed to be acting in concert; in particular, companies within the same group.

Persons can be considered to be "acting in concert" with one another whether or not there is any agreement in place between them; even co ordinated actions may be enough to establish that parties are "acting in concert".

The coming together of a concert party may in itself trigger the requirement for a mandatory offer; no further share purchases need to be made to trigger the mandatory offer requirement.

5. Can an indirect acquisition trigger a mandatory bid?

An indirect acquisition may trigger a mandatory bid under the FMSA. This may occur where an offeror acquires "control" of a company (Company A) which itself already holds shares in the target company (Company B). The meaning of "control" is not specifically defined in the legislation, but a level of more than 30% of the voting rights may confer control if Company A is listed, whereas a level of more than 50% may be required in other circumstances. If an offeror acquires control of Company A, and the voting rights held by Company A in Company B, aggregated with any voting rights in Company B held by the offeror itself, reach or exceed the 30% mark, this would give rise to a mandatory bid obligation for the offeror.

The existence of a publicly listed subsidiary to which the Offer Rules apply may therefore act as a deterrent against making an offer for the parent.

6. Do different rules apply to voluntary and mandatory bids?

6.1. Consideration

In principle, an offeror making a voluntary offer is free to offer whatever price it wishes to offer, subject to the "best price" rule (see paragraph 1 of section 5 below). However, an offeror making a mandatory offer is required to offer an "equitable" price for the shares in the target company. The equitable price must be equal to the highest price paid by the offeror (or any party acting in concert with the offeror) for the target shares in the year preceding the mandatory offer. However, if the offeror has not acquired any securities during the preceding year (and acquires control as a result of, for example, a cancellation of shares or a legal merger with another entity), the equitable price will be equal to the average share price during that year (see paragraph 1 of section 5 below).

6.2. Conditions

In contrast to a voluntary bid, the completion of a mandatory bid may not be made subject to any conditions. This also means that the offeror in a mandatory bid may not include a minimum acceptance condition in its offer and that, even if the takeover of the target is subject to antitrust or other regulatory clearance, the offeror is not allowed to include a regulatory condition in its offer. If there are antitrust or other regulatory concerns, the offeror needs to address these directly, or reduce its holding in the target below 30% in the 30 to 90-day period referred to in paragraph 3 of section 2.

6.3. From a voluntary to a mandatory bid

When an offeror in the process of making a voluntary bid acquires 30%+ control of the target (through acquisitions of shares or otherwise), the voluntary bid will lapse unless the offeror elects to continue with it as a mandatory bid, in which case the offer conditions will fall away. The consideration offered in the mandatory bid should be equal to or higher than the price offered in the voluntary bid, and any target shareholders that have already tendered their shares in the voluntary bid will have “withdrawal rights” for a period of seven days.

Spain

1. What are the different types of bid?

A takeover bid may be either voluntary or mandatory. A mandatory bid is required when a person gains control of a company listed on a Spanish Stock Exchange (see paragraph 3 below).

It is also possible to have a de-listing bid made by the target company itself (or a third party), or a bid to reduce share capital made by the target (although this is not really an "offer" in the sense of a takeover offer).

A bid may also be either a full offer for 100% of a target's share capital or a voluntary offer for a specified percentage (see paragraph 6 below).

A bid may also be either hostile or recommended by the board of the target company. A full offer which is recommended by the target board of directors, with no competing offer, is the most common and straightforward type of bid.

2. What are the different structures for a bid?

In structural terms, a takeover bid can be carried out either by the offeror making an offer to acquire the shares held by the target company's shareholders or by a target company itself initiating a de-listing tender offer.

In the case of an ordinary offer, the target company's shareholders are asked to accept the offer being made to them by the offeror. In a de-listing offer, it is generally the company seeking to be de-listed that must launch the offer, once it has initiated the de-listing. De-listing offers may also be launched by other third parties (for example, a parent company), subject to the approval of the general shareholders' meeting of the de-listing company.

Another way for two companies to combine is through a merger. A merger is a corporate process requiring the approval of the shareholders of both companies, and is usually structured as the target transferring its assets and liabilities to the offeror, the target shareholders becoming shareholders in the offeror, and the target then being dissolved. A merger requires approval by the shareholders of each of the participating companies.

A merger can be carried out between two Spanish companies. Following the implementation of the EU Cross-Border Merger Directive in Spain, a merger can also be carried out cross-border with a company in another EEA Member State.

A merger would not be subject to the Spanish takeover rules, although if the process resulted in a party obtaining control of the offeror, and the offeror is listed on a Spanish Stock Exchange, then that person will be required to make a mandatory bid (see paragraph 3 below).

3. What triggers a mandatory bid?

3.1. Mandatory bid to gain control of a listed target

A mandatory bid will be triggered whenever a person gains control of a company listed on a Spanish official market (i.e. a Spanish Stock Exchange or any other Spanish regulated market) in one of the ways set out in the Royal Decree (see below).

Control of a target by a person or by a group of persons acting in concert is deemed to exist where:

– they hold at least 30% of its voting rights, directly or indirectly; or
– they hold a stake of less than 30% of its voting rights but appoint (within the 24 months following the acquisition) such number of directors as, taken together with any already appointed by them, represent a majority of the target's board of directors.

Control may be acquired by either (A) directly or indirectly acquiring target securities with voting rights (whether direct or indirect); or (B) entering into a relevant shareholders' agreement (see paragraph 4 below).

The acquisition of securities that may be exchanged or converted into target shares carrying voting rights will only trigger the obligation to launch a mandatory bid once such conversion or exchange takes place.
The Royal Decree established a transitory regime for shareholders who had holdings of between 30% and 50% of the voting rights of a listed company as at 13 August 2007. Such shareholders will only be obliged to launch a tender offer if they:

– acquire at least an additional 5% of the target company's shares in any 12-month period;
– acquire at least 50% of the target company's voting rights; or
– acquire any additional stake in the target company and designate (within the 24 months following the acquisition) such number of directors as, taken together with any already appointed by them, represent a majority of the company's board of directors.

Where a target company holds its own shares in treasury, such shares are disregarded for the purposes of calculating any of these thresholds.

Except in the limited cases described below, mandatory bids must be addressed to:

- all holders of the target company's shares which have voting rights;
- all holders of the target company's non-voting shares, if such shares will have voting rights once the offer is launched; and
- all holders of the target company's convertible bonds or share subscription rights issued pursuant to a rights issue.

It is not compulsory to address a bid to holders of warrants or other financial instruments that give a possible future right to acquire or subscribe for shares, but if a bid is addressed to such holders, it must be addressed to them all in the same terms in order to comply with the equal treatment principle.

The CNMV may authorise a person acquiring more than 30% of a target's voting rights (Shareholder A) not to launch a mandatory offer if another shareholder (Shareholder B) has an equal or larger stake in the target. The CNMV's permission will be subject to the following conditions: (i) Shareholder B not reducing its stake in the target below Shareholder A's stake; and (ii) Shareholder A not appointing more than half of the members of the target's board of directors. If permission is not granted, or the conditions are not fulfilled, the acquiror must launch an offer for the target within three months, unless the stake in excess of 30% is sold within that period and, in the meantime, voting rights are not exercised.

A mandatory bid will not be triggered if:

- the shares in question are acquired for no consideration (e.g. by gift or inheritance). In order for this exception to be applicable in the case of intervivos gifts, the donee must not have acquired securities in the target during the previous 12 months and the donor and the donee must not act in concert;
- the shares concerned are acquired by certain public or regulatory authorities/bodies, including acquisitions by the Banking Restructuring Fund (FROB), which was created in the context of the 2008 financial crisis;
- the acquisition in question is a consequence of the application of the Compulsory Purchase Act (Ley de Expropiación Forzosa), or otherwise results from the exercise of public law powers;
- all of the target company's shareholders unanimously agree to the purchase or exchange of shares representing 100% of the company's capital, or unanimously waive their right to sell or exchange their shares or other

securities in a tender offer, and simultaneously approve the company's de-listing;

- the significant shareholding is acquired as a consequence of the capitalisation or conversion of debt into shares in a situation where the company's financial viability is in imminent and serious danger. The CNMV will decide whether this exception applies on a case-by-case basis. Such decision will not be necessary if the transactions contemplated in this section have been carried out as a direct consequence of a refinancing arrangement approved by a judge according to the Insolvency Law;
- control has been gained as a result of a voluntary tender offer addressed to the holders of all the target's relevant securities and either an equitable price has been offered or holders of securities with at least 50% of the voting rights in the target have accepted the offer; or
- the shareholder acquiring control does so as a result of a merger, in respect of which that shareholder has not voted at the relevant target shareholders' meeting (i.e. it has been approved by the other shareholders), and the merger can be justified on an industrial or commercial basis (i.e. the merger's main purpose was not merely to gain control over the target company). The CNMV will verify whether these two conditions have been met and, on this basis, will decide whether to grant the exemption.

If a person gains control over a listed company as a consequence of a reduction of share capital, conversion or exchange of securities, variations in the company's shares held in treasury or enforcement of an underwriting agreement, such person must launch a mandatory bid within three months following such event, unless an exception applies (see above).

3.2. De-listing bid

If a company approves the de-listing of its shares from an official Spanish Stock Exchange, a mandatory offer by the company or a third party (for example, a parent company) will be triggered unless:

- de-listing occurs after a public tender offer, and the offeror holds 100% of the target's share capital as a result of the exercise of squeeze-out or sell-out rights by the offeror or, as the case may be, the minority shareholders;
- all shareholders waive their right to sell their securities in a public tender offer and the de-listing is approved unanimously;
- the company is dissolved through a merger, as a result of which the dissolved company's shareholders become shareholders of another listed company;
- a public tender offer for 100% of the company's share capital has previously been launched and (A) the prospectus disclosed the intention to delist the company; (B) an independent report confirms that the price offered in the previous bid satisfied the requirements of a delisting bid; and (C) the sale of

the remaining shares is guaranteed by a permanent order from the offeror to buy all outstanding shares tendered to it at the price offered in the previous bid; or

- the general shareholders' meeting of the target approves a procedure which the CNMV regards as being equivalent to a tender offer in terms of shareholders' protection.

4. What causes third parties to be counted as "concert parties"?

Whenever two or more shareholders cooperate as part of an arrangement (whether oral or in writing, express or implied) entered into with a view to gaining control of a listed company, they will be taken to be acting in concert and their respective stakes in that company will be deemed to belong to the same shareholder. Consequently, if such combined stakes amount to at least 30% of the company's voting rights (or if, between them, they appoint more than half of the company's board of directors within 24 months), a mandatory bid will be triggered.

An arrangement of this nature will be deemed to exist if the parties have entered into a shareholders' agreement (regulated under sections 530 et seq. of the Corporations Act) intended to establish a common policy towards the company's management or to influence it significantly, as well as any other arrangement with a similar goal regulating the exercise of voting rights on the board of directors or its executive committee.

Entering into an arrangement of this nature will of itself trigger an obligation to make a mandatory bid if the parties' shareholdings in the target in aggregate exceed the relevant threshold(s), without any need for further acquisitions of shares.

5. Can an indirect acquisition trigger a mandatory bid?

An indirect acquisition may trigger a mandatory bid. This will occur whenever a person or company gains control of or merges with another company (Company A) which itself has control over the target company (Company B), control having the meaning set out in paragraph 3 above.

The mandatory bid, which must be launched within three months following the merger or the acquisition, must be for 100% of the target company. However, in addition to the exceptions already described in paragraph 3 above, this obligation can be avoided if:

- within three months of the merger or acquisition, the stake in Company B in excess of 30% is sold and, in the meantime, voting rights are not exercised; or
- the CNMV grants a waiver because a third party (alone or with concert parties) has an equal or greater percentage of voting rights in the potential target.

The existence of a publicly listed subsidiary to which the Securities Act applies may therefore act as a deterrent against making an offer for the parent.

6. Do different rules apply to voluntary and mandatory bids?

Voluntary bids are generally subject to the same rules as mandatory bids. However, there are exceptions to this rule:

6.1. Consideration

Mandatory bids must be in cash or have a cash alternative, and must be at an equitable price. A voluntary bid does not have to be launched at an equitable price, and an equivalent cash alternative to a voluntary offer is not required, except where the offeror and/or its concert parties have acquired, for cash, securities carrying 5% or more of the target voting rights during the 12 months prior to the announcement of the offer.

6.2. Conditions

Mandatory bids may not be subject to any conditions. Voluntary bids may be subject to conditions precedent (i) if it is possible to ensure that the condition is fulfilled by the end of the offer acceptance period; and (ii) if the condition is one of the following: (A) approval of a structural change (e.g. a merger) or a modification of the by-laws by the target company's general shareholders' meeting; (B) acceptance of the offer by target company shareholders holding a minimum percentage of shares; (C) approval of the offer by the offeror's general shareholders' meeting; or (D) any other condition considered appropriate by the CNMV.

6.3. Partial offers

Voluntary bids may be partial offers for a specified percentage under 100% of the target's share capital. This is possible if control of the target company will not be acquired as a consequence of the bid or if the bid is launched by a shareholder that already has control of the target.

United Kingdom

1. What are the different types of bid?

A bid may be either voluntary or mandatory. A mandatory bid is required when a person acquires an interest in shares which carry voting rights in a relevant company (see paragraph 3 of section 1 above) which exceed a certain percentage (see paragraph 3 below).

A bid may also be for either 100% of a target's share capital or a specified percentage (see paragraph 5 of section 14 below). However, this second type of "partial offer" is very unusual in the UK and requires the Panel's prior consent.

A bid may be either hostile or recommended by the board of the target company. A recommended offer is seen as easier for an offeror to implement than a hostile offer, and an offeror is normally expected to recognise this in the premium offered.

A full voluntary offer for 100% of the target which is recommended by the target board of directors, with no competing offer, is the most common and straightforward type of bid.

2. What are the different structures for a bid?

In structural terms, a takeover can be carried out either by the offeror making an offer to acquire the shares held by the target company's shareholders, or by the target company initiating a statutory court process called a "scheme of arrangement". (Both structures are governed by the Code, the Rules of which are modified appropriately where a scheme is being used.)

In the case of an offer, the target shareholders are asked to accept the offer being made to them by the offeror. In the case of a scheme, the target company shareholders are asked to vote on the takeover proposal put to them by the target, in conjunction with the offeror. (It should be noted that, in both cases, the offeror and the target will remain separate companies after completion of the bid, unlike a true merger.)

A scheme of arrangement is generally used in recommended offers where there is no reasonable likelihood of a competing bid. One of the main advantages of a scheme of arrangement was that stamp duty on the target company's shares (which, with an offer, is always payable by the offeror at 0.5% of the consideration – see paragraph 1 of section 14) could be saved. However, from 4 May 2015, a reduction or cancellation scheme of arrangement was prohibited and so the stamp duty saving is no longer available. The key advantage now of a scheme of arrangement is that it requires a lower percentage approval from the target shareholders in order to guarantee that the offeror will acquire all of the outstanding shares in the target.

There are also two further structures available to UK public companies wishing to undertake a true "merger". The first structure involves a scheme under which the target transfers its assets and liabilities to the offeror and is then dissolved. The second structure involves forming a new company (the offeror) for the purpose of acquiring two or more targets. Each target then transfers its assets and liabilities to the new company and is subsequently dissolved. The consideration in both of these structures must involve at least a partial issue of shares in the offeror.

Following the implementation of the EU Cross-Border Merger Directive in the UK, a true "merger" can also be carried out between a UK company and a company incorporated in another EEA Member State.

3. What triggers a mandatory bid?

The Code contains provisions which require a person who (alone or together with any concert party – see paragraph 4 below) acquires interests in shares with 30% or more of the voting rights in a target company to make an offer to acquire all of the equity share capital (voting or non-voting) of the target and also any other transferable securities carrying voting rights. The same rule applies to a person who is already interested in shares carrying between 30% and 50% (inclusive) of the voting rights in the target, if either that person or any person acting in concert with it acquires an interest in any other shares carrying voting rights which increases their percentage interest in the target. Where a target company holds its own shares in treasury, these shares are disregarded for the purposes of the threshold calculations.

On 23 November 2015, the definition of "voting rights" in the Code was changed. The amendments to the definition made it clear that shares (other than treasury shares) which are subject to a restriction on the exercise of voting rights or to a suspension of voting rights should normally be regarded for the purposes of the Code as having voting rights which are currently exercisable at a general meeting. The principal purpose behind this amendment was to eliminate the scope for a company to issue suspended voting shares as a means of avoiding triggering a Rule 9 mandatory bid and the requirement for a whitewash.

The Code defines "interests" as including any "long" economic exposure to changes in the price of securities, whether absolute or conditional – including through ownership, voting or control rights, derivatives or options. This includes both shares which have been borrowed (unless they are on-lent or sold on the same day) and also owned shares even if they have been lent. However, acquiring a security convertible into, or an option to subscribe for, new shares will only result in an acquisition of an interest in the shares upon exercise or conversion when the shares are issued.

A person who only has a "short" position in securities will not be treated as interested in those securities. For these purposes, a person will also not be treated as acquiring an interest in securities purely through obtaining an irrevocable undertaking in respect of them (see paragraph 5 of section 4 below).

A scheme of arrangement will itself be governed by the Code and will generally relate to the whole of the target's share capital. It will not therefore trigger a subsequent requirement for a mandatory offer. In addition, if the target shares have themselves been acquired as a result of a partial voluntary takeover bid, no additional mandatory bid should subsequently be required.

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

In particular, there is a "whitewash" procedure which allows the issue of new securities to a person who will end up with a 30%+ holding without that person making a mandatory bid, if the issue has been approved on a majority vote of the independent shareholders of the target.

The Panel will also usually waive the requirement if:

– another target shareholder already holds 50% or more of the voting rights (or shareholders holding 50% or more of the voting rights state that they would not accept the offer); or
– a shareholder has made an inadvertent mistake and subsequently reduces its interests in shares of the target; or
– the holding arises because a lender enforces security for a loan, and the lender then sells down to below 30%; or
– the holding arises as a result of a "rescue operation" for a company which is in serious financial hardship; or
– pre-arrangements have been made for a placing of the excess holding to unconnected parties; or
– a person becomes interested in shares carrying 30% or more of the voting rights of a company by the enfranchisement of their non-voting shares, except where the interest in those shares was acquired in the belief that the enfranchisement would take place; or
– two or more parties already interested in the voting equity shares of a company (acquired without the other's knowledge) come together to act in concert and are thereafter interested in between 30% and 50% of the voting rights of that company, provided that no concert party member subsequently acquires an interest in other shares carrying voting rights.

The requirement to make a mandatory offer will not apply if the change of interests results from the use of bank resolution tools, powers and mechanisms.

The prime responsibility for making a mandatory bid lies with the person making the acquisition which causes the obligation to arise. However, where a group of persons is acting in concert (see paragraph 4 below), if the person making the acquisition is not a "principal member" of such group, the obligation may also attach to principal members of the group and, in exceptional circumstances, also to other members of the group.

If a shareholder, with or without concert parties, sells shares in a target but keeps a stake of 30% or more (or if the holding is similarly diluted by a new issue), it may subsequently acquire more shares, subject to a 1% limit in any period of 12 months and a cap equal to its former highest percentage holding within the last 12 months.

4. What causes third parties to be counted as "concert parties"?

For Code purposes, persons "act in concert" (or become "concert parties") if, pursuant to an agreement or understanding (whether formal or informal), they cooperate to obtain or consolidate control of a company, or to frustrate the successful outcome of an offer for a company.

The Code lists a number of categories of persons who will be presumed to be acting in concert with other persons in the same category unless the contrary is shown. These include:

– a person with its "affiliated persons". The definition of "affiliated persons" is similar to the statutory definition of "subsidiary undertaking" and comprises any undertaking in respect of which: (i) the person has a majority of members' voting rights; (ii) the person is a member and has the right to either appoint or remove the majority of its board of directors, or controls a majority of members' voting rights under an agreement with other members; or (iii) the person has dominant influence or control;
– a company with its parent, subsidiaries, fellow subsidiaries and 20% associated companies;
– a company with its group pension funds (unless the Panel is satisfied that the pension fund is independently managed);
– a company with its directors (and their related trusts and close relatives). Directors of a target company will also be deemed to act in concert with each other, but only where an offer is imminent or in process;
– a person with its advisers and with companies in the same group as their advisers;
– a person, the person's close relatives, and the related trusts of any of them, all with each other;
– the close relatives of a founder of a company to which the Code applies, their close relatives, and the related trusts of any of them, all with each other; and
– shareholders of a private company who sell their shares in that company in consideration for the issue of new shares in a company to which the Code applies,

or who, following their re-registration of that company as a public company in connection with an IPO or otherwise, become shareholders in a company to which the Code applies.

The Panel may, in appropriate cases, agree that parties are not acting in concert despite one of the above presumptions applying to their relationship. However, in order to keep an eye on the relationship, the Panel may ask that dealing disclosures should still be made privately to the Panel as if they were a concert party (see paragraph 4 of section 3 below).

The Code also contains various pieces of guidance on how the Panel will determine whether a concert party exists. For example, it contains guidance on how joint shareholder activism may ultimately create a concert party if board control is its aim (although it has issued additional guidance that indicates that "normal" shareholder activism should not be constrained by this provision). The Panel has also ruled on various aspects of the definition (such as rulings on what constitutes the "close relatives" of a director). In cases of doubt, it is important to consult the Panel as early as possible.

In particular, where a consortium comes together (e.g. a private equity consortium setting up a bidding vehicle), it will be very important to ascertain how all the concert party relationships work, as the effect may be to bring all of the wider groups involved into the concert party. In general, a consortium member who has an interest of 10% or less in the bid vehicle will avoid this; between 10% and 50%, it will be in the discretion of the Panel.

There are special rules about principal traders and discretionary fund managers within a group, which should always be consulted (Rule 7.2 of the Code and accompanying notes). In summary, these ensure that such parties are not included within a concert party unless and until an offer is announced, or the relevant party otherwise has actual knowledge of the proposed offer.

Concert parties are relevant in a number of ways under the provisions of the Code. Their holdings and acquisitions of shares are aggregated for the purposes of the mandatory bid requirement, and also for provisions relating to the setting of the minimum consideration for an offer and for disclosure purposes (among other things). In general, the actions of persons who are concert parties to the offeror will be taken to be the actions of the offeror.

The coming together of a concert party will not itself normally trigger any requirement for a mandatory offer, even if the group is interested in 30%+ in aggregate of the voting rights of the target. However, further purchases by a member of the group would thereafter trigger the obligation.

5. Can an indirect acquisition trigger a mandatory bid?

An indirect acquisition may trigger a mandatory bid under the so-called "chain principle". This occurs where an offeror acquires interests in shares with over 50% of the voting rights in a company (Company A) which is itself interested in shares in the target company (Company B), and the Company B shares in which Company A is interested would, when aggregated with any Company B shares in which the offeror itself is interested, give rise to a mandatory bid obligation.

However, the chain principle normally only applies if:

- Company A's interest in the shares of Company B is "significant" in relation to Company A – a comparative profit, asset or market value ratio of 50% or more will normally be regarded as "significant"; or
- securing control of Company B might reasonably be considered to be a significant purpose of acquiring control of Company A.

The existence of a subsidiary to which the Code applies may therefore act as a deterrent against making an offer for the parent (although the requirement is only likely to be enforced if the subsidiary is listed or has more than a few shareholders).

6. Do different rules apply to voluntary and mandatory bids?

6.1. Consideration

An offeror making a voluntary bid has a very wide choice as to the offer price and the form of consideration offered to the target company's shareholders (see paragraphs 1 and 2 of section 5 below).

By contrast, a mandatory offer must in general be in cash (or accompanied by a cash alternative) at not less than the highest price paid by the offeror or any person acting in concert with it for any interest in shares of the same class during the "offer period" (which commences with the first announcement of an offer or possible offer) or during the preceding 12 months.

The cash offer or the cash alternative must remain open after the offer has become unconditional as to acceptances for not less than 14 days after the date on which it would otherwise have expired.

6.2. Conditions

A voluntary bid will invariably have a number of conditions attached to it. A discussion of the usual conditions included in a voluntary bid, and the circumstances in which they can be invoked, is included in section 6 below.

By contrast, a mandatory bid may only be conditional upon the offeror receiving acceptances in respect of shares which, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and its concert parties holding shares carrying more than 50% of the voting rights in the target company. If the offeror already holds target company shares carrying more than 50% of the voting rights, the offer must normally be unconditional.

This means that an offeror should not put itself in a position where it has to make a mandatory bid if it requires any offeror shareholder approval as a condition to its offer. It also means that an offeror making a mandatory bid cannot include the normal 90% share capital acquisition condition (which protects the offeror from having to acquire a company without being able to operate the compulsory squeeze-out – see section 12 below) and cannot include a material adverse change condition.

However, where the necessary cash for the offer is to be provided, wholly or in part, by an issue of new securities, the Panel may allow the offer to be made subject to any condition required, as a matter of law or regulatory requirement, in order validly to issue such securities or to have them listed or admitted to trading, so long as the offeror agrees to announce a firm intention to make a further cash offer if the condition fails to be satisfied.

If, prior to the later of the first closing date or the date on which a mandatory bid becomes unconditional, a full investigation is to be carried out by the Competition and Markets Authority (the "CMA"), or the European Commission takes Phase II proceedings (see section 7 below), the mandatory offer must lapse. However, if all necessary regulatory clearances are subsequently granted, the offeror must remake its bid. If a clearance is not granted, the offeror may be ordered to reduce its stake in the target instead.

SECTION THREE: EQUITY CONTROL LEVELS

France

1. Can you buy shares in a target before making a bid?

An offeror may sometimes wish to increase the likelihood of a successful bid by building a stake in the target through off-market and on-market purchases before the commencement of the offer period or the pre-offer period (if any). This stakebuilding is possible, but there are a number of applicable restrictions relating to insider dealing and market manipulation (and also disclosure obligations – see paragraph 4 below), and such purchases may also have an impact on the pricing of the eventual offer (see section 5 below).

1.1. Insider Dealing (under the French Monetary and Financial Code and/or the General Regulation)

An individual (e.g. directors or advisers of the offeror) may commit a criminal and/or civil offence if he comes into possession, by reason of his profession or position, of inside information (see the glossary), or if he knows that information he has received is inside information, in each case relating to a company or its securities, and he carries out, or encourages another person 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 duties communicates such information to a third party outside of the normal course of business, this can also be an offence.

The AMF may impose a fine for a breach of these provisions. In addition, the French Monetary and Financial Code imposes criminal liability for insider dealing.

Case law suggests that no breach of the General Regulation is committed if the dealings are made for "legitimate reasons". 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. Therefore, an offeror

should avoid buying target shares if it has inside information about the target itself. In particular, stakebuilding in the context of a hostile offer should be reviewed on a case-by-case basis in light of existing case law.

1.2. Market Manipulation (délit de manipulation de cours) (under the French Monetary and Financial Code and/or the General Regulation)

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 transposed 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 which 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 which misleads other investors who are buying or selling such financial instruments on the basis of that day's opening or closing prices.

As with insider dealing, market manipulation could lead to a fine from the AMF and/or criminal liability under the French Monetary and Financial Code.

1.3. Other

The offeror should be aware of the possible effect on the offer consideration of buying shares before the offer (see paragraph 1 of section 5 below) and the provisions relating to mandatory bids (see paragraph 3 of section 2 above). Finally, the offeror must not provide "inducements" to target shareholders to sell their shares (see paragraph 7 of section 5 below).

2. Can you buy shares in a target during a bid?

Restrictions on trading in securities issued by the target (and, in certain cases, by the offeror) apply during:

the "pre-offer period" (*période de pré-offre*). This period runs:

– from the publication by the AMF of the main features of the proposed offer after the offeror has made them public and notified them to the AMF;
– until the beginning of the offer period or, if the draft offer is not filed (i.e. because the offeror decides not to proceed), the publication by the AMF of the offeror's failure to file the draft offer; and

the "offer period" (*période d'offre*). This period runs:

– from the publication by the AMF of the main provisions of the draft offer filed with the AMF;
– until the publication of the results of the offer, or the subsequent re-opening of the offer if the offer has been successful, as the case may be.

2.1. Offeror

Pre-offer Period

The offeror (and any concert parties) may not purchase any target securities during the pre-offer period, regardless of the type of bid launched. The only exception arises where such acquisitions are made pursuant to an agreement entered into before the beginning of the pre-offer period, which would generally be disclosed when the pre-offer is announced. In a securities exchange offer (i.e. where the offer consideration includes securities, generally of the offeror), this exception is not available for target equity securities, or for any securities giving access, or derivatives linked, to such securities, and so is even more limited.

In a securities exchange offer, the offeror is also prohibited during the pre-offer period (i) from selling target equity securities (or securities giving access, or derivatives linked, to such securities); and (ii) from purchasing or selling equity

securities being offered as consideration (or any securities giving access, or derivatives linked, to such consideration securities). The offeror may, however, trade in its own securities under a share buy-back scheme implemented prior to the offer, provided that such trade does not have an impact on the offer process. Any purchases made must comply with the same conditions of price and volume as trades in the 12 months preceding the offer.

Purchases made during a pre-offer period, which can only be made under an agreement entered into before such time, will not have an automatic effect on the price paid in a voluntary offer. In a mandatory offer, the price offered to shareholders cannot be less than the highest price paid by the offeror (and any concert parties) during the 12 months preceding the trigger event, so such purchases could affect the price of the offer.

Offer Period

The offeror (and its concert parties) may not acquire any securities of the target company after the start of the offer period if either:

– its offer is conditional upon success of an offer targeting another listed company; or
– its offer is subject to the prior approval of a completion authority

If these restrictions do not apply (i.e. in an unconditional cash offer), and the offer is launched by a bidder that does not hold more than 50% of the share capital and voting rights, under the standard procedure, the offeror may buy shares in the target during the offer period, provided that the offeror does not cross any threshold that triggers a mandatory offer. However, the restrictions set out above mean that purchases after the offer period begins are rare in practice.

In addition, prior to the opening of a mandatory offer or an offer filed by a bidder that holds more than 50% of the share capital and voting rights under the simplified procedure, any acquisitions that may only be made up to a maximum of 30% of the securities targeted by the offer (excluding any securities already purchased by the offeror). Once the offer is opened, there is no further limitation on the acquisitions made by the bidder in a mandatory tender offer.

The offeror may also acquire any target securities if such acquisitions are made pursuant to an agreement entered into before the beginning of the offer period and any applicable pre-offer period.

Purchases made during the offer period at a higher price than the offer price will automatically increase the offer price by a specified amount (see paragraphs 1 and 3 of section 5 below). This means that purchases cannot be made at a price higher than the offer price at any time after the deadline for making an increased offer

(see paragraph 1 of section 9 below) and prior to the publication of the results of the offer (or the re-opening of the offer, if applicable). No purchases at above the offer price may be made during an offer period relating to a simplified offer or a buy-out offer.

The offeror is also restricted from selling shares, or any security giving access to the share capital of the target, during the offer period if it has made a securities exchange offer and, in any case, between the closing date of the offer and the publication by the AMF of the results of the offer.

In the event of a securities exchange offer, the offeror (and its concert parties) are also prohibited from trading in the offeror share capital and any securities giving access to the offeror share capital, as well as derivatives, until the closing of the offer. Where the shares being offered as consideration are shares in an entity other than the offeror (e.g. its parent), the restrictions apply to that other party's shares and securities.

The offeror may, however, trade in its own securities under a share buy-back scheme implemented prior to the offer, provided that any such trade does not have an impact on the offer process. Any purchases made must comply with the same conditions of price and volume as trades in the 12 months preceding the offer. In addition, the issuer of equity securities offered as consideration may trade in its own securities under a share buy back scheme during the re-opening of a normal securities exchange offer, and at any time during the offer period of a simplified securities exchange offer (see paragraph 1 of section 5 below).

2.2. Target

From a legal standpoint, the target company, and any persons acting in concert with it can deal in the target's own securities (or any securities giving access to, or derivatives linked to, such securities) on the market during the pre-offer and offer periods, as the target is now allowed to implement a 'frustrating action' (see section 13 below).

In particular, the purchases of the target's shares under a buy-back scheme previously authorised by the target's shareholders may continue during a cash offer if such continuation has been expressly authorised by the shareholders' meeting approving the buy-back scheme (which is rarely the case for companies which have a large free float).

However, if the target's articles of association impose a passivity rule on the target's management in the event of an offer, any transaction carried out by the target and any persons acting in concert with it in the target's securities (or any

securities giving access to, or derivatives linked to, such securities) on the market during the pre-offer and offer periods will be prohibited.

In the event of a securities exchange offer the target (and its concert parties) are also prohibited from trading in the share capital of the entity whose securities are being offered as consideration (generally the offeror itself or its parent), or in securities giving access to, or derivatives linked to, such securities, from the commencement of the offer period or the pre offer period (if any) to the closing of the offer.

The Takeover Law expressly provides that, in the event of a takeover, any person entering into an agreement with the target company aimed at frustrating the bid will be deemed to be acting in concert with the target and will therefore be subject to the same rules as the target with respect to dealing in securities of the target and, in the case of the securities exchange offer, the offeror (i.e. such person will be prohibited from dealing in securities of the target).

2.3. Third parties

After an offer has been notified or filed, other potential offerors remain, in principle, able to purchase shares in the target company. However, if such purchases may eventually frustrate the existing offer, the stock exchange authority may require a potential competitor to either file a competing offer or stop any further purchases. Recent experience suggests that the stock exchange authority may be reluctant to exercise this right in the context of a friendly offer.

2.4. Service providers

The restrictions on trading during the offer period or the pre offer period (if any) set out above also apply to the own-account trades of any investment service providers or institutions, as well as any company member in the same corporate group, where the provider is: (i) advising the offeror (and/or its concert parties); (ii) advising the target company (and/or its concert parties); and/or (iii) sponsoring the offer (i.e. providing a “certain funds” confirmation – see paragraph 4 of section 5 below). These parties are referred to in this section as the “relevant service providers”.

However, as a derogation to these restrictions, the relevant service providers are authorised to trade in the target securities subject to the offer, or derivatives relating to such securities, in transactions which are carried out for their own account or on behalf of other group members, provided that the following conditions are fulfilled:

- such trading is carried out by teams which have resources, objectives and responsibilities that are distinct from those of the teams involved in the offer, and that are separated from such teams by a "Chinese wall" or information barrier;
- such trading is in line with usual practices in risk hedging for transactions carried out on customer request or for market-making operations;
- the positions and their development resulting from own-account trading do not deviate significantly from usual practices;
- prior to any trading, the service provider concerned has taken all necessary steps to assess the impact of such trading, with a view to ensuring that it does not have any impact on the result of the offer and on the price of the securities concerned; and
- the trading complies with the general principles governing all public offers (i.e. free interplay of offers and counter-offers, equal treatment and information for all holders of relevant target/offeror securities, market transparency and integrity, fairness of transactions and competition).

Where there is a securities exchange offer, these restrictions also apply to dealings in the offeror's securities (or the securities of any third party whose shares are being offered as consideration – e.g. the offeror's parent).

On the commencement of the offer period or the pre-offer period (if any), the offeror, the target and their concert parties must immediately notify the AMF of the identity of the relevant service providers, in order to allow the AMF to monitor these restrictions.

3. Are there any special rules in relation to buying a large/controlling stake in a target?

The general principles of equality and fairness mean that it is not possible to pay a different price for a controlling stake in a target from that offered for the remaining shares in the subsequent offer. Also, following the recent introduction of a mandatory 50% acceptance threshold, it is likely that the acquisition of non-controlling blocks triggering the launch of a mandatory offer will become less common. Indeed, if the bidder does not reach the 50% threshold in the context of a mandatory offer, the offer will be declared null and void and the bidder will be deprived from all voting rights attaching to the shares whose acquisition triggered the obligation to launch the bid (i.e. shares in excess of the 30% threshold or in excess of the 1% threshold over a 12-month period).

4. What are the disclosure obligations if you buy shares in a target?

4.1. French Commercial Code

The rules in the French Commercial Code apply to the disclosure of shareholdings in any company with a registered office in France which is also listed on a regulated market or on a financial instruments market. The AMF may also require

similar disclosures in respect of companies listed on a French regulated market that are not incorporated in France. The disclosure obligations are not restricted to French shareholders, but apply irrespective of the legal status of the shareholder or the jurisdiction in which it is incorporated.

Any person or entity whose aggregate shareholding in a relevant listed company 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 such a company must inform:

– the company itself 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 such information to the public).

Where a company was listed on a regulated market less than three years earlier, but has been de-listed in order to be traded on an organised multilateral trading facility, a person that reaches thresholds of 50% or 95% of the outstanding shares or voting rights in such a company must also make these disclosures.

In addition, shareholders who reach the 10%, 15%, 20% and 25% thresholds referred to above in a company listed on a regulated market 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 company;
– the strategy that the reporting party intends to pursue in relation to the target company;
– any steps planned for carrying out that strategy (including any plans for a merger, reorganisation, liquidation, or transfer of the assets of the target company, any plan to modify the business of the target company, any plan to

modify the articles of association of the target company, any plans to de-list the target company, and any plan to issue target securities);

– any agreements to sell the shares or voting rights of the target on a temporary basis (e.g. 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 such a 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, provided they make a declaration that they do not intend to assume 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 any modification.

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

For the purpose of establishing a shareholder's aggregate holding in a listed company, and in accordance with the Transparency Obligations Directive, shares or voting rights will be deemed to be held by a shareholder if:

– they are held by entities controlled by that shareholder;
– they are held by other persons on behalf of that shareholder;
– they are held by a third party with whom the shareholder is acting in concert;
– they are existing shares or voting rights that may be acquired by that shareholder, or by persons that come within paragraphs (i) to (iii) above, at their sole discretion pursuant to an agreement or a security (such as an option to purchase or a bond exchangeable into issued shares). Following a recent reform, cash-settled derivatives with a similar effect to holding shares must also be taken into account in measuring the shareholder's aggregate holding in the target company when making disclosures (though not for the purposes of measuring the mandatory bid obligation). If a shareholder is required to give notice that it has reached a threshold as a result of an agreement or security referred to in this paragraph (iv), it must also give information about any shares and/or voting rights that it is able to acquire pursuant to securities or agreements other than those referred to in this paragraph (including entitlements to acquire shares that are not exercisable at its sole discretion and options to acquire unissued 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 shareholder has temporarily sold its shares, including by way of repurchase orders (*pension livrée*);
– they are held by that shareholder on behalf of other persons if that shareholder is entitled to exercise the voting rights attached to the shares without any specific voting instruction; or
– a proxy has been given to that shareholder without any specific voting instructions.

Shares will be deemed not to be held by a person for these purposes if (i) they are held by a unit trust ("OPCVM") managed by a company controlled by that person; or (ii) they are held in a portfolio managed by an investment service provider controlled by that person.

In order to facilitate the necessary percentage threshold calculations, a company listed in France 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 person holding a net short position that is equal to or greater than 0.2%, 0.3% or 0.4% of the capital of a company whose shares are admitted to trading on a regulated market or traded on an organised multilateral trading facility is required to report such position to the AMF within one trading day. The same reporting requirement applies if the net short position falls below one of these thresholds. If the net short position becomes equal to or greater than 0.5%, the AMF will, when notified of the position, make it public. The same reporting requirement applies when any additional 0.1% threshold is crossed either upwards or downwards. These disclosure requirements do not apply to liquidity providers classified as investment services providers or members of a regulated market, provided that they have obtained the AMF's prior authorisation.

None of these disclosure obligations will apply to shares:

– acquired for clearing, settling and delivery of financial instruments within the usual short settlement cycle, as defined by the General Regulation;
– held by custodians in their custodial capacity;
– held in the trading book of a credit institution or investment firm ("trading book" as defined in the Directive 2006/49/EC of the Parliament and of the Council of 14 June 2006, on the capital adequacy of investment firms and credit institutions), provided that (a) the voting rights held in the trading book do not exceed the 5% threshold; and (b) the credit institution or investment firm ensures that the voting rights attached to shares held in the trading book

are not exercised nor otherwise used to intervene in the management of the issuer; and

– provided to or by the members of the ESCB in carrying out their functions as monetary authorities according to conditions to be determined in accordance with the General Regulation.

The disclosure obligations will also not apply (i) to a market maker acting in its capacity as a market maker where it has acquired shares which result in its holding reaching or exceeding the 5% threshold (which means that in practice the obligation will apply once the 10% threshold is reached), provided that the market maker does not intervene in the management of the relevant issuer in accordance with the conditions specified in the General Regulation; or (ii) if the shareholder whose holding has exceeded one of the thresholds and is therefore required to make a disclosure, is at some level controlled by an entity which is also required to make an equivalent disclosure.

If any shareholder breaches the disclosure requirements mentioned above, its voting rights in respect of shares exceeding the threshold in question will be suspended for two years following the date on which the disclosure is eventually made. The Commercial Courts may also, at the request of the relevant company's chief executive officer, any of its shareholders or the AMF, order the suspension of all or part of the voting rights of the shareholder for a period of up to five years.

Criminal Courts can impose a fine of up to €18,000 on the representatives of the shareholders in breach. The AMF may also impose fines of up to €1,500,000.

Any agreement that provides for preferential terms and conditions of sale (e.g. a put/call option or a pre-emption agreement) over 0.5% or more of the outstanding shares or voting rights of a target company must also be disclosed to the AMF. Failure to make this disclosure renders such terms and conditions being unenforceable during the course of a tender offer. The AMF makes the terms public and determines whether or not the parties to such agreement are acting in concert as a result.

4.2. Specific disclosures during the pre-offer and offer periods

In addition to the disclosures set out in paragraph (a) above, which are applicable at any time, specific disclosures are also required during both the pre-offer and offer periods. The disclosure requirements applicable to (i) certain persons and entities connected with the offer (excluding investment service providers); and (ii) investment service providers, are set out below.

Persons and entities connected with the offer (excluding investment service providers)

During these periods, any dealings in securities subject to the offer (i.e. target company securities and, in the case of an exchange offer, securities being offered as consideration) by the offeror (or its concert parties), the target company (or its concert parties), their directors, and any person holding 5% or more of (i) the target's share capital or voting rights; or (ii) target securities other than shares to which the offer relates, must in each case be disclosed on a daily basis.

The same obligation applies to any other person (excluding the offeror and the investment relevant service providers) who has acquired, since the beginning of the offer period or the pre-offer period (if any), 1% or more of the (i) share capital of the target company; or (ii) the target securities other than shares to which the offer relates. This obligation continues for so long as such party continues to hold at least 1% of such securities.

These obligations also apply to any shares and securities being offered as consideration in the case of a securities exchange offer.

Any person (again, excluding the offeror and any investment service provider concerned) who increases the number of target shares in which it has an interest by more than 2% of the capital of the target after the beginning of the pre-offer period (if any) or the offer period must immediately disclose its intentions with respect to the outstanding offer. This obligation also applies to any person (again, excluding the offeror and any investment service provider concerned) holding more than 5% of the capital or voting rights of the target who increases the number of shares in which it has an interest (no threshold applies in this case). The notice must state whether or not the shareholder is acting in concert with any person and whether it intends to continue its purchases, or tender its shares into the offer.

In both cases, the AMF will make the information public.

According to the General Regulation, the following financial instruments must be taken into account when determining whether the 1% or 2% thresholds referred to above have been crossed:

- exchangeable bonds;
- futures; and
- options (whether exercisable immediately or at a future date), provided that, where the exercise of an option is conditional on the target share price reaching a level specified in the option contract, it will only need to be taken into account once that level is reached.

Investment service providers

The General Regulation further provides that investment service providers involved in transactions in such securities must comply with additional rules, depending on whether they are “relevant service providers” or not.

First, all relevant service providers (as defined in paragraph 2.2 above) which hold 1% or more of the target share capital or of the target securities other than shares to which the offer relates which they have acquired since the beginning of the pre-offer period (if any) or of the offer period must disclose their holdings in the target to the AMF every trading day, as long as they continue to hold at least 1%. This information is then kept confidential by the AMF.

In addition, other service providers are subject to the same disclosure obligations as the relevant service providers. There is an exception available for transactions carried out upon customer request or for market-making operations, where their trading is carried out in the normal course of their hedging or arbitrage business and positions resulting from such trading are in line with their usual practices. However, this exception no longer applies if the service provider comes to own more than 5% of the share capital or voting rights of the target company.

If service providers (other than the relevant service providers) do not satisfy such conditions, they must instead conform to the rules applicable to other persons and entities connected with the offer, as set out above.

Germany

1. Can you buy shares in a target before making a bid?

An offeror often wishes to increase the likelihood of a successful bid by building a stake in the target through off-market or on-market purchases before making its bid. This stakebuilding is possible in principle, but there are a number of applicable restrictions (and disclosure obligations – see paragraph 4 below). Such purchases may also have an impact on the structure and pricing of the eventual offer (see section 5 below).

1.1. Securities Trading Act

An individual (e.g. a director or an adviser of the offeror) 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: (i) admitted to trading on a German stock exchange or included on the regulated market or the regulated unofficial market, or (ii) admitted to trading on an organised market in another Member State, or (iii) whose price depends directly or indirectly on the price of financial instruments within the meaning of (i) or (ii).

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 an offeror 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 is that purchases made by the offeror to facilitate a bid, in the knowledge that the bid is in contemplation, would not violate the provisions of the Securities Trading Act.

If the offeror 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.

1.2. Market Abuse Regulation

By coming into effect as of 3 July 2016, the Market Abuse Regulation supersedes the national provisions of the Securities Trading Act relating to insider trading. Yet, this change of applicable regimes should not cause substantial changes for the offeror in the course of the stakebuilding process, since the provisions of the Securities Trading Act relating to insider dealing are based the Market Abuse Directive 2003/6/EC, which largely corresponds to the Market Abuse Regulation.

Under the regime of the Market Abuse Regulation, a person shall not

- engage or attempt to engage in insider dealing;
- recommend that another person engage in insider dealing or induce another to engage in insider dealing; or
- unlawfully disclose inside information.

As under the Securities Trading Act, inside information is defined as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. The respective information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instruments. In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.

An issuer is obliged to disclose the inside information and to inform the public as soon as possible of the inside information directly concerning the issuer. The issuer may, however, on its own responsibility delay the disclosure to the public, provided that (i) the immediate disclosure is likely to prejudice the legitimate interests of the issuer; (ii) the delay of disclosure is not likely to mislead the public; and (iii) the issuer is able to ensure the confidentiality of that information. In the case of a protracted process that occurs in stages and that is intended to bring about, or that results in, a particular circumstance or a particular event, an issuer or an emission allowance market participant may on its own responsibility delay the public disclosure of inside information relating to this process, subject to points (i), (ii) and (iii) above. Where an issuer has legitimately delayed the disclosure of inside information, it shall inform the FFSA that disclosure of the information was delayed and shall provide a written explanation of how the conditions (i), (ii) and (iii) above were met, immediately after the information is disclosed to the public.

1.3. The Takeover Act

Pursuant to the Takeover Act, purchases of shares in a target prior to making a bid may have an impact not only on the pricing of the eventual offer (see paragraph 1 of section 5 below) but also on the ability of the offeror to offer solely securities as consideration (see paragraph 2 of section 5 below).

The offeror will also have to be aware of the provisions relating to mandatory bids (see paragraph 3 of section 2 above). The offeror must not provide “inducements” to the target shareholders to sell their shares (see paragraph 7 of section 5 below).

2. Can you buy shares in a target during a bid?

2.1. Offeror

An offeror may also purchase shares in the target once it has announced an offer, although it will obviously need to consider similar issues to those set out in paragraph 1 above.

The purchase of shares in a target after the announcement of a bid may affect the consideration payable (see paragraph 1 of section 5 below) and, depending on the timing, also the consideration payable in a squeeze-out (see paragraph 1 of section 12 below).

There are no restrictions on sales of target shares by an offeror during an offer, except for insider dealing/market manipulation regulations.

2.2. Target

Acquisitions/sales of its own shares by the target during an offer may be restricted by the rules on frustrating action (see section 13 below).

3. Are there any special rules about buying a large/controlling stake in a target?

There are no special rules concerning the acquisition of a large/controlling stake in a target, except for certain disclosure obligations referred to below and the eventual obligation to make a mandatory bid (see paragraph 3 of section 2 above).

However, the ability to pay a block or control premium is significantly affected by the obligation to treat all target shareholders equally (see paragraph 1 above and section 5 below).

4. What are the disclosure obligations if you buy shares in a target?

4.1. Securities Trading Act

The Securities Trading Act places extensive disclosure obligations on the holders of (i) voting shares (whether held directly or indirectly, and taking into account provisions on the attribution of voting shares held by third parties) and (ii) financial or other instruments conferring a unilaterally exercisable right to acquire voting shares or relating to voting shares and having similar economic effect as instruments conferring a right to acquire voting shares. The Securities Trading Act further requires disclosure with regard to the aggregated holding of shares conferring voting rights and the instruments mentioned at (ii) above. It also places additional disclosure obligations on holders of material investments in a listed company. For this purpose, the FFSA is empowered to introduce more detailed provisions by ordinance regarding the content, scope, language, extent, and the form of notifications to be made.

All disclosure obligations in the Securities Trading Act apply in respect of any companies domiciled in Germany with shares admitted to trading in Germany or in another Member State, as well as to companies from outside the EEA whose shares are listed in Germany and who have chosen Germany as their home state (*Herkunftsstaat*).

The disclosure obligations are not restricted to German shareholders but apply irrespective of the legal status of the shareholder or the jurisdiction in which it is incorporated.

4.1.1. Disclosure of holdings of voting shares

The Securities Trading Act provides that any increase or decrease in the percentage of a person's direct or indirect shareholding in a relevant company to, above or below the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75% of the company's total voting rights must be notified to the FFSA and the target company, regardless of whether or not a takeover offer is contemplated or required. "Holding of voting shares" for these purposes encompasses the mere existence of an unconditional and enforceable right for delivery of shares to be settled without delay or any other corresponding obligation.

It is irrelevant whether the relevant thresholds are reached or crossed due to the acquisition or disposal of shares or for any other reason – for example, a capital increase or merger.

Under certain circumstances, shares held by third parties will be attributed to the shareholder who is obliged to make the disclosure. The rules for the attribution of shares held by third parties are, for the purposes of the disclosure, identical to the rules governing the question of whether or not a shareholder has gained control of a target (see paragraph 3 of section 2 above). This means, in particular, that shares held by the holder of a right to acquire target shares by a unilateral declaration will be attributed to the holder of such right (i.e. unlike with a typical call option, there are no actions required by the counterparty in order to perfect the transfer).

Notification must (i) be made in writing, (ii) contain certain prescribed details, and (iii) be made without undue delay and in any event within four trading days from the relevant change in holdings. The notification period begins once the party subject to the notification requirement learns or, in consideration of the circumstances, should have learned that their percentage of voting rights has reached, exceeded or fallen below the above-mentioned thresholds. Regarding the beginning of the disclosure period, it is deemed irrefutable that the holder obliged to disclose has gained such knowledge no later than two trading days following the attainment, the increase or the decrease of the above-mentioned thresholds. The target company is then itself obliged to publish the notification without undue delay, and in any event within three trading days from receipt of the notification. The FFSA keeps a publicly accessible database containing all the disclosures it has received.

If non-compliance with the notification requirements is the result of gross negligence, or is deliberate, the voting rights of the underlying shares (at least those in a German company) will be suspended for a period of six

months following the correction to the notification, unless the difference between the holdings wrongly notified and the actual shareholding of the investor is below 10%. This six-month suspension period is intended to prevent belated notifications that are submitted just before a shareholder meeting of the issuer. In addition, non-compliance will trigger an administrative fine.

4.1.2. Disclosure of holding of instruments

In addition to the disclosure obligations in respect of voting shares, a separate disclosure obligation applies to any person who, directly or indirectly (in particular, by a subsidiary), has acquired instruments (i) giving the holder an enforceable right to require the transfer to such holder of existing issued voting shares of a relevant company or (b) relating to voting shares and having similar economic effect as instruments conferring a right to acquire voting shares, if the number of those voting shares would exceed, reach or fall below the thresholds mentioned above (with the exception of the 3% threshold). "Instruments" can, in particular, be transferrable securities, options, future contracts, swaps or financial contracts for differences.

The disclosure obligation regarding instruments relates to, inter alia, option or future contracts providing for cash settlement, swap transactions, any CFDs where the underlying security is a voting share, derivative instruments referencing baskets and indices, where the relevant voting shares are included in the basket or index, and repo transactions (where the repurchaser has to make the disclosure, even in cases where it has no right to request a re-transfer of the underlying shares, but the counterparty alone has a right to put the shares back to the repurchaser). It also extends to put options on voting shares, from the perspective of the option writer.

Furthermore, the disclosure obligation regarding instruments includes irrevocable undertakings, any conditional purchase agreements where fulfilment of the condition is not in the control of the purchaser, as well as certain provisions in shareholder agreements or articles of association that may bring about a transfer of shares, such as rights of first refusal, tag-along rights, drag-along rights, or rights for the delivery of voting shares under a stock option plan, even if these rights are subject to vesting conditions.

The disclosure obligation does not apply if the right to acquire shares only relates to unissued shares (e.g. a subscription right for newly issued shares).

The very broad and general wording of these provisions has raised a number of uncertainties, most of which still remain unresolved. Guidance by the

FFSA is still scarce and case law non-existent. Parties acquiring instruments with a link to underlying voting shares should seek advice on a case-by-case basis.

4.1.3. Aggregation rules

Originally, the provision on disclosure of acquisition rights provided that shares actually held by (or attributed to) a shareholder did not have to be aggregated with shares that the same shareholder had a right to acquire. This lack of aggregation made it possible for shareholders to acquire just below 8% of a German listed company (just below 3% by way of actual shares and just below 5% in the form of instruments, such as call options) without making any disclosure. Following certain prominent and controversial cases of undisclosed stake – building in German listed companies, the German legislator introduced new aggregation rules to provide that shares actually held and shares subject to an option under an instrument had to be disclosed both separately and also in aggregate (which could lead to additional notification obligations). Following its most recent amendment, the Securities Trading Act currently provides for the aggregation of interests in voting shares and of instruments giving a right to acquire voting shares or relating to voting shares and having similar economic effect as instruments conferring a right to acquire voting shares. If the aggregate holding of shares and such instruments reaches, exceeds or falls below any of the above-mentioned thresholds (with the exception of the 3% threshold), the notification requirement is triggered even if none of the aforementioned disclosure requirements is triggered individually.

The disclosure rules do not provide for any netting of long and short positions.

In order to facilitate the necessary percentage threshold calculations, the target must, as a rule, announce the total number of voting rights outstanding without undue delay (at the latest within two trading days) after a change has occurred.

Non-compliance with the disclosure obligations relating to instruments giving a right or a possibility to acquire shares may trigger a suspension of voting rights and may lead to administrative fines of up to €2,000,000 for natural persons and up to €10,000,000 or 5% of the total revenue of the preceding business year, whichever is higher, for legal entities/corporations. The FFSA also publishes actions taken and fines imposed resulting from non-compliance with the disclosure requirements on its webpage (so-called “naming and shaming”)

4.1.4. Additional disclosure obligations for holders of material investments

Any investor holding a "material investment" (defined as holding 10% or more of the voting rights in a target, either individually or with concert parties) is required to disclose its objectives in acquiring the stake, as well as the source of funds used for the acquisition, unless the 10% threshold is reached or exceeded following a public tender offer.

The shareholder is required to make this disclosure within 20 trading days after having reached or exceeded the 10% threshold. In particular, the shareholder is required to disclose (i) whether it is pursuing strategic objectives or whether the investment is a mere financial investment; (ii) whether it intends to acquire further voting rights within a period of 12 months; (iii) whether it plans to influence the composition of the administrative, management or supervisory boards of the target; and (iv) whether it intends to effect a material change in the capital structure of the target, in particular by altering the debt or equity financing of the target or the target's dividend policy.

If the shareholder's investment objectives change during the period of its investment, the change must also be disclosed within 20 trading days. The investor's obligation is to make disclosure to the target, which is then itself required to publish the investor's disclosure or to announce any non-compliance. It is possible for issuers 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 unlikely to be common practice.

Other than a publication of non-compliance, the Securities Trading Act does not currently provide for any sanctions in the case of non-compliance with the additional disclosure obligations for holders of material investments.

4.2. The Takeover Act

Under the Takeover Act, any person who gains control of a target company (i.e. who holds 30% or more of the voting rights) must, without undue delay and within seven calendar days at the latest, announce that fact, stating the extent of his percentage of voting rights. As explained above (see paragraph 3 of section 2 above), shares held by third parties may also be relevant in certain circumstances. This requirement does not apply, however, where the 30% threshold is reached as a result of a public takeover bid.

It should be noted, however, that a 30% interest will in any case have to be announced within four trading days under the Securities Trading Act (i.e. generally a shorter period).

In addition, during an offer period, the offeror must publicly disclose the number of (i) any securities that either it or any of its concert parties (or their subsidiaries) hold in the target (taking into account the attribution rules referred to in paragraph 3 of section 2 above); as well as (ii) any target voting shares in respect of which the offeror and (although the wording of the Takeover Act is not clear in this respect) any concert party, or any of their subsidiaries, holds instruments giving such party a right to acquire such shares; and (iii) any target voting shares in respect of which it and (although the wording of the Takeover Act is again not clear in this respect) any concert party, or any of their subsidiaries, holds instruments giving it or a third party the possibility of acquiring such shares.

These announcements must be made on a weekly basis after the publication of the offer document, and on a daily basis during the last week of the offer period, as well as (i) immediately after the expiry of the offer period; (ii) immediately after the expiry of an extended offer period; and (iii) immediately after the number of voting shares held by or attributable to the offeror has reached a level of 95% of the voting shares of the target.

The information must be published over the internet and in the Federal Gazette. The information (together with proof of publication) must also be communicated to the FFSA.

Italy

1. Can you buy shares in a target before making a bid?

An offeror often wishes to increase the likelihood of a successful bid by building a stake in the target through off-market or on-market purchases before making its bid. Potential offerors are generally free to buy shares in an Italian target company, except that the offeror will have to be aware of the provisions relating to mandatory bids (see paragraph 3 of section 2 above) and the disclosure obligations referred to in paragraph 4 below. Such purchases may also have an impact on the pricing and/or form of consideration of the eventual offer (see section 5 below).

Special attention should be dedicated to stake building, as rules on insider trading resulting in the possible imposition of criminal sanctions may be applicable to pre-bid acquisitions carried out with knowledge of inside information on the target and for an illegitimate interest. Each situation should be analysed on a case-by-case basis before starting with the stake building acquisition.

In addition, pending a bid, all interested parties must (i) respect the equal treatment principle with regard to equivalent target shareholders; and (ii) refrain from carrying out market transactions that might affect whether target shareholders accept the offer or entering into agreements that might alter the underlying circumstances of the offer (e.g. entering into agreements in which target shareholders agree not to accept an offer, in return for receiving some other advantage).

2. Can you buy shares in a target during a bid?

2.1. Offeror

An offeror (and its concert parties and “interested parties” – see paragraph 4 below) may also purchase, or sell, shares in the target once it has announced a bid, although it will obviously need to consider similar issues to those set out in paragraph 1 above.

Any direct or indirect purchase of target shares, or acquisition of a long position relating to target shares, made by the offeror and its concert parties during the offer (up to the point of settlement) at a price higher than the offer price will result in an automatic increase in the offer price up to the higher price paid.

2.2. Target

Acquisitions and disposals of its own shares by the target company must comply with the procedure provided for in the “passivity rule” (see paragraph 1.2 of section 13 below).

3. Are there any special rules about buying a large/controlling stake in a target?

There are no special rules concerning the acquisition of a large/controlling stake in a target, except for certain disclosure obligations referred to below and the eventual obligation to make a mandatory bid (see paragraph 3 of section 2 above).

4. What are the disclosure obligations if you buy shares in a target?

4.1. General

The Regulation imposes disclosure requirements that apply to any person owning an interest in securities in an Italian company listed on a regulated market in Italy or in another Member State. These disclosure obligations are not restricted to Italian shareholders, but apply irrespective of the legal status of the shareholder or the territory in which it is incorporated.

The rules referred to below apply starting from 1 July 2016.

Anyone holding Voting Securities must notify the company and CONSOB whenever such holding reaches, exceeds or falls below the following thresholds: 3% (if the relevant issuer is not a SME), 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 66.6%, 75% or 90%.

In addition, anyone having a “holding in financial instruments” – that is the aggregate of a (i) “potential holding” represented by legally binding financial instruments that grant the right to acquire the underlying shares through physical settlement at the holder’s discretion; and (ii) any “other long position” in derivatives, irrespective of whether such instruments provide for a cash or a physical settlement – must notify the relevant issuer and CONSOB whenever such holding in financial instruments reaches, exceeds or falls below the following thresholds: 5%, 10%, 15%, 20%, 25%, 30%, 50% and 66.6%.

Finally, anyone holding an “aggregate position”, being the sum of the holding in shares and the “holding in financial instruments” referred to above, must notify the relevant issuer and CONSOB whenever such “aggregate position” reaches, exceeds or falls below the following thresholds: 5%, 10%, 15%, 20%, 25%, 30%, 50% and 66.6%.

Disclosure obligations may be triggered not only by purchases or disposals of financial instruments but also by increases or decreases in the issuer’s share capital.

With respect to derivative instruments that are settled only in cash, the underlying voting rights are calculated by applying a “delta coefficient” pursuant to

Regulation (EU) 2015/761 of the Commission dated 17 December 2014. The provisions of said regulation also apply with respect to the calculation of the underlying voting rights with respect to derivative instruments linked to a cluster of shares or to indexes.

Disclosure of relevant holdings must be made promptly, and in any case within four trading days, after each relevant transaction is agreed, whether or not it has completed, or after the date on which the relevant person becomes aware of the capital change triggering the disclosure obligation.

Non-compliance with the disclosure obligations can lead to administrative sanctions (e.g. fines). Non-compliance also leads to the suspension of voting rights, as soon as the relevant threshold is exceeded, and would allow any shareholder resolutions passed as a result of voting rights that are subject to suspension to be challenged in the courts.

4.2. During an offer

In addition to these general disclosure requirements, following the announcement of a bid, any interested party (as defined below) must comply with certain additional disclosure requirements laid down by the Regulation. An "interested party" is one of the following categories of person:

- the offeror, the target company, their controlling shareholders and companies controlled by them;
- other companies under common control with the companies referred to in (i), or affiliated companies (i.e. a company in which the offeror owns more than 20% of the Voting Securities);
- directors, members of the managing board, statutory auditors, members of the supervisory board and general managers of any of the above-mentioned companies; and
- shareholders of the offeror and/or the target company bound by any shareholders' agreement relating to, inter alia, the exercise of voting rights or any other rights attaching to the relevant shares.

The Regulation provides that interested parties must, by the end of each day, notify CONSOB and the market of (i) any sale and/or purchase of securities for which an offer has been made (including the agreed price); and (ii) any transaction involving derivative instruments – granting either a long or a short position – related to such securities. The offeror and its concert parties must also notify CONSOB and the market if they intend to sell any securities for which an offer has been launched at least one day before the relevant transaction takes place.
In addition, the offeror (or any other person in charge of receiving acceptance forms from target shareholders) must announce the number of acceptances of the

offer at least on a weekly basis. If the target's shares are listed on a regulated market, acceptances must be disclosed on a daily basis through the market management companies being used for the offer.

Finally, during the six-month period following settlement of an offer, the offeror and its concert parties must notify CONSOB, on a monthly basis, of all purchases and/or sales of securities for which the offer was made, disclosing all main terms and conditions, including price.

The Netherlands

1. Can you buy shares in a target before making a bid?

An offeror may wish to increase the likelihood of a successful bid by building a stake in the target through off-market or on-market purchases before making its bid. This stakebuilding is possible in the Netherlands, provided that (i) the bidder does not have inside information on the target; (ii) the bidder observes the rules on disclosure of substantial shareholdings; and (iii) no contractual standstill obligation applies (see section 4 below). Such purchases may also have an impact on the offer price ultimately offered (see section 5 below).

1.1. 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 company 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 which could qualify as inside information (for example, if it has carried out due diligence on the target and by doing so has obtained inside information on the target), it may not purchase any shares in the target company until that information has been made available to the market by the target.

1.2. 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.

1.3. Other implications

The offeror should be aware of the possible effects on the offer consideration of buying shares before making an offer (see section 5 below on the "best price" rule). The offeror must not provide "inducements" to target shareholders to sell their shares (see paragraph 7 of section 5 below). An offeror that purchases a stake of 30% or more of the voting rights in the target must make a mandatory bid, as discussed in section 2.

2. Can you buy shares in a target during a bid?

2.1. Offeror

An offeror may also buy or sell shares in the target once a bid has been announced or made, although it will need to consider similar issues to those set out above. Although share purchases are frequently made during a bid in the Dutch market, an offeror should consider whether it has obtained inside information during the due diligence process and is therefore prohibited from making such purchases (see paragraph 1 of section 3 above). A contractual standstill obligation may also prevent an offeror from making any such purchases.

The purchase of shares in a target after the initial public announcement of a bid may affect the consideration in the offer (see section 5 below). In the period between the initial public announcement and the publication of the offer memorandum, purchases must be publicly disclosed. In the period following the publication of the offer memorandum, purchases need to be notified to the market (see paragraph 4 of section 3 below).

2.2. Target

Acquisitions or sales by the target of its own shares are not generally restricted. The Netherlands has "opted out" from the rules of the Takeover Directive regarding frustrating action, and the rules of the Civil Code on frustrating action have a more limited reach than those of the Takeover Directive. However, the courts may prohibit a purchase or sale by the target of its own shares if the purchase or sale has the sole aim of frustrating an offer (see section 13 on hostile bids below). On the reporting or publication of share purchases see paragraph 4 of section 3 below.

3. Are there any special rules about buying a large/controlling stake in a target?

Subject to certain disclosure obligations discussed 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% of the voting rights in the target. Once a

purchase results in the purchaser holding 30% or more of the voting rights in the target, the mandatory offer rules apply, as discussed in paragraph 1 of section 2.

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

Although very rare in practice, a large or controlling stake (representing less than 30% of voting rights in the target company) may also be acquired by making a partial offer or a tender offer (see paragraph 1 of section 2 above).

4. What are the disclosure obligations if you buy shares in a target?

4.1. FMSA

Pursuant to the FMSA, any person who, directly or indirectly, acquires or disposes of an interest in the capital or voting rights of (i) a public limited liability company incorporated under Dutch law with shares admitted to trading on a regulated market in the EEA ("domestic companies"), or (ii) a company incorporated under the law of a non-EEA-state with shares admitted to trading on the regulated market of Euronext Amsterdam ("third country companies"), must immediately (i.e. as soon as reasonably possible) 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 a number of specific thresholds. For domestic companies the percentage thresholds are: 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%. For third country companies, the percentage thresholds are: 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.

The same immediate notification requirement applies to someone who acquires or loses a short position in shares as a result of which the short position will reach, exceed or fall below these thresholds. Also, cash settled instruments that create a long economic exposure to a company and which may influence exercise of the voting rights on the underlying shares, can be subject to a notification requirement.

A notification requirement also applies if a person's capital interest or voting rights reaches, exceeds or falls below these thresholds as a result of a change in the company's total share capital or voting rights. This type of notification has to be made no later than the fourth trading day after the AFM has published the company's notification of the change to its share capital.

The company 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 company's previous notification. The company must furthermore notify the AFM within eight days after the end of each quarter if its share capital or voting rights have changed by less than 1% in that quarter.

Every holder of 3% or more of the company's share capital or voting rights whose interest at year end (12 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 3% 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.

For the purpose of calculating the percentage of capital interest or voting rights held, the following interests must be taken into account: (i) the ordinary shares, or the voting rights attributable to ordinary shares, directly held by a person; (ii) the ordinary shares, or the voting rights attributable to ordinary 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); (iii) the ordinary shares, or the voting rights attributable to ordinary shares, that such person, or any subsidiary or third party referred to above, could acquire pursuant to an option or other right held by such person (including, for example, through convertible bonds); and (iv) the voting rights of any other person with whom such person has entered into an agreement on the "long-term joint policy on the exercise of voting rights" in the company.

Special rules apply with respect to the attribution of ordinary shares, or voting rights on ordinary shares, which are part of the property of a partnership or other similar body. A holder of a pledge or right of usufruct (*vruchtgebruik*) in respect of ordinary shares or depository receipts can also be subject to the notification obligations of the FMSA if such person has, or can acquire, the right to vote on the shares or, in the case of depository receipts, the underlying ordinary shares.

Non-compliance with the notification obligations under the FMSA may lead to criminal fines, administrative fines, imprisonment or other sanctions being imposed. In addition, non-compliance with some of the notification obligations

under the FMSA may lead to civil sanctions, including suspension of the voting rights relating to the shares held by the offender (for a period of not more than three years) and a prohibition on the offender obtaining any further shares or voting rights (for a period of not more than five years).

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 ask 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.

4.2. Decree on Public Offers

In addition to the above general disclosure obligations under the FMSA, the Decree on Public Offers provides that both the offeror and the target company must publicly disclose all transactions in target securities (and in any securities that are being offered under an exchange offer) made by them (i) in the period between the initial public announcement and the publication of the offer memorandum, and (ii) in the period between the publication of the offer document and the offer being declared unconditional. Although every transaction must theoretically be reported "immediately", one public notice covering all transactions in a day is sufficient.

Press releases disclosing transactions in target securities must disclose the number and class of the securities, the applicable price (or exchange ratio) and the other terms of the transaction, and also the resulting direct or indirect shareholdings of the offeror and the target company in each other.

The offeror is required to disclose in the offer document the number and class of shares it holds in the target company and any transactions carried out by the offeror in the 12 months prior to the date on which the offer document is published.

Spain

1. Can you buy shares in a target before making a bid?

An offeror who wishes to increase the likelihood of a successful bid by building a stake in the target through off-market or on-market purchases before launching its offer may do so under the Royal Decree. However, any such acquisitions may have a substantial effect on the subsequent bid:

- if, as a consequence of the purchase, the prospective offeror acquires control of the target company by exceeding the thresholds described in paragraph 3 of section 2 above, the bid will have to be compulsory and not voluntary, and therefore the price will have to be equitable and the offer will have to be unconditional; or
- if (i) the prospective offeror acquires securities carrying at least 5% of the target company's voting rights; (ii) the price is paid in cash; and (iii) the bid is announced during the 12 months following the said acquisition, the consideration in the offer must include a cash alternative.

2. Can you buy shares in a target during a bid?

2.1. Offeror

An offeror may buy shares in a target during a bid. However, an offeror should carefully consider whether it should carry out such purchases outside the offer procedure in view of the following consequences that may result from a purchase by an offeror (or concert party):

- if the offer is conditional upon a minimum number of acceptances, any purchase will amount to a waiver of such condition, and of any other condition to the offer;
- if the bid's consideration consists partially or totally of securities, any purchase will trigger a requirement for an alternative cash consideration to be offered at the highest price paid for the purchased securities; and
- if the bid's consideration is in cash, any purchase of securities for a higher price will automatically increase the bid price. Accordingly, the offer guarantees will have to be adjusted to the new offered price within three days following the purchase.

Any purchase outside the offer procedure by the offeror or persons acting in concert with the offeror must be notified to the CNMV on the acquisition date.

In addition, the offeror and persons acting in concert with the offeror cannot dispose of any shares in the target until after settlement of the offer. This rule also applies to transfers of securities offered in exchange offers.

2.2. Target

There are no specific provisions that prohibit the target company from acquiring or selling target securities during the offering period, unless the target is categorised as acting in concert with the offeror, in which case the target will not be allowed to dispose of shares in treasury until the settlement of the offer. In addition, any action by the target that might qualify as a defensive measure would have to be considered (see section 13 below).

3. Are there any special rules about buying a large/controlling stake in a target?

The acquisition of a stake in a target will trigger a mandatory bid if, as a result of the acquisition, a person gains control of the target (i.e. if the thresholds described in paragraph 3 of section 2 above are exceeded). However, an intention to acquire a large/controlling stake in a target will no longer, by itself, trigger an obligation to make a prior mandatory bid, as it used to under the previous rules.

Other than this, there are no special rules concerning the acquisition of a large/controlling stake in a target, except for certain disclosure obligations referred to below.

4. What are the disclosure obligations if you buy shares in a target?

The disclosure obligations in the Securities Act and the Royal Decree apply to any companies with shares admitted to trading on a Spanish regulated market. The disclosure obligations are not restricted to Spanish shareholders but apply irrespective of the legal status of the shareholder or the territory in which it is incorporated (except for the additional obligations referred to below).

Subject to some limited exceptions, the Securities Act and the Royal Decree provide that where the percentage of voting rights held by a person in a company (whether as shareholder or through a direct or indirect holding of qualifying financial instruments) reaches, exceeds or falls below 3%, 5% or any multiple of 5%, this must be notified to the target, the CNMV and the managing entity of the stock exchange where the company is listed, regardless of whether a takeover is contemplated. This threshold is reduced to 1%, or any multiple of 1%, if the holder of the securities or his representative is resident in a tax haven, or a jurisdiction where the authorities have refused any exchange of information with the CNMV.

Shareholders of a target company shall notify the CNMV of any purchase of shares if this purchase results in the relevant shareholder reaching or exceeding a 1% stake in the target. Likewise, shareholders holding at least a 3% stake in the target shall notify any transaction resulting in a variation of its stake in the target.

Holdings of shares and "qualifying instruments" are aggregated for the purposes of determining whether a person has a notification obligation in accordance with the relevant thresholds.

In determining what percentage a person holds, the Securities Act and the Royal Decree require a number of indirect interests to be aggregated. These provisions effectively replicate the relevant provisions of the Transparency Obligations Directive.

A person will be deemed to have an "indirect" holding where, among other things:

- that person has entered into an agreement with a third party holding voting rights, that obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the relevant issuer;
- shares are held by a subsidiary of that person, in which case aggregation of the relevant holdings will be required for the purposes of determining the parent company's (but not the subsidiary's) notification obligation;
- that person has a proxy over shares, provided he can exercise the voting rights attaching to shares at his own discretion;
- shares are lodged as collateral with that person, provided that person controls the voting rights attaching to the shares and declares an intention of exercising them; and
- that person has entered into an agreement with a shareholder providing for the temporary transfer (for consideration) of the voting rights in question.

However, a beneficiary under a trust will not automatically be an indirect shareholder unless, for example, he has a life interest in the shares or controls voting rights. In addition, interests of a person's spouse and children are no longer attributed to that person for notification purposes.

"Qualifying financial instruments" are financial instruments which result in an entitlement to acquire, on the holder's initiative, existing issued shares of the target to which voting shares are attached. This means the holder must have, under a formal agreement, either an unconditional right to acquire the underlying shares or the discretion whether or not to acquire such shares.

No changes have been made to the Spanish disclosure rules to extend disclosure to catch 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.

Therefore, most contracts for differences (CFDs) will not trigger this disclosure requirement.

In order to facilitate the necessary percentage threshold calculations, the target must announce the total number of voting rights and capital in respect of each of its classes of shares in issue, and 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 shares held in treasury are disregarded for the purposes of these calculations.

This disclosure is made by completing a standard form addressed to the CNMV and the managing entity of the stock exchange where the company is listed. It must be received within four trading days following the date on which the relevant transaction is known to the person obliged to make the disclosure. A person is deemed to have this knowledge within two trading days from the date of the transaction.

United Kingdom

1. Can you buy shares in a target before making a bid?

An offeror may wish to increase the likelihood of a successful bid by building a stake in the target through off-market or on-market purchases before making its offer. This stakebuilding is possible, but there are a number of applicable restrictions (and also disclosure obligations – see paragraph 4 below). Such purchases may also have an impact on the offer price, as well as the form of consideration offered in the bid (see section 5 below).

1.1. The CJA

An individual (e.g. directors or advisers of the offeror) may commit a criminal offence if he has inside information from an inside source and "deals" (on-market or as/through a professional intermediary), or encourages another person to "deal", in securities of the relevant company on the basis of that inside information. Inside information for these purposes is specific information relating to one or more particular companies (or securities in such company/ies), which has not been made public and which, if it were made public, would be likely to have a significant effect on the price of the relevant securities.

In the context of stakebuilding, there is a special defence which relates to the possession of "market information". Where a person's only inside information is "market information" arising out of his involvement in a transaction, no offence will be committed if he deals, or encourages another to deal, in connection with and to facilitate a particular transaction (i.e. a bid). "Market information" is essentially information about the acquisition and disposal, or proposed acquisition and disposal, of securities (including the parties and prices involved). Purchases made by an offeror to facilitate a bid, in the knowledge that the bid is in contemplation, would therefore not breach the provisions of the CJA.

"Market information" does not cover any information about the target acquired through due diligence. If the offeror has received inside information through this process, it may therefore need to wait until the information has been published in the offer document before making any purchases. If the target's share price has already been substantially inflated by bid speculation, it may be possible to rely on another defence – which operates where the person dealing does not expect such dealing to lead to a profit attributable to their possession of the inside information.

However, this should be considered extremely carefully, on a case-by-case basis.

1.2. Market Abuse

Section 118 of FSMA provides for a civil remedy against any party which, inter alia, deals in listed securities on the basis of inside information, or information which is not generally available to the market but which would be regarded by a regular user of the market as "relevant" to a decision whether to deal. (However, in the latter case there is an additional requirement that 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.)

However, the FCA's Code of Market Conduct (which provides guidance on market abuse) provides that behaviour based on inside information relating to a target company, in the context of a public takeover, does not of itself amount to market abuse. The inside information in this context may include both the fact that a bid will be made or is under consideration and also information obtained through due diligence on the target. This provides a safe harbour for genuine stakebuilding activity (though not for dealings in derivatives designed to hedge an offeror's downside rather than facilitate the offer).

1.3. The Code

In addition to the above restrictions, if a bid is in contemplation, the Code (Rule 4) prohibits any person who is in possession of confidential price-sensitive information concerning a proposed bid, other than the offeror itself, from dealing in target securities prior to the announcement of the bid.

This means that an adviser of an offeror would not be able to deal in target securities, unless they did so pursuant to an agreement where all the risks and benefits are borne by the offeror. It also means that members or potential members of a consortium must consult the Panel before acquiring interests in shares, unless they are acquired through the intended bid vehicle.

The offeror will have to be aware of the considerations relating to acquisitions of large stakes (see paragraph 3 below) and also of the provisions relating to mandatory bids (see paragraph 3 of section 2 above). It should also be aware of the effect on the offer consideration of buying shares before the offer (see paragraphs 1 and 2 of section 5 below).

The offeror should also consider the disclosure implications of any acquisition (see paragraph 4 below). In addition to the general disclosure requirements summarised in that section, an acquisition that affects the level of consideration to be offered must be immediately announced. This includes where the acquisition is by a potential offeror that has been publicly named, if it acquires shares at a price

higher than either (i) any price it has already said it may offer; or (ii) any offer price already firmly announced by a third party.

Finally, the offeror must not provide "inducements" to selected target shareholders to sell their shares (see paragraph 7 of section 5 below).

1.4. Other

A target company may seek to place contractual standstill obligations on an offeror, which would obviously restrict its ability to purchase a stake.

In addition, shares bought prior to an offer being made will not count towards reaching the "squeeze-out" threshold (see section 12 below).

An offeror will also not be able to vote the shares that it owns on a scheme of arrangement resolution – and this reduction in the number of shares which can be so voted will therefore reduce the number of shares needed to block the resolution (which makes purchases at any time unattractive, or even counter-productive, where a scheme is to be used).

2. Can you buy shares in a target during a bid?

2.1. Offeror

An offeror may acquire an interest in shares in the target once it has announced or made a bid, although not generally from an anonymous seller. It will obviously need to consider similar issues to those set out in paragraph 1 above.

The effect of acquiring interests in shares in the target after the announcement of a bid on the consideration in the offer will be different (see paragraph 1 of section 5 below). Buying shares at a price higher than the offer price, or higher than the level announced in connection with a possible offer or another competing bid, will require an immediate announcement.

Acquisitions after a bid is made (i.e. after the offer document is published) will also generally count towards the shareholding required to "squeeze out" the minority shareholders left at the end of a bid (unlike acquisitions made prior to the offer) – see section 12 below for details. However, the offeror will still not be able to vote such shares on a scheme of arrangement (see paragraph 1 above).

If shares are purchased, the Code prohibits the offeror and persons acting in concert with it from selling any securities in the target during an offer period, except with the prior consent of the Panel and after 24 hours' public notice. The Panel will not give its consent where a mandatory bid is in place or where the sale

price is below the value of the bid. In addition, once there has been an announcement that sales may be made, neither the offeror nor any persons acting in concert with it may make any further acquisitions or revise the bid.

2.2. Target

Directors and financial advisers to a target company must not deal in target securities in a manner which is contrary to advice they have publicly given to shareholders, unless they have given sufficient public notice and an explanation. A target company is also restricted in purchasing its own shares (and selling any treasury shares) by the rules on frustrating action (see paragraph 1 of section 13 below).

2.3. Other

A target company's advisers generally may not deal in target shares during an offer period, or enter into any agreement (such as a non-arm's length loan or an indemnity) encouraging others to deal in target shares. This is to avoid an adviser "buying" support for a target in a hostile offer situation.

The offeror, offeree and their concert parties (including connected advisers and their groups) are also prohibited from entering into, or taking action to unwind, any borrowing or lending transaction or entering into, or taking action to unwind, certain types of security financial collateral arrangement, in each case in respect of relevant securities.

If, in a competitive situation, one offer has lapsed, leaving another offer still outstanding, there are restrictions on the price at which the "lapsed" offeror can buy target shares – see paragraph 3 of section 13 below.

3. Are there any special rules about buying a large/controlling stake in a target?

It is very difficult to pay a control premium for a large stake prior to a bid because of the obligation to treat all target shareholders equally (see section 5 below). However, below the key 30% level, there are no longer any special rules that apply to the manner in which a large stake in a target may be purchased.

Once a person's interests in the voting shares of a company have reached 29.9%, any further acquisitions will be governed by the Code.

As well as the provisions requiring a mandatory offer to be made (see paragraph 3 of section 2 above), the Code also limits the ways in which a person may acquire more shares if that person (together with any concert party) will as a result become interested in shares which carry 30% or more of the voting rights in a company, or is already

interested in shares with between 30% and 50% (inclusive) of the voting rights in a company.

A person in this position may only acquire an interest in shares:

- if they are buying a pre-existing stake from a "single shareholder" (which may include a family or group of companies) and that is the only such acquisition made in any seven-day period. (This exception does not apply if the person has announced a firm intention to make a bid with no pre-conditions.);
- if the acquisition is made immediately before the announcement of a firm intention to make a bid (provided that the bid is to be publicly recommended by, or the acquisition is made with the agreement of, the target board and the acquisition is also conditional on the announcement of the bid);
- if they have already announced a firm intention to make a bid with no pre-conditions and, at the time of the acquisition: (i) the purchase is made with the agreement of the target board; (ii) an offer for the target by the acquiror (or any competing offer) has been publicly recommended by the target board; (iii) the first closing date of the acquiror's offer (or any competing offer) has passed; or (iv) the acquiror's offer is unconditional in all respects; or
- through acceptances of any bid.

If a person receives a gift of shares or an interest in shares which takes their aggregate interests in voting shares over 30%, they must consult the Panel.

4. What are the disclosure obligations if you buy shares in a target?

4.1. The UKLA Rules

The DTRs (part of the UKLA Rules) apply at all times in respect of shares issued by (i) most companies with shares admitted to trading on a UK regulated market, where the UK is their Home State, and (ii) other UK-incorporated companies with shares admitted to trading on a prescribed market (such as AIM). The disclosure obligations are not restricted to UK shareholders but apply irrespective of the legal status of the shareholder or the jurisdiction in which it is incorporated.

Subject to some limited exceptions, the DTRs provide that (a) where the percentage of voting rights held (or deemed held) by a person in a company, whether as shareholder or through a direct or indirect holding of qualifying financial instruments, reaches or exceeds or falls below 3%, or (b) where a percentage holding above 3% increases or decreases through a 1% threshold (rounding down to the nearest whole number), this must be notified to the target and the FCA regardless of whether a takeover is contemplated. (The percentages for issuers outside the EEA, USA, Japan, Israel and Switzerland are 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.)

It is irrelevant whether the notification requirement arises due to the acquisition or disposal of shares or due to any other reason: for example, a capital increase or reduction by the target.

Holdings of shares and "qualifying instruments" (which include instruments which are referenced to the shares of a UK company and have similar economic effects to "qualifying instruments") are aggregated for the purpose of determining whether a person has a notification obligation in accordance with the relevant thresholds.

In determining what percentage a person holds, the DTRs require a number of indirect interests to be aggregated. These provisions effectively replicate the relevant provisions of the Transparency Obligations Directive.

A person will be deemed to have an "indirect" holding where, among other things:

– that person has entered into an agreement with a third party holding voting rights that obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the relevant issuer;
– shares are held by a subsidiary of that person, in which case aggregation of the relevant holdings will be required for the purposes of determining the parent company's (but not the subsidiary's) notification obligation. (A subsidiary need not make a notification if it is already being made by its parent.);
– that person has a proxy over shares, provided he can exercise the voting rights attaching to shares at his own discretion;
– shares are lodged as collateral with that person, provided that person controls the voting rights attaching to the shares and declares an intention of exercising them; and
– that person has entered into an agreement with a shareholder providing for the temporary transfer (for consideration) of the voting rights in question.

However, a beneficiary under a trust will not automatically be an indirect shareholder unless, for example, he has a life interest in the shares or controls voting rights. In addition, interests of a person's spouse and children are no longer attributed to that person for notification purposes, and there are a number of other exemptions which should be reviewed in each circumstance.

"Qualifying financial instruments" are financial instruments which result in an entitlement to acquire, on the holder's initiative, existing issued shares of the target to which voting shares are attached. This means the holder must have, under a formal agreement, either an unconditional right to acquire the underlying shares or the discretion whether to acquire such shares.

Most contracts for differences (CFDs) would not typically fall within this definition, even though they generally give de facto control over underlying shares. However, instruments referenced to the shares of a company that have similar economic effects to "qualifying financial instruments" are in the disclosure net where such instruments relate to shares in a UK company. These will include CFDs where the holder has a long position on the economic performance of the shares. There is an exemption from the requirement to aggregate holdings of CFDs for CFD writers (i.e. persons who act as intermediaries providing liquidity via client-serving transactions).

In order to facilitate the necessary percentage threshold calculations, a target that is subject to the DTRs must announce the total number of voting rights and capital in respect of each of its classes of shares, and 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 shares held in treasury are disregarded for the purposes of the threshold calculations. However, if an issuer completes a transactions which leads to a material decrease or increase in the total number of voting rights, the issuer must disclose that information to the public as soon as possible and in any event no later than the end of the business day after the increase or decrease occurs. It is for an issuer to assess whether the effect on the total number of voting rights is material or not. The FCA considers an increase or decrease of 1% or more to be likely to be material to the issuer and to the public.

Notification of acquisitions or disposals of voting rights must be made to the target in writing, must contain certain prescribed details (and, if the issuer is listed on a regulated market, follow a prescribed form) and must be made within two trading days (or four trading days for a non-UK issuer) of the day on which the voting rights were acquired or disposed of. (This will be the day the parties learn of the acquisition or disposal (and the parties will, in any event, be deemed to have knowledge of the acquisition or disposal no later than two trading days following the transaction in question), unless there are conditions which are outside their control, in which case it will be the day on which the conditions are satisfied.) A target listed on a regulated market must make such information public by no later than the end of the first trading day (or the third for a non-UK issuer) after it is received.

It should also be noted that a UK target which becomes suspicious that a third party is "stakebuilding" may still send out a statutory notice (now known as a "Section 793 notice"), which requires the recipient to give details of all of his current interests in the share capital of the target and of any historical interests over the previous three years. This can obviously be a very useful tool for a UK target which considers that it may be about to receive a bid.

4.2. The Code

During an offer period, Rule 8 of the Code requires various persons to make public disclosures, or in certain cases private disclosures to the Panel only, of their positions or dealings in relevant securities of the parties to the offer. (Disclosures are not required to be made in respect of positions or dealings in relevant securities of an offeror that is only offering cash.)

An "Opening Position Disclosure" is an announcement containing details of interests or short positions in, or rights to subscribe for, any relevant securities of the offeror and target. An Opening Position Disclosure is required to be made after the commencement of the offer period and, if later, after the announcement that first identifies an offeror. The parties who are obliged to make these disclosures are the offeree company, any offeror (but only after its identity is first publicly disclosed) and any person that is interested in 1% or more of any class of relevant securities of any party to the offer. Opening Position Disclosures must be made within 10 business days of the obligation arising (or by the offeror on the date of a "Rule 2.7" announcement if earlier), and an offeror and target must include in their disclosures details of all relevant interests of their concert parties.

A "Dealing Disclosure" is required after the person concerned deals in relevant securities of the offeror or the target. If a party to the offer or any person acting in concert with it deals in relevant securities, it must make a Dealing Disclosure by no later than 12 noon on the business day following the date of the relevant dealing.

In addition, if a person is, or becomes, interested in 1% or more of any class of relevant securities of the offeror or the target, that person must also make a Dealing Disclosure if it deals in any relevant securities (including by means of an option in respect of, or a derivative referenced to, relevant securities). A Dealing Disclosure by such a person must be made by no later than 3.30 p.m. on the business day following the date of the dealing.

Dealing Disclosures are required to contain details of the interests or short positions in, or rights to subscribe for, any relevant securities of the company in whose securities the person disclosing has dealt, as well as the person's positions (if any) in the relevant securities of any other party to the offer, unless these have previously been published under Rule 8 (and have not since changed).

All disclosures must use the specimen forms available from the Panel's website. Disclosure must be made to a RIS and also sent to the Panel in electronic form.

"Relevant securities" in the target company are all securities that are being offered for or which carry voting rights, all other equity share capital and all convertible securities/options. Where the consideration being offered by an offeror includes

securities in the offeror (other than loan notes), "relevant securities" in that offeror comprise equivalent existing securities, all other equity share capital and all convertible securities/options.

An offeree and an offeror (unless intending to offer only cash) will now be required to assist the Panel in identifying persons who are interested in 1% or more of any class of relevant securities. The Panel has confirmed that this will not require the despatch of Section 793 notices to suspected shareholders, but would require parties to give any information they have available, based on shareholder registers, analysis from corporate brokers etc. The offeree and offeror will also be required to send an explanation of the disclosure provisions to all their 1%+ shareholders; although the offeree will be able to comply with this obligation by sending out the initial announcement (including a summary of Rule 8) to all shareholders, as it is required to do at the beginning of an offer period (see paragraph 2 of section 8 below).

In addition to these disclosure requirements, an offeror must also announce the levels of acceptance of its offer (and any other interests in shares acquired separately) by 8.00 a.m. on the business day following each day when its offer is due to expire, or is declared unconditional as to acceptances, or is revised or extended.

SECTION FOUR: BID PREPARATION

France

1. Can the target and the offeror enter into confidentiality/standstill/exclusivity agreements?

   Before giving any non-public information to an offeror, the target company will insist upon the execution of a confidentiality agreement.

   The target company may also seek to include “standstill” provisions preventing the offeror from acquiring shares of the target without the target’s consent for a specified period. However, standstill provisions are not widespread in France and an offeror will often resist such a restriction.

   An offeror may try in return to obtain an exclusivity agreement, whereby the target agrees, for a specified period of time, not to negotiate with any other potential offeror, nor to recommend a competing offer to its shareholders.

   Standstill and exclusivity agreements are in principle lawful under French law, but their enforceability is subject to difficult legal questions in the context of a bid. An overriding principle of the French takeover regulations is to allow freedom for competing offers and “equal treatment” between competing offerors. In addition, directors of the target company should in all circumstances (including in assessing and recommending an offer) act in the best interests of the company and its shareholders. Standstill and exclusivity arrangements would be judged in this context.

   Competing offerors must all be provided with the same level of information by the target (see paragraph 3 below). The target may insist on an equivalent confidentiality agreement from other offerors, and also seek a standstill agreement.

2. Can the target agree a “break fee” with the offeror?

   The use of break fees is not widespread in France and there is no case law, nor any clear consensus among practitioners, on their enforceability.

The traditional view has been that a break fee agreed by the target would not be enforceable or, if it was, would expose the board of the target (and particularly the chief executive) to the risk of liability to the target company for mismanagement.

However, there is an increasingly popular view among practitioners that a break fee should in principle be enforceable and that, while there would be a potential claim for mismanagement, certain factors would, if present, provide a strong defence. The factors are that (i) the transaction in question is of the highest strategic importance for the target; (ii) if the target did not agree to the break fee, the offeror would not be prepared to continue negotiations; and (iii) the break fee is not so excessive that it would make a rejection of the bid by the target's shareholders a practical impossibility. In addition, the offeror would also have to agree to pay a reciprocal break fee to the target if it decides not to complete the transaction for any reason.

Finally, the break fee must not impair the principle of freedom for competing offers and must therefore not be of a magnitude likely to deter any competing bid.

3. What level of due diligence is normally carried out?

Pre-takeover due diligence in France is usually limited in scope, and certainly more limited than due diligence on a private acquisition.

In the case of a hostile offer, the due diligence exercise will normally be limited to a review of publicly available information.

In the case of a recommended bid, the offeror will usually review publicly available information, before approaching the target with a list of matters on which it requires further information before proceeding with the offer. The target will generally try to limit the extent of its responses. More sensitive information may be withheld until the offeror has proven its interest in the target.

The COB (one of the predecessors to the AMF) previously issued a recommendation stating that the information provided to a friendly offeror must also be made available to any subsequent hostile offeror. This recommendation is still followed in practice. In addition, the offer prospectus must disclose all material information provided to the offeror.

Confidential price-sensitive information made available to the potential offeror may not be disclosed, and persons who have access to such information must not trade in the target's securities, until such information is disclosed to the public or an offer is made.

It is generally not the practice in France for a target to conduct due diligence on an offeror, even where the offeror is offering its own shares as consideration.

4. Can an offeror protect itself against undisclosed liabilities in the target?

It is not French practice for representations and warranties to be given in the context of a public offer (either by the target or by the selling shareholders), since shares are being purchased directly from the public. The only circumstance in which limited warranties might be given (although it is rare) in the case that a purchase of a controlling stake of shares from a single shareholder is purchased before an offer is launched.

Due diligence is therefore generally the offeror's only means of ascertaining any potential problems before the offer is made.

Once the offer is filed with the AMF, the offer is irrevocable, except where a competing bid is filed or by specific dispensation from the AMF. Such dispensation would only be granted where the target takes material steps that affect the condition of the target company (see section 6 for further details).

5. Can an offeror seek undertakings from target shareholders to accept its bid?

In order to increase its chances of success, an offeror will often seek acceptance undertakings from key target shareholders before making the offer.

Such undertakings must be disclosed to the target and to the AMF for public disclosure.

There are difficult questions of law as to the validity and enforceability of such undertakings if they are irrevocable even if a competing offer is made. Such undertakings may contravene the principle of free competition between competing offerors.

In practice, therefore, undertakings usually provide that they cease to apply in the event of a higher offer. However, in some recent takeover bids, the relevant undertakings between the offeror and the main shareholders of the target have provided that, where there is a higher offer, the shareholders would share with the thwarted offeror the financial gain resulting from the difference between the initial bid and the higher, competing offer. Undertakings will not usually contain many additional provisions (in particular, they will not usually include representations or warranties).

In addition, the AMF is likely to refuse to provide its required consent to the terms of the offer if irrevocable undertakings from target key shareholders exist which, in its view, would render a higher offer a practical impossibility. In the past, the French authorities have accepted irrevocable commitments representing 10%, and refused those representing 40%, of a target's share capital.

The French courts also have jurisdiction to determine the validity of such undertakings.

The use of such undertakings must therefore be considered on a case–by-case basis depending on the shareholding structure and shareholder profile of the target and their use must be negotiated with the AMF.

6. What happens if a bid is “leaked”?

A fundamental rule of French law is that information disclosed to the public must be “true, correct and not misleading”. French regulations state that a listed company must inform the public by press release, as soon as possible, of any event that may have a significant influence on the trading price of its listed securities or on the position of its security holders.

In certain circumstances, such as the preparation of a takeover bid, if the disclosure would prejudice the company concerned and secrecy can be maintained, disclosure to the public can be postponed. However, if a leak occurs, a press release must be made as soon as practicable and the AMF may suspend the trading of the target securities until such press release is published. The potential offeror immediately notifies the main features of the proposed offer to the AMF, and the AMF makes such features public. The publication by the AMF of the main features of the proposed offer triggers the commencement of the pre-offer period.

If an offeror announces its intention to file an offer, the restrictions applicable during the pre-offer period regarding the trading of shares by the companies involved, their management and their shareholders apply (see paragraph 2 of section 3 above), as do the restrictions and requirements governing statements made during an offer period (see paragraph 1 of section 8 below).

Germany

1. Can the target and the offeror enter into confidentiality/standstill/exclusivity agreements?

Before giving any non-public information to an offeror, the target company will generally insist on a confidentiality agreement, as otherwise the target's directors might be in breach of statutory fiduciary duties.

The target company may also seek to include "standstill" provisions preventing the offeror from acquiring shares of the target without the target's consent for a specified period. While in principle this is permissible under German law, there may be problems if the standstill period is unduly long or if a payment is made to the potential offeror to enter into a standstill agreement. An acceptable period for a standstill agreement will vary from case to case, but it should not generally exceed the period during which the information provided is likely to cease being confidential and become public knowledge.

An offeror may try in return to obtain an exclusivity agreement, whereby the target agrees, for a specified period, not to negotiate with any other potential offeror, nor to recommend a competing offer to its shareholders.

There is some legal debate in Germany as to whether the target can enter into an exclusivity agreement, given the principle of equal treatment for offerors, and also whether it can withdraw from such an agreement if a better offer is received. Until this is resolved, the enforceability of such agreements may be questionable.

It is unclear under German law whether competing offerors must all be provided with the same level of information by the target (see paragraph 3 below). If they are all provided with information, the target may wish to insist on equivalent confidentiality agreements from such other offerors.

2. Can the target agree a "break fee" with the offeror?

Break fees payable by the target are still a relatively new development in Germany. There are various German legal issues in relation to break fees. As a general rule, the target company must be able to show that the offer is beneficial to the target and that, if the target did not agree to the break fee, the offeror would not be prepared to make its bid.

The fee itself should be reasonable, and should not put undue pressure on the shareholders and supervisory board of the target to approve the bid. It should therefore be of a size which aims to compensate the offeror for its losses and expenses, rather than act as a penalty for the target. A fee of 1% of the offer value has been suggested as

a starting point for agreeing a reasonable break fee, although this has no statutory basis and has not yet been confirmed by the courts.

Furthermore, the Takeover Act prohibits frustrating actions by the target. This prohibition is likely to rule out any break fee where an offer has already been made, as well as any break fee requested after an initial bid by a second (or third) competing offeror (a "white knight").

It will not generally be necessary to provide for a break fee payable by the offeror, since a takeover bid must not be subject to conditions that are within the offeror's control. It is therefore unusual to see such a break fee in Germany.

3. What due diligence is normally done?

Pre-takeover due diligence in Germany is usually limited in scope – more limited than due diligence on a private acquisition.

In the case of a hostile offer, the due diligence exercise will normally be limited to a review of publicly available information.

In the case of a recommended bid, the due diligence may be more extensive, although the target board will have to decide carefully how much information is appropriate to be disclosed, taking into account its fiduciary duties. More sensitive information may be withheld until the offeror has proved its interest in the target.

German law is silent as to whether information given to one offeror in a due diligence exercise must also be passed on to another offeror (whether recommended or hostile). Previously the consensus was that no such obligation existed, but this is now a matter of debate. In fact, the view that information may have to be shared has gained recognition and now appears to be the majority view. Consequently, the target should be prepared to disclose information which it has revealed to one party to other potential offerors.

In general, a party receiving confidential price-sensitive information about a target would be subject to insider dealing restrictions unless that information was made public. In its "Guidelines for Issuers" the FFSA expressed 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 violated 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.

Where the offeror is offering its own shares as consideration, the target may well also insist on carrying out due diligence on the offeror itself.

4. Can an offeror protect itself against undisclosed liabilities in the target?

It is not German practice for representations and warranties to be made in the context of a public offer (either by the target or by the selling shareholders), since shares are being purchased directly from the public.

However, if the offeror acquires a controlling stake in the target outside the public offer (e.g. between 25% and 50%), it would be usual – depending on the circumstances – to receive some representations and warranties from the shareholder(s) selling the stake.

Due diligence is therefore in general the offeror's only means of ascertaining any potential problems before the offer is made.

The offeror may, in principle, make the offer conditional on objective conditions which relate to (for example) the non-existence of certain liabilities or the non-existence of a material adverse change, provided such conditions are not dependent on the offeror's discretion and their satisfaction can be objectively determined. To avoid any risk that the FFSA might intervene with respect to such conditions, it may be advisable to approach the FFSA prior to including such conditions in an offer.

In practice, offerors usually refrain from inserting too many conditions, since a conditional offer is likely to be less attractive to the target's shareholders – see section 6 for further details.

5. Can an offeror seek undertakings from target shareholders to accept its bid?

In order to increase its chances of success, an offeror may seek acceptance undertakings from key target shareholders before making the offer. A shareholder who enters into such an undertaking but nevertheless accepts a competing offer would be liable to a damages claim from the offeror, unless the parties have agreed on a withdrawal right.

If such an undertaking is entered into, this must be disclosed in the offer document.

Such undertakings may, if expressly agreed between the parties, cease to apply in the event of a higher offer. Reliable practice on this point is not yet established.

There is also no established practice as to the usual provisions of such undertakings generally – they are agreed on a case-by-case basis.

6. What happens if a bid is "leaked"?

In general, the offeror is obliged to announce its intention to make a public offer without undue delay once a firm decision is made. However, as long as the decision is uncertain, there is no obligation on the offeror to announce under the Takeover Act.

The target is generally under no obligation to make any announcement about a proposed offer.
Companies generally have no duty to comment on any rumours that arise in the public domain. However, there might be practical pressure – and under certain circumstances even a legal duty – to react if a leak by the offeror or target has caused a particular rumour, leading to an untoward movement in the share price of the target. In such case, the parties will be under a duty not to deceive the market, either by making untrue statements or – depending on circumstances – by failing to correct rumours that are inaccurate.

An announcement of inside information must be notified first to the FFSA and the stock exchanges where the shares of the relevant company are listed, and then be published via an electronic information distribution system widely used by banks and insurance companies and on the company's website (if it has one).

Italy

1. Can the target and the offeror enter into confidentiality/standstill/exclusivity agreements?

   Before giving any non-public information to an offeror, the target company will insist on a confidentiality agreement.

   The target company may also seek to include "standstill" provisions preventing the offeror from acquiring shares of the target without the target's consent for a specified period, the length of which is for negotiation. The offeror will, however, seek to resist this restriction.

   Exclusivity agreements, under which the target agrees not to negotiate with any other potential offeror, are not common practice in Italy. The offeror may, however, seek to obtain similar results by entering into exclusivity agreements with the key shareholders of the target company (see paragraph 5 below).

   Standstill and exclusivity agreements are both in principle lawful under Italian law. Depending on the circumstances, however, the enforceability of such agreements may raise difficult questions of Italian law.

   In Italy, the target has no obligation to provide all competing offerors with the same level of information (see paragraph 3 below) except that, in any particular case, the directors must comply with their general duties of care and loyalty when dealing with offerors.

2. Can the target agree a "break fee" with the offeror?

   The use of break fees in the context of a tender or exchange offer, whether in favour of the target or in favour of the offeror, is not common practice in Italy.

   It is doubtful whether break fees would be enforceable under Italian law. In particular, there is no case law nor consensus among legal writers on the enforceability of break fees. As a consequence, any analysis about the enforceability of a break fee should be made on a case-by-case basis. A break fee agreed in favour of an offeror could also expose the board of the target to the risk of liability towards both the target company and its shareholders.

3. What due diligence is normally done?

   Pre takeover due diligence in Italy is usually limited in scope – more limited than due diligence on a private acquisition.

In the case of a hostile offer, the due diligence exercise will normally be limited to a review of publicly available information.

In the case of a recommended bid, the offeror will usually wish to conduct a more extensive due diligence investigation in relation to the target company before announcing the offer. However, the target will generally try to limit the extent of the due diligence exercise. More sensitive information may be withheld until the offeror has proved its interest in the target.

In Italy, a listed company must communicate to the market all inside information which directly concerns that company. It has a right to delay such an announcement, but only if disclosure could prejudice the company's interests (e.g. could adversely affect the successful carrying out of a transaction). If the offeror receives inside information from the target which should have been disclosed, but is not disclosed either prior to or at the time of the bid (whether in the offer document or separately by the target), then the offeror might be liable under Italian insider trading regulations, in the same way as the target and its directors would, even if the offeror does not trade in target securities during the period of non-disclosure.

The target has no obligation under Italian law to provide all competing offerors with the same level of information. Decisions on what information should be given to competing offerors are usually made on a case-by-case basis by the directors of the target (taking into account their duties to the company, the shareholders and the market).

Where the offeror is offering its own securities as consideration, the target may also insist on carrying out limited due diligence on the offeror itself.

4. Can an offeror protect itself against undisclosed liabilities in the target?

It is not Italian practice for representations and warranties to be given in the context of a public offer (either by the target or by the selling shareholders), since securities are being purchased directly from the public.

However, if key shareholders of the target company undertake to tender their shares to the offeror (see paragraph 5 below), the offeror may ask such shareholders to give certain representations and warranties in relation to the target company and to undertake certain indemnification obligations towards the offeror. The representations and warranties given by the key shareholders will be more limited in scope than for a private acquisition.

Aside from the above, due diligence is the offeror's only means of ascertaining any potential problems before the offer is made.

The offer will usually be subject to conditions which (if the offer is "friendly") may be negotiated between the offeror and the target. The conditions are generally aimed at providing some protection for the offeror to withdraw from the offer in the event any facts or circumstances (unknown as at the date of the offer) which are materially adverse to the target company arise during such period of time. In practice, there are a number of fairly standard conditions to which an unsolicited offer will be subject. See section 6 for further details.

5. Can an offeror seek undertakings from target shareholders to accept its bid?

In order to increase its chances of success, an offeror will usually seek undertakings from key target shareholders before making the offer. Such undertakings must be disclosed by the offeror in the offer document.

Such undertakings will usually cease to apply in the event of a higher offer.

The other terms and conditions of such undertakings will be negotiated on a case-by-case basis between the offeror and the key shareholders of the target company and may include, among other things, representations and warranties, indemnification obligations, commitments not to take actions which could cause the offer to be unsuccessful and, to the extent the key shareholders are to retain an interest in the target company, corporate governance provisions.

6. What happens if a bid is "leaked"?

Under the CFA, a listed company must inform the public of any inside information which directly concerns that company (see paragraph 3 above).

Therefore, the target company is technically under an obligation to disclose a potential offeror's intentions as soon as it becomes aware of them. However, in certain circumstances, to be confirmed on a case-by-case basis, the disclosure may be postponed until the point at which the intention of the offeror to launch the offer becomes firm (in addition, see the circumstances in which a listed company may delay the announcement of inside information in paragraph 3 above).

However, if a leak occurs, the target company is likely to be required to disclose the negotiations being conducted with an offeror even if the offeror does not yet have a firm intention to launch the offer. Alternatively, where rumours of a potential takeover bid become widespread in the market, or irregularities in the trading of a potential target company's securities occur, Consob may require the potential offeror to disclose its intentions.

Generally, all announcements made by the parties to an offer must be made by way of a press release and must be accompanied by a notification to Borsa Italiana and to CONSOB.

The Netherlands

1. Can the target and the offeror enter into confidentiality/standstill/exclusivity agreements?

   Before entering into preliminary discussions on a potential takeover, or giving any non public information to an offeror, the target company will typically require a confidentiality agreement.

   The target company would also typically require the offeror to agree to "standstill" provisions preventing the offeror from acquiring shares in the target without the target's consent for a specified period; this period will usually be between six to 12 months.

   An offeror may in return try to obtain an exclusivity agreement. In such an agreement, the target board might undertake not to solicit, encourage or engage in discussions with other parties regarding a public bid for the target or any other similar transaction by the target company. However, a "fiduciary out" is commonly negotiated, allowing directors of the target to consider and recommend an unsolicited higher offer.

   There is no constraint on further potential offerors also being asked for confidentiality and standstill agreements.

2. Can the target agree a "break fee" with the offeror?

   It has become common practice in the Netherlands to agree on a break fee in favour of an unsuccessful offeror if a higher competing offer is made and the board of the target company withdraws its initial recommendation or supports the competing offer, or the competing bidder in any case completes its offer. The value of a break fee would generally be about 1% to 2% of the transaction value. However, under Dutch law, it could be argued that a break fee is only enforceable if it is intended to compensate the unsuccessful offeror for its reasonable costs incurred in connection with the offer.

   The target might also ask the offeror for a break fee; for instance, if the offeror has agreed to take the risk of obtaining any necessary consents or regulatory clearances and, as a result of the offeror not being able to obtain these clearances or consents, the offer cannot proceed.

   The AFM requires that the initial public announcement of an offer must provide details of any agreed break fees. Break fee arrangements must also be disclosed in the offer document.

3. What due diligence is normally done?

Pre-takeover due diligence in the Netherlands is normally limited in scope and is typically more limited than due diligence on a private acquisition.

In the case of a hostile offer, the due diligence exercise will typically be limited to a review of publicly available information about the target.

In the case of a recommended bid, the due diligence exercise may be more extensive (and usually is), but the target company will generally try to limit the extent of the due diligence. More sensitive information may be withheld until the offeror has effectively demonstrated its interest in the target company.

Unlike many other jurisdictions, Dutch law does not specifically require information given to one offeror to be given equally to any other offeror. Under Dutch law, it is unclear whether the target board has a fiduciary duty to its shareholders to provide due diligence information to a competing and potentially unwelcome offeror. However, it is market practice for the target board to agree with the offeror that it is at liberty to provide due diligence information to a bona fide competing offeror.

Receipt by the offeror of inside information about the target will make the offeror an "insider" and may prevent it, and any other person who has access to such information, from trading in the target company's securities until the information is disclosed to the public (see paragraph 1 of section 3 above). Therefore, the timing and level of information to be provided to the offeror during a due diligence exercise should be carefully planned and organised.

Where the offeror is offering its own shares as consideration, the target may also insist on carrying out limited due diligence on the offeror.

4. Can an offeror protect itself against undisclosed liabilities in the target?

It is not Dutch practice for representations and warranties to be given in the context of a public offer, since shares are being purchased from the public. However, if the target company has a large shareholder acting in a management capacity, the offeror may obtain certain representations and warranties from such shareholder.

Due diligence is therefore generally the offeror's only means of ascertaining any potential problems before the offer is made.

The offer will usually be subject to conditions which (in a recommended offer) will be negotiated between the offeror and the target. The conditions may give the offeror some limited protection from the date of publication of the offer memorandum to the point at which the bid is declared unconditional. In practice, there is a standard set of

conditions which are used in almost any recommended offer. These include a condition as to no material adverse change having occurred, which could allow the offeror to withdraw from the offer if something unexpected (and material) comes to light (see paragraph 4 of section 6 below). However, any offeror invoking a condition exposes itself to the risk of the target seeking injunctive relief and to claims for damages by the shareholders of the target.

5. Can an offeror seek undertakings from target shareholders to accept its bid?

In order to increase its chances of success, an offeror may, and usually will, seek irrevocable undertakings from major shareholders to tender their shares if the bid is launched at a certain price or exchange ratio.

In order to collect such undertakings, an offeror may approach major shareholders before making the initial public announcement to find out whether, and on what terms, they would be willing to accept a bid. Dutch insider trading rules do not prohibit such contacts provided that confidentiality is safeguarded and the discussions are necessary for the offeror to assess whether its offer would be successful. Contact and discussions with major shareholders will therefore need to be carefully organised and monitored.

Any undertakings by major shareholders must be disclosed in the initial public announcement. The undertakings usually fall away if, subject to a certain threshold or “collar”, a bona fide higher offer is made. Undertakings often contain additional provisions, including that the large shareholder will continue to support the offer, not sell its shares to any third party and vote for certain corporate resolutions (usually for the appointment of new directors and the removal of anti-takeover devices of the target). The undertakings will not usually include representations and warranties, other than regarding the shareholder’s title to the tendered shares.

In order to benefit from an exemption which ensures that no obligation to make a mandatory bid shall arise for a party giving such an undertaking, the form of undertaking must meet the following conditions: (i) the shareholder’s undertaking to offer its shares to the offeror in the public offer must be irrevocable and not subject to any conditions precedent; (ii) the undertaking must be limited in time and expire when the offer is declared unconditional; and (iii) the shareholder may only undertake to exercise its voting rights in the target general meeting in respect of certain specific resolutions (see above).

6. What happens if a bid is “leaked”?

Under the Dutch regime for disclosure of price-sensitive information by listed companies, a company may delay disclosure of price-sensitive information in certain circumstances. Delayed disclosure is permitted where the company has a legitimate reason for the delay, the delay is not likely to mislead the public and the company can

ensure confidentiality of the information. This regime (which implements the requirements of the Transparency Obligations Directive) is meant to facilitate takeovers. The Decree on Public Offers provides that an announcement must be made once the offeror and the target board have reached an agreement or a "conditional agreement" about an offer. (The "conditionality" of agreements in a Dutch context is related to the offeror's and the target's obligations towards their works councils under the Works Councils Act (see paragraph 2 of section 14 below)) Therefore, although discussions regarding an intended offer are clearly price-sensitive, disclosure may generally be delayed until agreement (conditional or unconditional) is reached, provided that confidentiality is maintained.

However, if confidentiality cannot be maintained and a "leak" occurs, it is generally necessary to make an announcement immediately. The obligation to do so falls on both the target (to the extent it is aware of the offeror's interest) and the offeror. Failure to make an announcement in these circumstances may result in administrative sanctions or shareholders instituting claims for damages against the target company and/or the offeror. The making of a leak announcement may have consequences for the timetable of the offer (see section 8 below).

The offeror and the target are not usually required to comment on rumours. However, rumours about an intended offer that are on the whole accurate may be an indication that the relevant company is unable to ensure confidentiality and may therefore require an announcement. Whether a "rumour" constitutes a "leak" should be judged on a case-by-case basis.

It is sensible for the offeror and the target company to prepare a number of emergency press releases prior to commencement of negotiations regarding a public offer so that they can ensure that an announcement can be made immediately following a leak.

Announcements in this context are made by a press release, sent to the AFM and posted on the target's (and offeror's, as the case may be) website.

Spain

1. Can the target and the offeror enter into confidentiality/standstill/exclusivity agreements?

   Before giving any non-public information to an offeror, the target will insist on a confidentiality agreement.

   The target may also seek to include "standstill" provisions preventing the offeror from acquiring shares of the target without the target's consent for a specified period. However, standstill provisions are not widespread in Spain and an offeror will in most cases seek to resist this restriction unless it applies solely to the period up to the making of an offer.

   An offeror may in return try to obtain an exclusivity agreement, whereby the target agrees, for a specified period, not to negotiate with any other potential offeror, nor to recommend a competing offer to its shareholders. The target may seek to include a "fiduciary duty" carve out allowing directors to consider and recommend an unsolicited higher offer, or at least an offer at above a specified price.

   Spanish takeover bid regulation establishes the principle of equal access to information for all potential offerors. As a result of this, all offerors or bona fide potential offerors are entitled to equal information (see paragraph 3 below). This principle may limit the application of exclusivity agreements.

2. Can the target agree a "break fee" with the offeror?

   Spanish takeover regulation expressly allows a target to grant a break fee to an initial offeror (although not to any subsequent offeror). Such a fee would be payable if a competing bid is launched and, as a result, the initial bid does not succeed.

   Any break fee is subject to four conditions: (i) its amount must not be greater than 1% of the total value of the bid; (ii) it must be approved by the target's board of directors; (iii) a favourable report of the financial adviser to the target must be obtained (although practice has yet to develop regarding the content of such reports); and (iv) it must be disclosed in the offer document.

3. What due diligence is normally done?

   Pre-takeover due diligence in Spain is usually limited in scope – more limited than due diligence on a private acquisition.

   In the case of a hostile offer, the due diligence exercise will normally be limited to a review of publicly available information.

In the case of a recommended bid, the offeror will usually carry out additional due diligence. However, in deciding what information to release, the target company board may only agree to release information to the extent strictly necessary to complete the bid. More sensitive information may be withheld until the offeror has proved its interest in the target.

The Spanish takeover regulations require information given to one offeror to be given equally to any other bona fide potential offeror. However, the other offeror must specify the specific information it wants to be provided by the target and cannot simply request the delivery of all information supplied to the initial offeror.

A due diligence exercise may conflict with applicable insider dealing regulations if the offeror is provided with price-sensitive information, unless such information is publicly disclosed at the time of the bid (either in the offer document or separately by the target).

It is not the practice for the target to conduct due diligence on the offeror, even when the offeror is offering its own shares as consideration.

4. Can an offeror protect itself against undisclosed liabilities in the target?

It is not Spanish practice for representations and warranties to be given in the context of a public offer (either by the target or by the selling shareholders), since the shares are being purchased from the public. The only circumstances in which limited warranties might be given (although it is extremely rare) is where there is a purchase of a controlling stake of shares from a single shareholder before an offer is launched.

Due diligence is therefore the offeror's only means of ascertaining any potential problems before the offer is made.

The bid itself may not be made conditional on any material adverse change in the target. See section 6 for further details.

5. Can an offeror seek undertakings from target shareholders to accept its bid?

In order to increase its chances of success, an offeror may seek acceptance undertakings from key target shareholders before making the offer. Such undertakings must be disclosed in the relevant offer document.

Such undertakings may be "irrevocable" or they may cease to apply in the event of a higher offer. Undertakings will not usually contain many additional provisions (in particular, they will not usually include representations and warranties). However, it may be the case that an offeror may seek to agree a break fee which would be payable if

the shareholder(s) failed to sell their shares in the target to the offeror in breach of their undertaking(s).

6. What happens if a bid is "leaked"?

In the absence of a leak, the offer would be filed by the offeror with the CNMV after it has publicly announced its intention to launch the offer.

If a bid is "leaked", then the target would be required to make an announcement confirming or denying the bid, and the CNMV would also normally request the offeror to make an announcement.

Announcements are made by sending a "relevant fact" to the CNMV and posting this on a web page which is maintained by the CNMV for this purpose. The announcing company must also post all such notices on its own web page.

United Kingdom

1. Can the target and the offeror enter into confidentiality/standstill/exclusivity agreements?

   The Code has a general prohibition on "offer-related arrangements. The Panel's consent is required for the target company (or its concert parties) to enter into any "offer-related arrangement" with the offeror (or its concert parties) either during an offer period or when an offer is reasonably in contemplation. Furthermore, the Panel will not generally consent to the target company entering into any such arrangements although there are some limited exceptions (see paragraph 2 below).

   The Code defines an "offer-related arrangement" as including any agreement, arrangement or commitment in connection with an offer, including any inducement fee arrangement or other arrangement having a comparable financial or economic effect. Certain very limited types of arrangements are, however, specifically excluded from the definition and these comprise: confidentiality agreements; commitments not to solicit employees, customers or suppliers; commitments to provide information/assistance in order to obtain official authorisation or regulatory clearance; irrevocable commitments or letters of intent; agreements relating to existing employee incentive arrangements; and arrangements/commitments that impose obligations only on an offeror (or its concert parties) except in the context of a reverse takeover. The consequences of these rules for confidentiality, standstill and exclusivity agreements are set out below.

   Before giving any non-public information to an offeror, the target company will insist on a confidentiality agreement. This is permitted under the Code, as it places obligations on the offeror. However, if the confidentiality agreement is mutual (i.e. it seeks to place confidentiality restrictions on the target as well) it must not include any provisions that might prevent the target board from making an announcement relating to a possible offer, or publicly identifying the potential offeror, at any time that it considers it appropriate. (In practice, this is usually dealt with by including an express carve out to that effect.) Care must also be taken to ensure that the agreement does not include any other obligations on the target that would fall within the definition of an offer-related arrangement.

   The target company may commonly seek to include "standstill" provisions preventing the offeror from acquiring shares of the target without the target's consent for a specified period – usually of six to 12 months. An offeror may, however, seek to resist this restriction. Again, as this is an arrangement which imposes obligations only on the offeror, it does not fall within the definition of an offer-related arrangement and is therefore permitted under the Code. In the context of a reverse takeover, however, where the offeror might ask for the standstill, Panel consent would need to be obtained. In addition, there remains a question under UK law as to the enforceability of such standstill provisions, although in practice they are routinely observed.

Exclusivity agreements are not permitted without Panel consent, which will generally not be given.

Competing offerors must all be provided with the same level of information by the target (see paragraph 3 below). The target may insist on an equivalent confidentiality agreement from such other offerors, but not a standstill agreement.

Details of any offer-related arrangements or other agreements/arrangements permitted under, or excluded from, Rule 21.2 must be disclosed in the initial Rule 2.7 announcement and a copy of the agreement/arrangement must be published on a website (see paragraph 1 of section 8 below).

2. Can the target agree a "break fee" with the offeror?

Break fee arrangements are not permitted under the Code except with Panel consent, which will generally not be given. A "break fee" (or inducement fee) includes any amounts payable if certain specified events occur (e.g. an agreement is breached) which have the effect of preventing the offer from proceeding or causing it to fail, or any other non-cash favourable arrangements (e.g. put/call options) which have a similar effect.

Certain limited dispensations from the general prohibition are permitted under Rule 21.2. However, it should be noted that the dispensations do not automatically apply if the criteria set out below are met; instead, these are the circumstances in which the Panel may be prepared to grant a dispensation.

First, where a hostile bidder has announced a firm intention to make an offer, the Panel would normally consent to the target company entering into a break fee arrangement with one or more competing offerors at the time of the announcement of their firm intention to make a competing offer. This will only be permitted, however, if the aggregate value of all the break fees capable of being paid by the target does not exceed 1% of the value of the target (calculated by reference to the price of the first competing offer) and are only payable if an offer by a third party (which may include the first hostile bidder) becomes or is declared wholly unconditional.

Second, where the target announces a formal sale process before any offeror announces a firm intention to make an offer, the Panel would normally consent to the target company entering into a break fee arrangement with one offeror. The offeror concerned must have participated in the sale process, and the break fee must be agreed only at the time of the announcement of its firm intention to make an offer, subject to the same provisions as set out in the previous paragraph. In exceptional circumstances, the Panel may also be prepared to consent to the target company entering into other offer-related arrangements with that offeror. The Panel should be consulted at the earliest opportunity in all cases where such a dispensation is to be

sought. It remains to be seen at present, however, how many offerors would be prepared to publicly announce a formal sale process.

Although not expressly stated in the Code, the Panel has also indicated that it might be appropriate to grant a dispensation to permit a target company to enter into offer-related arrangements with an offeror where the target company is in serious financial distress and where refusal to grant a dispensation would clearly be detrimental to the interests of the company's shareholders.

Details of any break fee must be disclosed in the initial Rule 2.7 announcement and a copy of the agreement containing the break fee arrangements must be published on a website (see paragraph 1 of section 8 below).

In addition to the Code restrictions, there are also some English law legal issues relating to break fees. They are possible only where the fee does not materially reduce the target's net assets and where the target board is able to reach a view that, if the target did not agree to the break fee, the offeror would not be prepared to make its bid. The English courts could also seek to attack the enforceability of a break fee if it is expressed to be a "penalty" for termination of an agreement or if it amounts in substance to an indemnity for the offeror's costs (e.g. the amount payable varies in line with expected costs).

3. What due diligence is normally done?

Pre-takeover due diligence in the UK is normally limited in scope – more limited than due diligence on a private acquisition.

However, the Code provides that an offeror must not launch an offer until it is absolutely certain that it is able to carry the offer through. Therefore, if an offeror chooses not to carry out due diligence at all, it may be unable to rely on the conditions to the bid if the financial circumstances of the target turn out to be worse than expected (see paragraph 4 below).

In the case of a hostile offer, the due diligence exercise will normally be limited to a review of publicly available information.

In the case of a recommended bid, the due diligence exercise may be more extensive (especially where the bid is being financed by private equity capital). The target will generally try to limit the extent of the exercise. More sensitive information may be withheld until the offeror has proved its interest in the target.

The provisions of the Code require information given to one offeror to be given equally to any other bona fide potential offeror. However, the other offerors must specify the

questions they want answered by the target and cannot simply request the delivery of all information supplied to the initial offeror.

Receipt by the offeror of inside information about the target will make the offeror an “insider” and may prevent it, and any other persons who have access to such information, from trading in the target’s securities until the information is disclosed to the public (see paragraph 1 of section 3 above).

Where the offeror is offering its own shares as consideration, the target may also insist on carrying out limited due diligence on the offeror.

4. Can an offeror protect itself against undisclosed liabilities in the target?

It is not UK practice for representations and warranties to be given in the context of a public offer (either by the target or by the selling shareholders), since shares are being purchased from the public. The only circumstances in which limited warranties might be given (although it is extremely rare and would be likely to require the Panel’s consent under Rule 21.2) is where there is a purchase of a controlling stake of shares from a single shareholder before an offer is launched.

Due diligence is therefore the offeror’s only means of ascertaining any potential problems before the offer is made.

The offer will usually be subject to conditions which, at least in a recommended offer, will be negotiated between the offeror and the target. The conditions are generally aimed at providing some limited protection for the offeror from the date the offer is made to the day it completes and are intended to give the offeror a chance of withdrawing from the offer if, for example, previously undisclosed material liabilities of the target emerge. In practice, there is a fairly standard (and quite lengthy) set of conditions which are used in almost every offer (see paragraph 4 of section 6 below).

However, the Code states that an offeror may not invoke a pre-condition or condition unless the circumstances are of “material significance” to the offeror in the context of the bid. In practice this test sets a very high hurdle to get over: in one instance, the Panel ruled that the events in the USA of 11 September 2001 were not sufficiently material in the context of a bid to permit the invoking of a “material adverse change” condition. It would be particularly difficult to satisfy this test where the offeror has failed to carry out due diligence. Therefore, the conditions to an offer do not give the offeror nearly as much protection as their terms suggest. See section 6 for further details.

5. Can an offeror seek undertakings from target shareholders to accept its bid?

In order to increase its chances of success, an offeror will often seek acceptance undertakings (known as irrevocable undertakings) from key target shareholders before making the offer. (In the case of a scheme, an offeror will seek undertakings to vote in favour of the scheme.)

The Panel limits the number of shareholders who may be approached, without Panel consent, prior to the offer being announced to a maximum of six, for confidentiality reasons, and the Panel must be consulted by the offeror before either approaching any private individual/small corporate shareholder or instituting a "telephone campaign" to collect irrevocables. Note that the ability to approach six shareholders would be reduced if any other parties (e.g. potential financiers) were approached prior to the offer being announced.

Irrevocable undertakings may be made binding on the shareholder in all circumstances, unless the offer lapses. However, most institutional shareholders will insist that their undertaking ceases to apply in the event of a higher offer, or an offer which is at least a specified percentage higher than the original bid. Indeed, in many cases, target shareholders will only be prepared to offer a "letter of intent", indicating whether or not they currently intend to accept the offer.

An announcement must be made if a party that has previously agreed to an irrevocable undertaking or letter of intent advises the offeror that it cannot or will not comply with the terms of that undertaking.

Undertakings will not usually contain many additional provisions (in particular, they will not usually include representations and warranties).

Any existing undertakings or letters (and any conditions to them) must be disclosed in the offeror's Opening Position Disclosure, and the subsequent offer documentation. (Letters of intent procured before an offer period must be reconfirmed in writing at the time they are disclosed.) If an offeror or target company procures an irrevocable undertaking or letter of intent during an offer period, the offer must disclose this circumstance, and the existence of any other undertakings or letters, by 12 noon on the following business day.

In addition, there is a requirement for an irrevocable commitment or letter of intent to be published on a website (see paragraph 1 of section 8 below).

Traditionally, directors give "hard" irrevocables (namely an unconditional agreement to accept the offer, come what may).

6. What happens if a bid is "leaked"?

The Code provides that an announcement must be made once the offeror has formed a firm intention to make the offer and that intention has been communicated to the target.

However, the Code also sets out certain situations where it might be necessary to make an announcement before the parties have reached the stage of a firm intention to make an offer.

In particular, where (i) following an approach to the target company (or where the target company is itself seeking an offeror), the target is the subject of rumour and speculation or there is an untoward movement in its share price; or (ii) prior to an approach, the target is the subject of rumour and speculation or there is an untoward movement in its share price and there are reasonable grounds for concluding that it is the potential offeror's actions which have led to the situation, an announcement must be made.

Whether a share price movement is "untoward" is a decision for the Panel, which it will consider in the light of all relevant facts (including other possible reasons for the price rise, such as general market and sector movements). The Panel must be consulted if there is a movement of 10% or more above the lowest share price since the initial approach by the offeror (or since the offeror first "actively" considered the bid), or a movement of 5% in one day. The Panel encourages potential offerors/known targets to appoint a financial adviser who can keep an eye on the share price as early as possible during the process.

If the target is aware of the offer, it is the target's responsibility to keep its share price under review. However, if the target does not yet know of the potential bid or has "unequivocally" rejected any approach made, it is the offeror's responsibility to keep the target's share price under review. In cases where the target has rejected the approach, the parties should agree where the responsibility lies, or consult the Panel.

It is worth noting that there is a requirement for the announcement by a target company that commences an offer period to identify any potential bidder with which it is in talks or whose approach has not yet been unequivocally rejected (see paragraph 1 of section 8 below). This announcement must also specify the automatic "put up or shut up" deadline for the named offerors. In addition, the Panel will also normally require an announcement to be made identifying a potential offeror if, during an offer period, rumour and speculation specifically identifies a potential offeror which has not previously been identified in an announcement.

A potential offeror may not be obliged to make an announcement if it has changed its mind about making a bid. However, where a potential offeror tells the Panel that it has changed its mind, it may not within six months of the dispensation:

– announce an offer or possible offer for the offeree company (including a partial offer which would result in the offeror and persons acting in concert with it being interested in shares carrying 30% or more of the voting rights of the offeree company);
– acquire any interest in shares of the offeree company if the offeror would be obliged to make a Rule 9 offer;
– acquire any interest in, or procure an irrevocable commitment in respect of, shares of the offeree company if the shares in which such person would be interest (together with any persons acting in concert) and the share in respect of which he, or they, had acquired irrevocable commitments would in aggregate carry 30% or more of the voting rights of the offeree company;
– make any statement which raises or confirms the possibility that an offer might be made for the offeree company; or
– take any steps in connection with a possible offer for the offeree company where knowledge of the possible offer might be extended outside those who need to know in the potential offeror and its immediate advisers.

A potential offeror must also not actively consider making an offer for the target company for a period of three months. The Panel may consent to these restrictions being set aside if (i) a third party announces a firm intention to make an offer; (ii) the Panel determines that there has been a material change of circumstances; or (iii) the target company announces a "whitewash" proposal or a reverse takeover. In addition, the Panel may also consent, at the request of the target company, to a potential offeror recommencing active consideration, but such consent will not normally be given within the first three months of the period.

The Panel may still, however, require a clarifying announcement to be made when rumour and speculation continues or is repeated and/or the Panel considers that it is otherwise necessary to prevent the creation of a false market. If any such announcement is made by the target company, it will not normally be required to identify the former potential offeror, unless it has been specifically identified in rumour and speculation.

A UK listed target will also have to comply with its obligations under the UKLA Rules. These will overlap with its obligations under the Code, in that (although companies do not have a duty to comment on rumours that are largely inaccurate) an immediate announcement will usually be required if there has been a leak of inside information by the target.

Announcements by a UK-listed company must generally be released via a RIS (such as Regulatory News Service (RNS)) or, if released outside normal business hours, distributed to two national newspapers and two newswire services in the UK, plus a RIS for release as soon as it opens.

SECTION FIVE: CONSIDERATION

France

1. What price do you have to offer?

In general, an offeror making a voluntary bid is not subject to AMF prior approval of the offer price, and is free to offer any price it wishes – although unless the offer price is at some premium to the current market price of the target's shares, it is unlikely to be a successful offer. In most voluntary bids, the AMF is therefore only required to assess whether the information provided in the offer document (*note d'information*) as to how the price has been determined is comprehensible, complete and consistent, in the context of the "multi-criteria approach" required by the General Regulation (see below). However, if the AMF considers that the information provided is not comprehensible, complete and consistent, it may still refuse to clear the offer unless the disclosure is revised.

The AMF does have the regulatory power to approve the offer price in the case of a mandatory offer, certain simplified offers, a squeeze-out, or where a fairness opinion is required (see paragraph 5 of section 10 below).

Where the AMF has the regulatory power to approve the offer price itself, it will in principle review the price to confirm that it complies with the relevant rules and with the principles of shareholder equality, market transparency and integrity, fair trading and fair competition, as set out in the General Regulation. The General Regulation requires the use of a "multi-criteria approach" (*approche multi-critères*), which is based on several objective criteria, including, as relevant, the market price of the target shares, the value of the target's assets and the discounted cash flow method.

If the AMF concludes that the proposed offer price does not comply with these rules and principles, it may ask the offeror to modify the price. The AMF must be able to justify its decision, and the Paris Court of Appeal has jurisdiction to consider appeals against the AMF's decision.

However, where the offeror has acquired shares within the 12-month period immediately preceding the event triggering a mandatory offer obligation, and there are no complicating circumstances (see (b) below), the AMF will only review whether the price is at least equal to the purchase price paid for such shares, and will not use the multi-criteria approach.

The multi-criteria approach must also be adopted when considering what price to pay for convertibles or other classes of securities/shares in the target (see paragraph 3 of section 14 below).

In addition to a review of the price, where the consideration consists of securities, the AMF is also required to assess whether such securities are liquid securities admitted to trading on a regulated market in an EU Member State. Otherwise, the consideration must include a cash alternative (see paragraph 6 of section 2 above).

Specific restrictions are also applicable in certain circumstances:

1.1. Simplified offer procedure

In the case of a simplified offer procedure (see paragraph 1 of section 2 above), if the offeror already holds (directly or indirectly, alone or in concert) 50% or more of the share capital or voting rights of the target, the offer price cannot be less than the volume-weighted average target share price over the 60 trading days preceding the commencement of the pre-offer period (if any) or the offer period, except with AMF approval.

1.2. Mandatory bids

Where a mandatory bid is required, the offer price cannot be less than the highest price paid for target shares by the offeror in the 12 months prior to the event that gave rise to the offer obligation. However, the AMF 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 offeror in the 12 months prior to the event that gave rise to the obligation to file a proposed offer, the price is determined using the multi-criteria approach.

In addition, where a mandatory offer for a subsidiary is triggered by a change of control in the parent company (see paragraph 5 of section 2 above), the AMF

requires that the offer price for the subsidiary must also be determined by reference to the price paid for the parent company's shares, as well as the other applicable criteria.

1.3. Squeeze-out procedure within three months of an offer or a buy-out offer

The price offered under a squeeze-out procedure implemented within three months following the closing of an offer period of any type of bid (i) must be supported by an independent expert's fairness opinion (except when the squeeze-out procedure follows a "normal" offer where the consideration offered is cash or includes a cash alternative); and (ii) cannot be lower than the cash consideration offered in the previous offer, except in certain specified cases (see paragraph 1 of section 12 below).

1.4. Competing bids

Competing bids must follow the rules for increased offers set out in paragraph 3 below, comparing the new bid with the most recent competing offer price.

1.5. Independent expert's fairness opinion required

Where an independent expert's fairness opinion is required (see paragraph 5 of section 10 below), the offer price must be supported by a valuation of the target carried out by an independent expert and such price will also be reviewed by the AMF.

There is no restriction whatsoever on an offeror making a further offer for the target after the lapsing or closing of the initial offer. In addition, the offeror may subsequently acquire shares from minority shareholders at any price they will accept. However, the price paid to minority shareholders would then be used as an element to be taken into account in the multi-criteria approach in determining the price for any further offer (or as a minimum price in the event of a mandatory offer, other than the cases described in paragraph (b) above), or as the price required in a squeeze-out procedure (see section 12 below).

2. What sort of consideration can you offer?

There is generally no restriction on what sort of consideration which may be offered in a French voluntary offer. Forms of consideration may therefore include cash, loan notes, shares, warrants or convertible/exchangeable bonds. An offer which includes securities as part of the consideration is known as a "securities exchange offer".

However, where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market in a Member State, the offer must

include a cash alternative. In any event, the offer must include a cash alternative where the offeror, alone or with its concert parties, has purchased securities comprising 5% or more of the target's share capital, or carrying 5% or more of the share capital or voting rights in the target, for cash over a period of 12 months before the launch of the offer.

Another possible type of consideration is a contingent value right or CVG (*certificat de valeur garantie*). Holders of CVGs are entitled to receive the difference between a guaranteed price and the future market price of their shares at a later date. The option must be exercisable within a reasonable time. CVGs must be offered as an alternative to the main offer and must include guarantees and benefits equivalent to those provided under the offer (i.e. an equivalent price, with payment unconditionally guaranteed by the institution sponsoring the offer). If CVGs are issued in respect of the target's shares as an alternative to a normal cash offer, the CVGs may provide an incentive for shareholders to initially retain their target shares based on the price protection offered, which may be desirable for the offeror in the context of a mandatory bid if it wishes to avoid acquiring 100% of the shares. Alternatively, in a securities exchange offer, CVGs may be used to guarantee the value of the offeror's shares issued as consideration.

A mandatory bid will generally have to be in cash or include a cash alternative, given the 5% acquisition rule referred to above. An offeror may choose to offer target shareholders alternative consideration – for example, by permitting them to choose between cash and shares.

Alternatively, the offeror may wish to offer a mixture of cash and shares. This may include what is known as a "mix-and-match" election, which is helpful if the offeror has a maximum amount of cash available and a maximum amount of shares but believes that different target shareholders are likely to want different proportions of cash and shares. The basic offer may therefore be of 50% cash and 50% shares, but a target shareholder can (for example) elect for more cash and will be entitled to receive such additional cash to the extent that other shareholders have elected for additional shares.

3. Can you increase the value of a bid?

It is possible for the offeror to increase its offer (but not to decrease it), but any such increase must be made no later than five trading days before the closing date of the tender period. New conditions cannot be added to an increased offer.

An increased offer must:

- raise the price offered by at least 2% of the previous offer price in a cash offer;
- offer "substantially better terms" in a securities exchange offer; or
- in a voluntary offer, waive or reduce the minimum acceptance condition, but only to the extent the offeror had set a higher threshold than the minimum acquisition

threshold provided by law (i.e. 50% of the share capital and voting rights of the target).

At the time the new offer price is reviewed or approved by the AMF, the AMF will determine whether the closing date of the offer should be extended to allow more time to accept the new offer.

If the terms of an offer are revised, the AMF will also determine whether acceptances of the previous offer should become void. In the event the consideration paid by the offeror is revised, target shareholders who accepted the original offer must then have an opportunity to accept the revised consideration.

If, after its offer has been filed the offeror purchases target shares on the open market at a price higher than the offer price, the offer price will be automatically increased to the greater of (i) the price paid; or (ii) 2% above the previous offer price. The offeror and any persons acting in concert with it are therefore not permitted to buy target company shares at a price higher than the offer price at any time between the last date on which the offer could be increased and the closing date of the offer. This is a strict requirement, regardless of the quantity or price of the securities purchased – the offeror's ability to buy target shares is in any case extremely restricted (see paragraph 2 of section 3 above).

A statement by the offeror that the offer price will not be increased is not necessarily binding. The offeror may therefore subsequently increase the price (for instance, where there is a competing offer) but must be careful not to misrepresent its current intentions.

4. Does cash consideration have to be guaranteed?

The letter by which the proposed tender offer is filed with the AMF must contain a guarantee of the irrevocable nature of the offer and the commitments of the offeror. This applies whether or not the consideration is in cash. The letter must be signed by at least one of the offeror's sponsoring financial institutions.

Prior to giving the guarantee, a sponsoring financial institution will usually seek to have the offeror deposit with it the necessary funds to cover the guarantee, or require an on-demand guarantee from another financial institution. Alternatively, the financial institution may also be the bank providing the bid finance by way of a loan, in which case a deposit/guarantee will generally not be required. If the offeror defaults in its payment of the offer consideration, the sponsoring financial institution would instead be required to pay.

5. Are there any special requirements when offering securities as consideration?

Where securities are offered as consideration, either such securities must be liquid securities admitted to trading on a regulated market in a Member State or the consideration must include a cash alternative.

If offeror securities are being issued/listed, the "Other Information document" (see section 10 below) relating to the offeror must include all the information required in a prospectus (i.e. will be an "equivalent document") or must incorporate by reference a prospectus containing such information.

The offeror must also ensure that it has all the correct corporate authorisations to issue the securities, which may require the holding of a shareholder meeting. The requirement for authorisation is deemed fulfilled if the management body has an express delegation of authority for this purpose.

Alternatively, depending on the circumstances of the offeror, the AMF may allow the offeror to make the offer conditional upon the offeror being authorised to issue the securities by a general meeting of the offeror shareholders, provided that such meeting has already been called before the offer is filed.

Another issue to consider when offering shares is the presence of foreign target shareholders. A cash offer can be made in most jurisdictions, whereas an offering of shares may require registration statements and other such documentation in foreign jurisdictions.

Therefore, if an offering of shares is to be made, the target shareholders' locations must be taken into consideration, as must the possibility of encountering problems in these jurisdictions, since the time spent drafting and seeking approval of the additional documents may affect the proposed timetable. Alternatively, however, offerors tend to exclude some foreign target shareholders from the offer, and in practice most foreign shareholders generally hold their shares through French or other European structures in any case.

6. How is the consideration paid?

Consideration in a "centralised" offer (i.e. in a normal or a mandatory offer, or if the offeror otherwise elects for a centralised acquisition process) must generally be paid to target shareholders within three or four trading days of the final announcement of the results of the offer, and the final announcement must be made within nine trading days of the trade date (i.e. the date of completion of the offer). The exact date for settlement is determined by Euronext (or any other financial institution acting as centralising agent). Transfers of cash and securities in settlement of the offer consideration are made electronically through Euronext, acting as centralising agent.

Where the offer is not centralised but carried out on the market through on-market purchases on the basis of the conditions of the offer, settlement and delivery will be completed within two trading days from the date on which the shareholder tenders its shares.

7. May a target shareholder be offered an additional inducement to accept the offer?

   In order to comply with the principle of shareholder equality, the consideration offered to all target shareholders in an offer must be the same, or at least equivalent. Therefore, an offeror may not agree favourable conditions or inducements with one target shareholder to the exclusion of the others.

Germany

1. What price do you have to offer?

In general, an offeror making either a voluntary takeover bid 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 Regulation (see below). If the offeror 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 some premium to the required minimum in order to guarantee a successful bid.

The Regulation provides that the offer price for a voluntary takeover or mandatory bid is generally adequate if it is not less than the higher of (i) the highest price agreed or paid by the offeror (or its concert parties) for shares of the target during the six months prior to the publication of the offer document; and (ii) 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.

Special provisions apply to target companies where the shares are not liquid. If the market price of the shares has been officially quoted on only one-third of the trading days within the three months prior to the publication of the decision to make an offer, and if there has been a significant variance in the market prices quoted, then the "adequate consideration" must instead be established by way of a valuation opinion.

If the shares are exclusively traded on a market in another Member State, the offer price must also not be less than the unweighted average stock exchange price at the stock exchange with the highest turnover during the relevant three-month period.

Where a company has more than one class of shares, the consideration must be determined separately on the above basis for each class. Consequently, the price offered for each class is likely to be different.

If the offeror 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.

In addition to the offer consideration, an obligation to make subsequent "top-up" payments to shareholders who accept the offer will arise if the offeror pays a higher price than the offer price in buying outstanding minority shares within a year of completion of the bid.

2. What sort of consideration can you offer?

The types of consideration that may generally be offered comprise cash (in euro 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 offeror provides a cash alternative, it is also free to offer shares which 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 – see above.

In the case of either a voluntary takeover offer or a mandatory bid, cash consideration (or a cash alternative) must be offered if the offeror (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.

An offeror is never required 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 rarely used in Germany.

3. Can you increase the value of a bid?

It is possible for the offeror to increase or amend its offer (but not to decrease it) up to one working day prior to the expiry of the acceptance period. If the offer is revised during the last two weeks of the original acceptance period, the acceptance period is automatically extended for two further weeks.

An offer price will automatically increase if the offeror or any concert party purchases any target shares at a price higher than the offer price.

During the initial offer period, the offeror may revise its offer as often as it wishes. However, if the offer is revised during the last two weeks prior to the expiry of the initial acceptance period, no further changes to the offer may be made during the resulting two-week extension of the acceptance period (see above).

An offeror would not automatically be prevented from increasing its offer just because it has stated that it does not intend to do so.
Any revised offer must be published in the same way as the original offer document.

If an offer is revised, all shareholders who accepted the original offer are entitled to withdraw their acceptance and, if they choose, accept the revised consideration (or any other offer from a competing offeror). This right to withdraw only expires concurrently with the acceptance period (or, if applicable, the extended acceptance period). It is a

point of dispute as to whether this also applies following an automatic increase of the offer price as a result of offeror share purchases at a higher consideration.

4. Does cash consideration have to be guaranteed?

Cash consideration does not have to be guaranteed. However, the offer document for a cash offer must include a confirmation by an independent investment services provider, which must be domiciled in the EEA, that the offeror has taken all necessary actions to ensure financing of the offer. To qualify as "independent", the party giving the confirmation must not belong to the same group of undertakings as the offeror and the offeror must not have dominant influence over it. The current view is that the role may be filled by the offeror's financial adviser.

The independent investment services provider may be required to pay compensation to target shareholders who suffer damage as a result of any failure by the offeror ultimately to finance the transaction. The provider may, however, escape liability if it can show that it was unaware of the error or incompleteness of the information in the offer document and that this lack of awareness was not intentional or the result of gross negligence.

In order to satisfy these requirements, the investment services provider will generally expect to see a firm undertaking from a lending bank to provide the necessary funds, unless the offeror already has sufficient cash resources. In many cases, the bank that has agreed to provide the acquisition loan will itself give the certain funds confirmation.

The offer document must contain a description of all the steps taken by the offeror to ensure that sufficient financing is available for the offer. This should include a summary of the major terms of the relevant documentation; including, in particular, the arrangements which ensure that the loan will actually be advanced upon completion of the offer.

5. Are there any special requirements when offering securities as consideration?

Where shares are to be offered as consideration in an offer, they must be traded on a regulated market within the EEA (or a market outside the EEA if there is also a cash alternative). The market must also be liquid, which means that a sufficient number of the shares offered as consideration must be traded on that, in order to reflect a fair price.

The Takeover Act does not require that the shares offered must be issued by the offeror itself. Therefore, a bidding vehicle may, for instance, offer shares in its parent company.

If the shares offered as consideration result from an initial listing of the offeror, the offeror must ensure that such listing will be effective without any delay after completion

of the offer, and that such listing is made on a relevant market which has sufficient liquidity. The circumstances should, in addition, be discussed with the FFSA in advance.

Shares offered as consideration must also be valued (for the purposes of determining the minimum offer price – see paragraph 1 above) at not more than their average weighted market price during the three months prior to the publication of the decision to make an offer. This will therefore establish a minimum exchange ratio that has to be offered in a share offer.

Where shares are to be offered, the offeror must also ensure that, when submitting the offer, it has all the correct corporate authorities in place to issue the securities upon closing of the offer. This means that the offeror must not require any additional shareholder approvals to issue the shares, unless the offer is conditional upon obtaining such approval.

If shares are offered as consideration, the offer document must contain the same information regarding those shares as would be required for a prospectus. No separate prospectus will then be required, since the offer document would constitute an "equivalent document" for the purposes of the Securities Prospectus Act, which implements the Prospectus Directive in Germany (see paragraph 4 of section 10 below).

Another issue to consider when offering shares is the presence of foreign target shareholders. A cash offer can be sent to most jurisdictions, whereas an offering of shares may more often require registration statements and other such documentation in foreign jurisdictions. Therefore, if an offering of shares is to be made, the target shareholders' locations must be taken into consideration, as must the possibility of encountering problems in these jurisdictions, since the time spent drafting and having the additional documents approved may affect the proposed timetable. If an offer includes shares or a cash alternative as consideration, it may be possible to exclude foreign shareholders from the share consideration alternative in order to avoid the necessity to prepare or passport a prospectus or registration statement.

6. How is the consideration paid?

The Takeover Act does not contain any specific provisions governing the settlement of consideration for an offer. However, in practice settlement generally occurs within four to seven business days after the end of the acceptance period.

It is customary to settle both cash and share considerations electronically, through banks acting as trustees for the payment of cash and the transfer of dematerialised shares.

7. May a target shareholder be offered an additional inducement to accept the offer?

The consideration offered must be the same for all target shareholders.

Any premium paid during the six months prior to the publication of the offer document or during the offer automatically has an impact on the offer price. This is because an "adequate" price must not be lower than the highest price paid or agreed by the offeror for the purchase of target shares during the six-month period prior to publication of the offer document or during the offer period (see paragraph 1 above).

The same applies if, within one year after publication of the results of the takeover offer, the offeror or its concert parties acquire shares in the target off-market for a price higher than the initial offer price. No retroactive adjustment of the offer price is, however, triggered by any statutory obligation to pay compensation to shareholders of the target company as a result of domination or profit and loss pooling agreements, statutory merger or squeeze-out.

There are, however, no specific restrictions on agreeing "inducements" with selected shareholders, except that this triggers an obligation to offer additional consideration to all other shareholders. Payments or similar incentives offered to members of the management or supervisory boards of the target are permissible, but must be fully disclosed in the offer document.

Italy

1. What price do you have to offer?

In general, an offeror making a voluntary bid is free to offer whatever price it wishes – although unless the offer price is at some premium to the current market price of the target's securities, it is unlikely to be a successful bid.

However, the tender offer rules provide that the offer price for a mandatory bid must not be lower than the highest price paid by the offeror and by its concert parties for the purchase of the relevant class of the target company's securities over a 12-month period preceding the announcement of the mandatory bid. For the purposes of calculating this offer price, derivative instruments which grant a long position and relate to the relevant target securities must also be taken into consideration. The relevant price will be calculated by reference to the strike price provided by such instruments and the price paid or received in order to acquire the long position.

If no purchases for value of the relevant class of securities have been made in the relevant period, the offer price will instead be equal to the weighted average market price of the target securities over the previous 12 months (or, if a market price for the relevant class of securities has not been available for the whole of this period, over such shorter period for which a market price has been available). In the absence of purchases for higher prices, the same offer price applies in case the thresholds triggering the mandatory bid are exceeded due to the enhancement of voting rights.

If there is a "chain principle offer" triggered by an indirect acquisition (see paragraph 5 of section 2 above), the highest price paid by the offeror for the target's Voting Securities has in the past been taken by CONSOB to be the value of the indirectly acquired company as agreed among the parties, to the extent that such value is capable of objective determination from the contractual documentation and financial statements. However, if the seller and the offeror have not separately assigned a value to the holding of target securities, the offer price would be based only on the market price of the target's Voting Securities.

The price offered in a mandatory offer may be different for different classes of Voting Securities.

If an offer is made for options or convertibles in the target, the price for such securities would be separately calculated. In practice, the price for such securities would usually be the offer price for the underlying target shares, less the relevant subscription/conversion price.

The Regulation provides for specific procedures which must be followed in order to increase or reduce the mandatory offer price. In some cases, CONSOB will

automatically reduce the offer price (for example, where there have been instances of market manipulation or similar exceptional events), but in other cases the offeror will need to request CONSOB's approval.

2. What sort of consideration can you offer?

2.1. Voluntary offer

In a voluntary offer, the offeror may offer cash, securities or a combination of the two. Securities that may be offered include shares, bonds, warrants, derivatives and other financial products, and (except in a mandatory bid) these may be either listed or unlisted.

However, if an offeror reaches the 25% (or 30%, as the case may be) mandatory offer threshold as a result of a voluntary bid where the consideration consists (wholly or partly, but without a cash alternative) of securities that are not Voting Securities listed on an EU regulated market, then the exemption from making a further mandatory offer will not apply and the offeror will be required to make a second bid under the mandatory offer rules as to consideration.

2.2. Mandatory bid

The consideration for a mandatory bid may consist, wholly or partly, of Voting Securities. However, the offeror must offer a full cash alternative if (a) such securities are not listed wholly or partly on an EU regulated market; or (b) the offeror and its concert parties have paid cash for securities that confer at least 5% of the voting rights at a target shareholders' meeting in the 12-month period preceding the announcement of the offer.

3. Can you increase the value of a bid?

The consideration offered can be increased – but not decreased – and other amendments to the offer which are beneficial to the target shareholders can be made, at any time up to one day before the closing date of the acceptance period. However, the percentage of target share capital to which the offer applies can never be reduced.

Any direct or indirect purchase of target securities (or of a long position relating to such securities) made, between the beginning of an offer and its settlement date, by the offeror or any concert party at a price higher than the offer price will oblige the offeror to increase the offer price to match such higher price. This "best price rule" also applies retrospectively if the offeror or its concert parties acquire securities (or derivative instruments granting a long position in securities) for which an offer was made during the six months after settlement of that offer. In this case, those target shareholders who accepted the offer will receive "top-up" additional consideration from the offeror.

Revised offers must be published by way of a press release communicated to CONSOB and to the market. Where an offer is increased it cannot close until three days after publication of the increase, and will be automatically extended if necessary.

If an offer is revised, all shareholders that accepted the original offer will be able to withdraw their acceptances and may accept the revised offer. The offer document may also provide that such shareholders will be taken to have automatically accepted the higher offer unless they indicate otherwise.

There are no special rules about statements by the offeror that it does not intend to revise its offer.

4. Does cash consideration have to be guaranteed?

Cash consideration must be secured by a guarantee in a form acceptable to CONSOB. This usually takes the form of a first demand bank guarantee for the payment of the offer price.

While an offeror must tell CONSOB how it intends to secure its finances at the time of announcement of the offer, it does not need to provide the guarantee at that point. The final and binding guarantee must be provided to CONSOB at least one day before the publication of the offer document, and the terms of the guarantee must be summarised in the offer document.

5. Are there any special requirements when offering securities as consideration?

Where securities are to be offered as consideration, the offeror must ensure that it has all the correct corporate authorities to issue the securities, which may require the holding of a shareholder meeting. If the consideration securities are not already available for issue, the offeror must convene a shareholder meeting to approve the issue of the securities prior to announcing the offer. This will involve careful co-ordination of the meeting notice and the announcement. The shareholder resolution itself must be provided to CONSOB at least one day before the publication of the offer document.

As set out in paragraph 2.1 above, the exception which exempts an offeror from making a second, mandatory bid if it acquires 25% (or 30%, as the case may be) or more target shares in a voluntary offer does not apply if the consideration for the voluntary offer consists wholly or partly of securities which are not Voting Securities listed on an EU regulated market (and there is no cash alternative).

If securities are being offered, the offer document must contain information equivalent to that required to be included in a prospectus under the Prospectus Directive. No separate listing/offering prospectus is then required.
Another issue to consider when offering securities is the presence of foreign target shareholders.

A cash offer can be sent to many jurisdictions, whereas an offering of securities may more often require registration statements and other such documentation in foreign jurisdictions. Therefore, if an offering of securities is to be made, the target shareholders' locations must be taken into consideration, as must the possibility of encountering problems in these jurisdictions, since the time spent drafting and having the additional documents approved may affect the proposed timetable.

6. How is the consideration paid?

There are no specific provisions relating to the date and method of payment. These aspects are therefore required to be set out in the offer document. However, settlement usually occurs within five trading days after the end of the acceptance period.

In the case of exchange offers, settlement is carried out pursuant to the rules governing the circulation and dematerialisation of securities. Settlement of cash consideration under a tender offer is also carried out electronically.

7. May a target shareholder be offered an additional inducement to accept the offer?

The consideration offered to all holders of the same class of target securities in an offer must be the same. Therefore, during the offer an offeror may not agree a favourable price with one target shareholder but not the others.

The Netherlands

1. What price do you have to offer?

1.1. Voluntary offer

An offeror making a voluntary bid is in principle free to offer whatever price it wishes—although unless the offer price is at some premium to the previous market price of the target's shares, it is unlikely to be a successful bid.

In addition, the offer price will be subject to the "best price" rule. The "best price" rule applies to all bids and requires the offeror to apply an offer price which is not less than the highest consideration paid by the offeror for the relevant securities in the target company in any transaction entered into after the initial public announcement regarding the offer. On-market purchases of such securities do not count for purposes of the best price rule.

The AFM has issued detailed guidelines for the calculation of the "best price", including in cases where shares were bought for cash after the initial public announcement and the offer consideration is in securities.

A voluntary offer may be made for specific classes of securities. There is no requirement to make comparable offers for other classes of securities, or for options and convertibles.

For a period of one year after an offer is declared unconditional, the offeror is not permitted to acquire target securities of the same class, either directly or indirectly, at a price or on conditions which are more favourable than those applicable under the offer. However, this prohibition does not apply where the offeror acquires the securities through regular trading on-market, or through a squeeze-out procedure (see section 12 below).

1.2. Mandatory offer

In contrast to a voluntary offer, a mandatory offer must be made at the "equitable price", which will in principle be the highest price paid by the offeror (or by parties acting in concert with the offeror) for relevant securities in the year preceding the mandatory offer. If the offeror has not acquired any securities during the preceding year (and crosses the percentage threshold that triggers the requirement to make a mandatory offer as a result, for example, of a cancellation of shares by the target or by a legal merger with another entity), the average share price of the target during that year will be taken as the equitable price.

Any one of the offeror, the target company or the target shareholders or depository receipt holders may request the Enterprise Chamber to set the price in a mandatory offer at a different level than the “equitable price”. A request may be filed within four weeks after the announcement of the mandatory offer. The Enterprise Chamber must refuse the request if the “equitable price” differs by less than 10% from the average quoted share price for the target during the three-month period preceding the request. If the difference is greater, the Enterprise Chamber will need to assess whether the applicant’s interests have been “disproportionately” prejudiced. If it decides there has been a disproportionate prejudice, the offer period will then be suspended until the Enterprise Chamber has decided what the price should be. The revised offer price set by the Enterprise Chamber will replace the previous offer price by operation of law.

A mandatory offer must be made for all outstanding shares and, if applicable, all depository receipts for target shares that were issued with the cooperation of the target company.

2. What sort of consideration can you offer?

There are generally no restrictions on the type of consideration that may be offered in a Dutch voluntary offer. However, in practice, the consideration in voluntary offers invariably consists of cash, securities or a combination of the two. The offeror may also provide a choice to shareholders of the target company to opt for either cash or securities as consideration.

A large proportion of Dutch public offers are in cash or have a cash element as part of their consideration, mainly because this is more attractive to many target shareholders. However, unlike many other jurisdictions, there is no requirement in Dutch voluntary public offers to offer cash, or a cash alternative to a securities offer, even if the offeror has acquired a high percentage of target shares for cash prior to the offer.

Target shareholders may be offered shares in the offeror (or the offeror’s parent), or other liquid securities. This is referred to as an “exchange offer” or “securities exchange offer” (*ruilbod*). Shares in the offeror (or its parent) may typically be offered if the public offer is intended to create an equal merger between the parties, or if the target shareholders wish to share in the upside of the combined companies in the future.

In the case of a mandatory offer, the consideration may in theory also consist of cash, securities or a combination of the two. However, in practice, the consideration is likely to be in cash, as a cash alternative must always be offered if the offeror has acquired target voting rights in excess of 5% in exchange for cash in the year preceding the announcement of the offer. If securities are offered in a mandatory bid, the securities offered must be “liquid” and admitted to trading on a regulated market.

3. Can you increase the value of a bid?

The offeror is allowed to raise its bid as often as it wishes, provided that it is able to fund the increase in price in cash, or has taken measures to ensure that it has another form of consideration available to cover the increased offer. Depending on the nature of the increased offer price and the timing of the new offer within the regulatory timeframe, the publication of an additional document, and/or extension of the offer period, may be required. All target shareholders will be given a seven-day period to respond to the increased offer price. Shareholders who offered their shares before the price increase becomes available will have "withdrawal rights" in respect of their offered shares within this period.

Any increase in the offer must be publicly announced by the offeror. There is no restriction as to the point in time within the offer period when an increase may be announced.

4. Does cash consideration have to be guaranteed?

Cash consideration does not have to be guaranteed.

However, the Offer Rules do contain a "certain funds" rule. This rule provides that, by the day on which the offeror submits the offer document to the AFM for approval, the offeror must have "certain funds". This means that it must ensure that (i) it is able to raise the cash consideration necessary to complete the offer; and/or (ii) it has taken "all reasonable measures" to secure the provision of any other form of consideration.

As soon as the offeror has "certain funds", it must make a public announcement in which it describes how it will ensure that it is able to raise the cash consideration and/or the measures that it has taken to secure the provision of any other form of consideration.

Only limited guidance has been given on the implementation of the "certain funds" rule, and so it is, for example, not clear if the offeror is deemed to have "certain funds" if it has agreed a term sheet for bank financing, or whether a signed facility agreement is required. In practice, a signed term sheet seems to be sufficient. The AFM does not check that the offeror's representation has been properly given. Shareholders of the target company are supposed to make their own assessment, on the basis of the contents of the "certain funds" statement, as to whether the announced offer is realistic.

5. Are there any special requirements when offering securities as consideration?

The "certain funds" rule under the Offer Rules applies to securities offers as well as to cash offers. This means that, by the time that approval of the offer document is requested from the AFM, an offeror making securities available as consideration should

have taken all reasonable preparatory measures to make the consideration available, such as the announcement of an offeror shareholder meeting at which a shareholder resolution authorising an issuance of offeror securities can be taken. However, an offeror is generally permitted to make the offer subject to the passing of a shareholder resolution authorising the issue of consideration securities.

In addition, where the offeror is required to hold a general meeting of its shareholders in order to approve an issue of securities, that general meeting must be held no later than seven days before the expiry of the offer period (see paragraph 1 of section 9 below).

See also the requirements for securities offered as part of a mandatory offer in paragraph 2 above.

Another issue to consider when offering shares is the presence of foreign target shareholders. A cash offer can be made in most jurisdictions, whereas an offering of shares may in certain jurisdictions require registration statements and other such documentation. Therefore, if an offering of shares is to be made, the target shareholders' locations must be taken into consideration, as well as the possibility of encountering problems in these jurisdictions, since the time spent drafting and having the additional documents approved could affect the proposed timetable.

Alternatively, offerors may exclude some foreign jurisdictions from the offer. However, in each case this will need to be approved by the AFM, since the AFM takes the position that excluding certain jurisdictions may violate the rule that a public offer must be made to all holders of the securities to which the offer relates.

6. How is the consideration paid?

There are no specific provisions relating to the date and method of payment. These aspects are therefore required to be set out in the offer document. Settlement of consideration will usually take place three to five business days after the end of the offer period. If the original offer period is extended (following the offer being declared unconditional), settlement may occur daily.

7. May a target shareholder be offered an additional inducement to accept the offer?

An offeror must offer the same consideration to all holders of a particular type of target securities. Therefore, an offeror may not agree a more favourable prices or an additional inducement with one target shareholder but not with the others. This limitation expires one year after the offer is made, and even within that one-year period the AFM may grant an exemption; for example, if a higher price is justifiable on the basis of external factors.

If a target shareholder wants to buy target assets from the offeror once the bid is successful this is generally acceptable if: (i) the fair market value is paid for the assets; (ii) the valuation is supported by a fairness opinion; and (iii) the transaction is approved by independent members of the target supervisory board.

If there is a public to private transaction or a management buy-out, and management will receive shares in the offeror as a result, this is generally acceptable. However, there may be a conflict of interest or a deemed conflict of interest resulting in management having to abstain from any decision-making and discussions regarding the proposed transaction.

Spain

1. What price do you have to offer?

As a general rule, an offeror making a voluntary bid is free to offer whatever price it wishes – although unless the offer price is at some premium to the current market price of the target's shares, it is unlikely to be a successful bid. However, acquiring control through a voluntary bid may subsequently lead to an obligation to make a mandatory bid, unless the voluntary bid is made for all securities at an equitable price (see below) or accepted by a certain number of holders (see paragraph 3 of section 2 above).

In addition, where an offeror is making a competing offer, the offer price must be higher than the previous offer made (unless the offer is instead extended to more securities (see paragraph 3 below) or is otherwise an improved offer (e.g. with fewer conditions)).

In the case of a mandatory bid, Spanish public takeover regulation is based on the concept of an "equitable price". The equitable price must be no less than the highest price paid or agreed on by the offeror or its concert parties in respect of the target securities over the 12 months prior to the announcement of the bid. If the acquisition of shares in question included some alternative compensation in addition to the price paid or agreed upon, or if a deferral in payment was agreed upon, the equitable price must take this compensation or deferred payment into account. Specific rules also apply to determine the equitable price if the purchase of the relevant securities resulted from the exercise of a prior call or put option, the acquisition of derivative instruments or an exchange or conversion of other securities.

If the offeror has not acquired securities during the 12 months prior to the announcement of the bid, the equitable price must be no less than the price calculated in accordance with the valuation rules that apply to de-listing offers, which adopt the following valuation methods:

- underlying book value of the target and, if applicable, of its consolidated group, calculated on the basis of the most recent audited annual accounts and, if the valuation is obtained after the date of such accounts, on the basis of the most recent financial statements;
- break-up value of the target and, if applicable, of its consolidated group. However, it is not necessary to use this method if it would give a value significantly lower than the values obtained using the other methods;
- average weighted price of the target's securities over the six-month period immediately prior to the announcement of the takeover;
- value of the consideration previously offered on any previous takeover bid for the target, if a bid was made no more than one year prior to the date of the current takeover bid; and

- other valuation methods applicable to the specific case and generally accepted by the international financial community, such as analysing discounted cash flows, company multiples and comparable transactions.

The target's directors must prepare a report supporting the proposed valuation and this report must be made available to target shareholders.

The CNMV may modify the equitable price resulting from the provisions described in paragraphs (a) to (e) above in any of the following circumstances:

- the listing price of the target's securities during the reference period has been affected by the payment of dividends, a corporate transaction or any extraordinary event that merits an objective adjustment to the equitable price;
- the listing price of the target's securities during the reference period shows signs of manipulation, as a result of which a sanction proceeding has been commenced by the CNMV, provided that notice of the statement of charges has been served upon the interested party;
- the equitable price is lower than the trading range for the securities on the date of the acquisition that sets the price, in which case the bid price shall not be less than the lower price in such range;
- the equitable price is set by an acquisition of a volume of securities that is not significant in relative terms, provided that it was carried out at the listing price on the relevant day; in which case the equitable price shall instead be the highest price paid or agreed upon under the other acquisitions during the reference period;
- the acquisitions during the reference period include some alternative compensation in addition to the price paid or agreed upon, in which case the bid price shall not be less than the highest price that results after adding in the value of such compensation; or
- the target is undergoing serious financial difficulties, in which case the consideration shall be calculated in accordance with the valuation rules regarding de-listing offers (described above).

There are no rules as to what price must be offered to holders of other classes of shares or of convertibles or options/warrants – the only principle is equality of treatment between holders of the same class of securities. However, it would be usual to base an offer price for a convertible security on the offer price for the underlying shares, less the conversion price.

2. What sort of consideration can you offer?

The offeror may offer cash, securities issued or to be issued by the offeror or another company (such as a listed parent or subsidiary), or a combination of these. Loan notes

cannot be offered as consideration, and there is no practice of offering "mix-and-match" elections in Spain.

In the following cases, the bid must include a cash alternative that is at least financially equivalent to the exchange offer:

- where the offeror (together with any concert parties) has acquired in cash, over the 12 months prior to the announcement of the bid, securities representing 5% or more of the voting rights in the target company;
- in the case of a mandatory bid triggered by the acquisition of control;
- in the event of an exchange offer, unless it consists of:
  - securities already admitted to trading on a Spanish official market (i.e. a Spanish Stock Exchange or any other Spanish regulated market) or on another regulated market of a Member State; or
  - securities to be issued by the offeror company itself, provided that (A) its capital is totally or partially admitted to trading on any of such markets; and (B) the offeror assumes an express commitment to request the admission to trading of the new securities within a maximum period of three months after the disclosure of the result of the bid.

If the securities offered in an exchange offer are not admitted to trading on any of the markets referred to in paragraph 2, bullet point (a) above, a report prepared by an independent expert must be submitted with an assessment of the value of such securities.

There are no circumstances in which an offeror is obliged to offer securities as consideration.

3. Can you increase the value of a bid?

The offeror may increase the offer price (but not decrease it), or modify the consideration terms of the offer provided that it results in a more favourable treatment of the target shareholders, at any time except during the last five days of the acceptance period. The offeror can extend the acceptance period up to a maximum of 70 days.

The CNMV must approve the new terms of the offer and may require an extension of the acceptance period of the offer in view of the new terms, if it considers this appropriate. There is no limit to the maximum extension which the CNMV may require. After approval, the new offer must be published by the offeror in the same way as the original offer.

All target shareholders that accepted the original offer before it was amended must be entitled to the revised consideration and will be deemed to have accepted the amended offer unless they expressly elect to the contrary.

The increase in the offer price automatically requires an offeror to increase its guarantee (see paragraph 4 of section 5 below).

As regards competing offers, the price may be increased at any time before the date that the "sealed envelope" process comes into play (see paragraph 2 of section 9 below). Furthermore, the first offeror may increase its price after that time in certain circumstances (set out in that section).

4. Does cash consideration have to be guaranteed?

If the consideration is in cash, the offeror must either deposit equivalent cash with the CNMV or provide a guarantee for the amount from a "credit entity" (i.e. a bank with at least one branch in Spain). In practice, most offerors take the second option.

The terms of the guarantee need to be provided to the CNMV at the time of filing the application for the authorisation of the offer or within the following seven business days.

5. Are there any special requirements when offering securities as consideration?

If the offer consideration consists of securities that are already in issue, evidence must be provided to the CNMV that they are available and in a blocked account with the relevant depository.

Where securities yet to be issued by the offeror form all or part of the consideration, the offeror board must resolve to call a shareholders' meeting at the same time that it also meets to resolve to launch the bid. The announcement calling for the shareholders' meeting must be published on or before the date of publication of the first announcement of the offer following the CNMV's authorisation of the bid. The shareholders' meeting will then be held no less than one month and no more than 40 days after the first announcement is published. An application also needs to be made for the new securities to be listed.

Where the offer includes new shares, the offer document must also include all of the information usually required in a prospectus for the public offering of such shares, in order to qualify as an "equivalent document" under the prospectus regime. Alternatively, it may be possible to satisfy some of these requirements by cross-referring to a previously filed prospectus, if this is still valid.

Where the offer consideration consists solely of securities, a cash alternative may be required (see paragraph 2 of section 5 above).

Another issue to consider when offering shares is the presence of foreign target shareholders. A cash offer can be sent to most jurisdictions, whereas an offering of

shares may more often require registration statements and other such documentation in foreign jurisdictions. Therefore, if an offering of shares is to be made, the target shareholders' locations must be taken into consideration, as must the possibility of encountering problems in these jurisdictions, since the time spent drafting and having the additional documents approved may affect the proposed timetable.

6. How is the consideration paid?

The consideration is paid through Iberclear two days after the result of the offer is published in the trading bulletin of the relevant stock exchange (known as the "trade date").

Iberclear transfers the target's securities to the account designated by the offeror and credits the corresponding cash or securities to the deposit entities of the target shareholders. If securities are offered as consideration, the bid will be settled according to the specific depository rules set out in the offer document.

7. May a target shareholder be offered an additional inducement to accept the offer?

The consideration offered to all holders of the same class of target securities in an offer must be the same. Therefore, an offeror may not agree favourable conditions or inducements with one target shareholder but not the others.

United Kingdom

1. What price do you have to offer?

In general, an offeror making a voluntary bid is free to offer whatever price it wishes – although unless the offer price is at some premium to the current market price of the target's shares, it is unlikely to be a successful bid.

However, the Code requires that the bid price must not be less than the highest price (as calculated in accordance with the Rules) paid by the offeror or any person acting in concert with it to acquire an interest in shares in the target during the three months prior to the offer period, or during any period between the commencement of the offer period and the announcement of a firm intention to make an offer. The Panel may also count purchases made before the three-month deadline if, for example, they were made from directors of the target. (This is subject to the discretion of the Panel, which could, for example, be exercised if the market has fallen sharply since the relevant acquisition and/or the target board is happy to recommend a lower price.)

In addition, if the offeror stated prior to making its offer that it was considering making an offer at a particular price, it will generally not be permitted to make an offer at a lower price other than in "wholly exceptional circumstances", or if it reserves the right to bid at a lower level if certain specified events occur (e.g. a competing offer or a recommendation). Once the offeror has announced a firm intention to make an offer, an offeror will not be permitted to exercise any right it had previously reserved either to set aside a statement in relation to the level of consideration or to vary the form and/or mix of the consideration.

In the following circumstances, the offer price must also not be less than the highest price paid by the offeror for shares in the 12 months prior to the offer period and during the offer period:

– where a mandatory bid is required (see paragraph 3 of section 2 above); or
– (a) where the offeror and its concert parties have acquired an interest in shares in the target "for cash" during the preceding 12 months which carries 10% or more of the target company voting rights.

A purchase "for cash" would include an acquisition where the consideration in fact consisted of securities, but the seller was free to sell them before the end of the subsequent offer.

Where a company has more than one class of equity share capital, a "comparable" offer must be made for each class of shares, whether or not such capital carries voting rights. Where both classes are listed, a "comparable" offer will generally be required to reflect

the comparative average market prices of the two classes of shares. The Panel must be consulted in advance.

An offer must also be made for all convertible securities and options in the target (generally at their "look-through" value). Offers relating to options are, by custom, not made until after the main offer has become unconditional, although the Panel's consent is still technically required to such a delay.

If the offeror is left with a number of minority shareholders in the target and the squeeze-out procedure cannot be used (see section 12 below), it is prevented from offering them a higher price than the offer price for a period of six months after the offer closes.

2. What sort of consideration can you offer?

There are generally no restrictions on what sort of consideration may be offered in a UK voluntary offer. Types of consideration may therefore include cash, loan notes, shares, warrants or convertible/exchangeable bonds.

A large proportion of UK takeover bids have a cash element as part of their consideration, mainly because this is more attractive to many target shareholders. However, acceptance of a cash offer will constitute a disposal for UK CGT purposes and so cash consideration may be accompanied by a "loan note alternative". The loan notes are generally unlisted and have a rate of interest which is below the applicable bank rate. If the offeror (or its parent) does not have an acceptable credit rating, a bank guarantee for the principal may be requested by the target. Individual shareholders who accept the loan notes will "roll over" the gain into the notes and will then be able to realise their capital gains over a number of years, depending on the life of the loan notes, thereby taking advantage of their yearly tax allowances (see paragraph 1 of section 14 below).

Alternatively, target shareholders may be offered shares in the offeror (or its parent); for example, if the bid is intended to create an equal merger between the parties, or if the target is being acquired for a price which could be viewed as "cheap" and the target shareholders wish to share in the future upside. This is known as a "securities exchange offer".

The offeror <u>must</u> normally provide cash or a cash alternative to target shareholders where:

– there is a mandatory bid (see also paragraph 6 of section 2 above);
– there is an acquisition of shares as referred to in paragraph 1, bullet point (a) above; or
– there is an acquisition of any target shares "for cash" during the offer period.

Cash may also be required if the Panel otherwise considers it appropriate (e.g. where there have been prior cash purchases from directors).

In addition, the offeror must normally provide securities or a securities alternative to target shareholders if the offeror and its concert parties have acquired interests in shares in the target during the three months prior to the offer period or during the offer period in exchange for securities and such shares carry 10% or more of the target company voting rights. Such securities must be offered on the basis of the same number of securities per target share, not on the basis of equivalent value.

The offeror may also choose to offer a mixture of cash and shares. This may include what is known as a "mix-and-match" election, which is helpful if the offeror has a maximum amount of cash available and a maximum amount of shares but believes that different target shareholders are likely to want different proportions of cash and shares. The basic offer may therefore be of 50% cash and 50% shares, but a target shareholder could (for example) elect for more cash and receive that extra cash to the extent that other shareholders have instead elected for more shares (see also paragraph 1 of section 12 below).

Alternative offers may generally be closed on any closing date without notice, except that they must be kept open for 14 days after the first closing date on which the acceptance condition is satisfied (unless the alternative is a cash underwritten alternative worth more than half the maximum offer value and 14 days' notice of closure has been given). A "mix-and-match" election can be closed on any closing date. However, if a scheme of arrangement is being used, the earliest cut-off date for elections for alternative consideration is the date on which the shareholder meeting is held, and the earliest deadline for withdrawing any election is one week prior to the court sanction hearing.

3. Can you increase the value of a bid?

It is possible for the offeror to increase its offer (but not to decrease it). If it is revised, the offer must be kept open for at least 14 days following the date on which the revised offer document is published. An offeror will normally be required to increase its bid if it (or any concert party) acquires any interest in shares in the target at above the offer price after the offer is made.

An offeror will also be required to amend its bid to include a cash alternative if it (or any concert party) buys any shares for cash after the offer is made. A similar requirement for a securities alternative will apply if it (or any concert party) buys shares in return for securities after the offer is made.

If an offer is revised, all shareholders who accepted the original offer must be entitled to the revised consideration. New conditions may be introduced, but only if they are necessary to implement the increased offer and the Panel has approved them.

There are certain circumstances in which a revised offer may not be made:

– since a revised offer must remain open for acceptance for 14 days, an offeror will generally not be able to revise its offer (and must not place itself in a position where it would be required to revise its offer) in the 14 days ending on the last day on which its offer is able to become unconditional as to acceptances; and
– where an offeror has made a statement which firmly states that the offer will not be increased, then the offeror will only be able to amend the terms of the offer if it clearly specifies circumstances in which the statement will not apply – such as where there is subsequently a competitive offer, or a target company recommendation, or the target makes a late announcement of material new information (after Day 39). Otherwise an increase will only be allowed if the Panel consents, which it is very unlikely to do. (An increase following a competitive offer must be announced within four days of the competing offer being announced and shareholders who accepted the offer after the date of the "no-increase" statement must then be given an eight-day right of withdrawal.)

Any revised offer must be published in the same way as the original offer document.

If a scheme of arrangement is being used, an increase will only be capable of being made later than 14 days before the original date of the relevant shareholder meeting(s) if (i) the meetings are adjourned; or (ii) the Panel gives its consent.

4. Does cash consideration have to be guaranteed?

Cash consideration does not have to be specifically guaranteed and, in practice, it would be very rare to see a bank guarantee (except in relation to a loan note alternative).

However, the Rule 2.7 announcement for a cash offer (including all mandatory offers and any voluntary offer with a cash element) must include confirmation by the offeror's financial adviser or another "appropriate" third party that sufficient funding is in place for the offeror to satisfy full acceptance of the offer. The person giving the confirmation will not normally be required to produce the cash itself provided that it acted responsibly and took all reasonable steps to assure itself that the cash was available.

In practice this is likely to mean that the financial adviser will want to ensure that the offeror actually has the cash in a bank account, or has an unconditional right to draw down funds from its investors (in the case of a private equity offeror), or has a right to borrow the cash pursuant to a specially tailored loan facility, which should generally

have no events of default that could be triggered during the course of the offer. It will need to complete this process before the firm announcement of the bid (which obliges the offeror to make an offer). Where the cash offer is being funded by an issue of new securities, the Panel has indicated that the cash confirmation cannot be conditional on a successful issue. The offeror must therefore be certain of the success of the issue of those securities (e.g. through an underwriting agreement with limited conditionality), or have alternative financing arrangements in place.

A description of how the offer is being financed and the source(s) of the finance must be included in the offer document, which must also disclose details of the debt facilities or other instruments entered into in order to finance the offer and to refinance the existing debt or working capital facilities of the target company. The Code sets out a non-exhaustive list of details that are required to be provided in the offer document including, inter alia, the amount of each facility or instrument, the repayment terms, interest rates (including any "step up" or other variation provided for), a summary of the key covenants and the names of the principal financing banks. It is also a requirement of the Code that, following a Rule 2.7 announcement, any documents relating to the financing must be published on a website in accordance with Rule 26 (see paragraph 1 of section 8 below).

5. Are there any special requirements when offering securities as consideration?

Where securities are to be offered as consideration, the offeror must ensure that it has all the correct corporate authorities to issue the securities, which may require the holding of a shareholder meeting and the issue of a prospectus or equivalent document for the new securities. The offer may be made conditional on obtaining any necessary shareholder resolution to create (if relevant) or grant authority to allot the new securities, and on the admission to listing and admission to trading of new listed securities (see paragraph 4 of section 6 below).

Securities that will not be listed on a regulated market in the UK will not generally satisfy the three month "highest price paid" obligation (see paragraph 1 above). Securities cannot be offered in a mandatory bid (or where a cash bid is otherwise required – see paragraph 2 above) without a full cash alternative.

If the securities being offered are listed, the middle market quotations for (inter alia) the first business day in each of the previous six months must be included in the offer document. If the securities are unlisted, the offer document must instead contain an independent valuation of the securities and any information available as to the number and price of transactions (if any) which have taken place during the preceding six months (if no transactions have taken place, a negative statement must be included to that effect). In both cases, the offer document must also contain full particulars of the rights attaching to the securities, a statement indicating the effect of acceptance on the capital and income position of the target company's shareholders (e.g. how the

dividends paid in the last 12 months on the offeror's shares compare with the dividends paid in the last 12 months on the target's shares) and details of any applications for listing.

Another issue to consider when offering shares is the presence of foreign target shareholders. A cash offer can be sent to most jurisdictions, whereas an offering of shares may in certain jurisdictions require registration statements and other such documentation. Therefore, if an offering of shares is to be made, the geographical spread of the target shareholders must be taken into consideration, as must the possibility of encountering problems in these jurisdictions, since the time spent drafting and having the additional documents approved could affect the proposed timetable.

The difficulties in other jurisdictions may be mitigated by simply making the offer incapable of acceptance from within a jurisdiction, or (where there is a cash alternative) providing that only the cash is available in such jurisdiction. However, the Code provides that offer documentation must generally be sent into all EEA jurisdictions, and may only be withheld from non-EEA jurisdictions where (i) this would result in a significant risk of civil, regulatory or criminal exposure for the offeror or target, and provided that less than 3% of the target's shares are held by registered shareholders located in that jurisdiction, or (ii) the Panel otherwise grants dispensation – but experience suggests that the Panel is taking a fairly strict approach to this exception.

Similarly, any offer-related documents, announcements and information that are published on a website should be capable of being accessed by shareholders in all jurisdictions unless there is a sufficient objective justification for restricting access from certain non-EEA jurisdictions on the basis set out above.

The difficulties set out above may be avoided if a scheme of arrangement is used, as many problematic jurisdictions (e.g. the US and Canada) have exemptions from filing or registration requirements that apply to the court process used on a scheme of arrangement.

6. How is the consideration paid?

Except with the Panel's consent, the consideration must be sent to target shareholders within 14 days of the later of (i) the first closing date of the offer; (ii) the offer becoming wholly unconditional in all respects; and (iii) the receipt of the relevant acceptance complete in all respects.

For target shares which are held in certificated form, the holder is usually sent the consideration by post (be it a cheque, loan note or new share certificate in the offeror). For target shares which are held in uncertificated form (that is, through CREST), it is possible to settle cash payments electronically. It is also possible to issue consideration

shares in the offeror through CREST if the offeror shares are already in the CREST system.

7. May a target shareholder be offered an additional inducement to accept the offer?

The value of the consideration offered to all target shareholders of the same class must be the same. This is not only required as a General Principle of the Code, but is also necessary to ensure that the "squeeze-out" can be operated (see section 12 below).

In addition, the Code provides that an offeror may not make any arrangements with target shareholders or other persons interested in any voting shares in the target (either during an offer or while one is reasonably in contemplation) if there are favourable conditions attached which are not extended to all target shareholders.

This is a strict provision, and it means that an offeror cannot buy shares in advance of the offer on the basis that it will pay extra to the seller if the final offer is at a higher price, or enter into irrevocable undertakings combined with an option to sell if the offer fails.

It also has implications where an offeror is dealing with target shareholders in other capacities (e.g. as potential purchasers of assets, as members of management or as lenders).

If a target shareholder wants to buy any target assets from the bidder following completion of the offer, the Panel will normally consent provided that the sale has been approved by a vote of the independent target shareholders and that the target's financial adviser has advised that the terms of the sale are fair and reasonable. However, this is an onerous procedure and is therefore rarely seen in practice.

Where members of the target's management who hold shares are being offered incentivisation (i.e. to ensure that they stay with the company after the takeover) an offeror must:

- disclose details of any arrangements/proposals that have been entered into with management or have reached an advanced stage of discussion (and, in this case, the independent adviser to the target must state publicly that in its opinion the arrangements are fair and reasonable); or
- confirm the position, and disclose details of any discussions, if it does intend to put incentivisation arrangements in place after completion, but only limited or no discussions have yet been held; or
- state publicly that no incentivisation arrangements are proposed.

In addition, the Panel must be consulted if significant and/or unusual incentivisation arrangements are proposed for the target management (whether or not they hold

shares), and its consent to these types of arrangements will be required if management do hold shares.

As a condition to the Panel's consent to such significant/unusual arrangements, it may require them to be approved by independent target shareholders at a general meeting. An independent shareholder approval will always be required if management will receive shares in the offeror as part of the incentivisation arrangements that are not available to other shareholders – except where that is part of any offer being made for their target options/warrants etc. (e.g. a roll over into offeror options).

The Panel is also concerned to ensure that the Rule is observed where members of a debt syndication group who are financing a bid also hold shares in the target. In this case, either an information barrier meeting certain minimum requirements must be put in place between the debt desk and the equity investor, or the parties must demonstrate to the Panel that the debt is being provided on "market terms".

SECTION SIX: CONDITIONS

France

1. How can an offeror withdraw its bid?

Where the offeror (and its concert parties) announce their intention to file a draft offer (either voluntarily or following an AMF request), the AMF will set the date by which they must publish a release setting out the terms of the draft offer or, depending on the circumstances, file a draft offer.

If the terms of the draft offer are not disclosed (or if the draft offer is not filed) by the relevant deadline, the offeror (and its concert parties) are deemed to no longer have the intention to file a draft offer. The offeror may also make an announcement to this effect.

If the offeror (and its concert parties) declare (or are deemed to have declared) that they no longer have the intention to file a draft offer after the commencement of the pre-offer period, they are not bound to make an offer. In this case, they may not make an offer for six months following their announcement, or the end of the deadline set by the AMF, unless significant changes occur in the market environment or in the situation or share ownership of the parties concerned (including the offeror itself).

During this period, the offeror (and its concert parties) may not place themselves in a situation in which they are obliged to file an offer. If they increase, by 2% or more, the number of equity securities and securities giving access to capital or voting rights that they hold in the target, they must report this immediately and confirm their intentions until the expiry of the six-month period.

During the pre-offer period, the offeror may also include pre-conditions to making an offer that are wider than those conditions expressly contemplated by the law during the offer period (see below).

However, as a matter of general principle, once an offer is filed, an offeror may not simply reserve a right to withdraw the offer. The offeror must instead guarantee the irrevocable nature of its offer in a letter filed with the AMF, which must be signed by at

least one of the offeror's sponsoring banks. The offer is generally considered to be irrevocable from the time it is filed with the AMF.

It is also a general principle that an offer should not be conditional. There are, however, certain exceptions to this principle (see paragraphs 2 and 3 below). If one of the exceptions applies (i) an offeror may be able to withdraw its bid by invoking the non-satisfaction of certain permissible conditions; and/or (ii) a bid may automatically lapse if a permitted condition is not satisfied or waived within a particular period of time. This would include the automatic lapse of an offer made conditional on antitrust approvals, if the matter is referred to the Competition Authority, or Phase II proceedings are launched by the European Commission (or a similar procedure occurs in another Member State or the US) (see paragraph 3 below and paragraphs 2.2 and 3 of section 7 below).

An offer may also be withdrawn by the offeror in the event of a subsequent competing bid. The AMF must be notified of the withdrawal within five trading days from the publication of the timetable of the competing bid.

Finally, the offeror may withdraw an offer if the target adopts measures during the offer period which:

- unconditionally alter the "substance" of the target significantly. While this will be determined by the AMF on a case-by-case basis, examples of such conduct could include a target disposing of key assets, making material changes to its by-laws, or making a significant capital increase; or
- result, for the offeror, in an increase in the price of its offer.

The offeror cannot exercise this withdrawal right without the prior authorisation of the AMF, which will make its decision on the basis of the overriding principles of equality and fairness (see paragraph 1 of section 1 above).

There is no restriction on an offeror making a new bid if its first offer lapses or is withdrawn after the commencement of the offer period.

2. Can a bid be conditional on receiving a certain level of acceptances?

All offers (voluntary and mandatory) shall be declared void if the offeror does not obtain at least 50% of the target's share capital or voting rights in the offer.

In addition to this legal threshold, the offeror in a voluntary offer may set a higher threshold (e.g. two-thirds of the capital or the voting rights of the target (corresponding to majority requirements in extraordinary general meetings). This threshold can be expressed in share capital and/or voting rights (on a fully diluted basis or not). Any

significantly higher threshold – e.g. 95% of the capital or voting rights which is the percentage required for a squeeze-out in France – is likely to be vetoed by the AMF.

In a voluntary offer, the acceptance condition may be waived or reduced to the legal minimum acquisition threshold, with the prior approval of AMF, at any time up to five trading days before the closing date of an offer. If the acceptance condition is waived or reduced, the offer will be treated in the same way as an increased offer.

However, an acceptance condition cannot be waived or reduced after the offer closes and therefore, if such condition is not satisfied by that point, the offer will fail. The offeror may then file a new offer (with a lower or no threshold) if it wishes.

An offeror making an offer for two or more companies simultaneously can provide that each offer is conditional on the acceptance thresholds in both offers being satisfied to the extent these acceptance thresholds are set higher than the minimum acceptance threshold. The offeror can withdraw this cross-conditionality during the respective offer periods, including in the case of a competing offer for one of the target companies.

3. What other pre-conditions or conditions are permitted?

A pre-condition to an offer is different from a condition. With a pre-condition, the tender period does not commence unless the pre-condition has been satisfied. With a condition, the tender period commences but the offer cannot be completed unless the conditions are satisfied or waived within the tender period.

A French offer is always pre-conditional on the AMF having been provided with all material regulatory authorisations (except for any relevant antitrust approvals) of the offer required by law. For example, if the target is a regulated entity such as a bank, insurance company, media or communication company, or a regulated former state-controlled company, the offeror will be required to obtain prior authorisation from the relevant regulator for the takeover. An offeror whose registered office is not in France or which is controlled by foreign shareholders will also need to obtain prior authorisation from the Minister for Economic Affairs if the target engages in certain ”sensitive activities”, as defined by the French Monetary Code (see paragraph 1 of section 1 above).

In relation to other pre-conditions, see paragraph 1 above.

In terms of conditions, the General Regulation allows an offer to be made conditional upon approval by the French or European antitrust authorities (or by the antitrust authorities of any other Member State or the US). The General Regulation also allows an offer to be made conditional upon approval by other countries’ antitrust authorities, provided that the process for granting such clearance does not exceed 10 weeks from the opening of the public offer. The AMF may also grant an additional extension upon

request, after having consulted with the target company. Where this applies, the offeror would file its offer with the AMF, but the tender period would not close unless competition clearance is given in the first phase (e.g. the offer will lapse if the offer is referred to the French Competition Authority, or if a Phase II investigation is opened by the European antitrust authorities).

In addition, the AMF may allow a securities exchange offer to be made conditional upon authorisation of the securities to be issued by a general meeting of the offeror's shareholders, provided that such meeting has already been called at the time the offer is filed. In making this decision, the AMF will have regard to the applicable statutory, regulatory or by-law provisions governing the offeror.

An offer may not be made conditional upon the absence of material adverse changes, either in the offeror, the target or the market (without prejudice to the offeror's ability to withdraw the offer if the AMF deems, pursuant to paragraph 1 above, that the target has significantly altered itself or has taken measures resulting for the offeror in an increase in the price of its offer during the offer period).

4. What are the most common types of pre-condition and condition?

See paragraphs 2 and 3 above – the pre-conditions and conditions which may be included in a French offer are extremely limited.

5. How long can it take to satisfy the conditions?

The antitrust condition, and any necessary authorisation of any securities to be issued as consideration by the general meeting of the offeror's shareholders, must be satisfied before the end of the tender period (i.e. before the closing of the offer). In each case, the offer will lapse if the conditions are not satisfied (or, where relevant, waived) by the deadline.

No other conditions are permitted (see paragraph 3 above).

6. How easy is it to terminate a bid for non-satisfaction of a condition?

There are only a very limited number of conditions permitted in a French offer. However, the consequence of any non-satisfaction of these conditions is clear; the offer will lapse.

On the other hand, if an offeror wishes to withdraw as a result of measures taken by the target (see paragraph 1 above), it will have to consult with the AMF and gain prior approval. In practice, the cases where the AMF will consider that the offeror may withdraw as a result of decisions taken by the target which result in a material change to its substance are extremely rare. However, any decision taken by the target and

resulting in an increase of the consideration to be paid by the offeror may give rise, for the offeror, to a right to withdraw after the filing date.

There is no restriction on an offeror making a new bid if its first offer lapses or is withdrawn after the commencement of the offer period. However, if the offer lapses following the opening of a Phase II investigation by the competent antitrust authority, the offeror will be required to inform the market whether or not it intends to pursue the transaction (in which case, it will have to file a new offer at some point).

7. Can a shareholder withdraw its acceptance?

A target shareholder is entitled to withdraw its acceptance at any time up to and including the closing date of the offer.

Germany

1. How can an offeror withdraw its bid?

The Takeover Act prohibits an offeror from simply reserving the right to withdraw its offer once made. However, a voluntary offer – either a takeover offer or an offer that is not intended to acquire control – can be made subject to the satisfaction of a number of conditions, which must not be "subjective" (see paragraph 3 below).

An offeror can actively withdraw its bid by invoking a breach of such conditions. The bid is lapsed if any of the conditions are not satisfied or waived in the required time (see paragraph 5 below); for example, if the required number of acceptances has not been received by the end of the offer period.

Any waiver of a condition must be declared at least one working day prior to the end of the acceptance period and triggers a right of revocation for target shareholders that have already accepted the offer. A waiver declared within the last two weeks of the acceptance period also triggers an extension of such period by a further two weeks.

If an offer lapses because of a failure to reach the acceptance threshold, the offeror and its related concert parties are prohibited from making another offer for the target within one year from the end of the acceptance period, unless a special waiver is granted by the FFSA and the target gives its consent.

If other conditions cause an offer to lapse, the offeror is not subject to this "cooling-off" period and may re-launch a bid for the target at any time.

There are special rules about conditions in mandatory bids. A mandatory bid must not be subject to any conditions (including any shareholder resolution or minimum acceptance threshold) other than conditions relating to certain necessary regulatory clearances (e.g. antitrust clearances where it would be unlawful for the offer to close before clearance has been granted, or where the offeror could be ordered to unwind the acquisition if clearance is refused).

2. Can a bid be conditional on receiving a certain level of acceptances?

A voluntary offer may be made subject to a condition that it will lapse unless the offeror receives a certain level of acceptances. Acceptance conditions are normally set at 50% or 75% of the voting rights in the target, but sometimes they are as high as 95%. A very high acceptance level condition might, depending on the circumstances (in particular, the initial holding of the offeror), be considered a breach of the prohibition on subjective conditions, by effectively giving the offeror a free option to withdraw the bid. The FFSA may, therefore, prohibit an offer containing such a condition.

In practice, the offeror may decide to waive the acceptance condition, or lower the specified threshold once it has reached a sufficient percentage to give it control, since most shareholders will not continue to resist an offer once it becomes obvious that it will complete. There is no minimum acceptance level that must be achieved by the offeror.

However, if the offeror waives or lowers the acceptance threshold during the last two weeks of the offer, the offer will remain open for a further two weeks, and the offeror cannot lower the threshold again during that extended period. As indicated in paragraph 1 above, such a waiver or amendment also triggers revocation rights for those shareholders that have already accepted the offer.

3. What other pre-conditions or conditions are permitted?

The Takeover Act does not make provision for pre-conditions to an offer (i.e. conditions which, once satisfied, will cause an offer to be made). The Takeover Act instead provides that, once a decision to make an offer has been reached, the offer must be submitted within a defined period of time (see paragraph 1 of section 9 below).

The completion of the offer may, however, be subject to certain conditions, provided that they are not "subjective". Subjective conditions are those in relation to which fulfilment can be brought about exclusively by the offeror, its concert parties, their subsidiary undertakings or their advisers.

Mandatory offers may not be conditional on shareholder resolutions or acceptance levels. However, it is generally accepted that they can be conditional on obtaining certain antitrust clearances (see paragraph 1 above).

4. What are the most common types of pre-condition and condition?

The conditions attached to a voluntary bid will vary depending on the particular circumstances, but there are a number of conditions that have been employed in the past. These include:

– any resolutions necessary to implement the offer being passed by the shareholders of the offeror (and registered in the Commercial Register) – this condition is used only rarely in practice;
– where the consideration involves the issue of newly listed securities in the offeror, the admission of those shares to listing on an organised market;
– all necessary competition or antitrust approvals or clearances having been obtained (this is a common condition used in about a third of all German takeover bids); and
– the absence of specified defensive measures being implemented by the target (e.g. the sale of its most valuable assets) – this condition is also used only rarely.

Offerors may also seek to include objective "force majeure" or "material adverse change" conditions, and these have frequently been used in recent takeover bids. However, it is possible that such a condition may, depending on the drafting, be viewed as subjective by the FFSA. In its annual report of 2003, the FFSA took the view that material adverse change conditions will not be sufficiently specific if they include overly broad definitions of fact or definitions of material adverse changes that are open to interpretation. However, those concerns can be addressed by providing explicitly that a material adverse change will only be deemed to exist if, for example, the material adverse change is confirmed by an expert's opinion from a neutral third party or by an ad hoc confirmation by the target. In practice, conditions relating to material adverse changes in the target have in almost all cases included the additional requirement that the target must have announced the circumstances constituting the material adverse change as inside information in accordance with the Securities Trading Act (a "notification ad hoc"). The same rules apply to compliance conditions that relate to the absence of a material compliance violation.

If any "unusual" conditions are being considered, it is advisable to consult the FFSA in advance.

5. How long can it take to satisfy the conditions?

As a general rule, the conditions must be satisfied by the end of the acceptance period. A condition relating to an acceptance threshold must be fulfilled within the acceptance period, and a condition requiring the passing of an offeror shareholder resolution must be satisfied five business days before the end of the acceptance period.

An exception to this rule is made for necessary regulatory clearances. Accordingly, there is no statutory time limit for obtaining any required regulatory consent or antitrust clearance. However, as a practical matter, an offer which is reliant on the satisfaction of conditions that will be outstanding for a long time may not be very attractive to target shareholders. Furthermore, the FFSA requires a realistic time limit to be included in the offer (usually up to six or nine months after the end of the acceptance period).

The offer document must contain information about any requirements for, and the status of, regulatory (including antitrust) approvals and procedures.

6. How easy is it to terminate a bid for non-satisfaction of a condition?

With regard to a number of conditions, it can be objectively assessed whether they are fulfilled or not. If a condition is not satisfied, the offer will lapse.

Should there remain any doubt on the satisfaction of a condition (which can arise especially with regard to a material adverse change clause or a compliance clause), the

Takeover Act does not provide any method of ascertaining whether the condition has been satisfied. There is no generally established practice in this area yet and the FFSA does not have the jurisdiction to make judgments on this issue. If the offer is subject to a MAC clause, the offer will often provide that occurrence of a MAC will be evidenced by an auditor's opinion, to be provided on or before the last day before publication of the offer acceptance results.

However, a target shareholder that had already accepted an offer would be able to sue an offeror that terminates its bid improperly for specific performance in the civil courts. The courts would then be required to examine whether the relevant condition had been satisfied.

If the offeror has made an offer dependent on reaching a certain acceptance level and that acceptance level has not been reached upon expiry of the acceptance period, the offeror is prohibited from making another offer for one year. The offeror is not otherwise subject to any restrictions.

7. Can a shareholder withdraw its acceptance?

The Takeover Act provides that a target shareholder is only entitled to withdraw its acceptance in two cases:

- upon an amendment of a bid by an offeror (either of the consideration or of the conditions), a target shareholder who has accepted the original bid may withdraw its acceptance at any time before the expiry of the offer period; and
- upon the making of a competing bid, a target shareholder who has accepted the original bid may withdraw its acceptance.

A shareholder that withdraws its acceptance following a competing bid is under no obligation to accept the alternative offer.

Italy

1. How can an offeror withdraw its bid?

Both voluntary and compulsory takeover offers are irrevocable, so an offeror cannot simply reserve the right to withdraw its offer once notified to CONSOB and communicated to the market.

However, a voluntary takeover offer will usually be made subject to the satisfaction of a number of conditions (see paragraph 3 below). An offeror is not allowed in any circumstances to include a condition if its satisfaction is solely within the offeror's control.

The offer document must indicate the date by which all conditions must be satisfied. This date can subsequently be extended or shortened by the offeror by way of an amendment to the offer, published up to one day before the original closing date of the acceptance period. The date may be amended more than once provided the deadline for such amendment is met.

The date of satisfaction of the conditions to an offer may fall after the end of the acceptance period, and there is no ultimate deadline by which the conditions must be satisfied (see paragraph 5 below). If the conditions are not satisfied by a specified date, the offeror may choose to either waive the conditions and become bound by the offer or let the offer lapse.

Conditions to a mandatory offer are prohibited.

2. Can a bid be conditional on receiving a certain level of acceptances?

A voluntary offer will usually contain a condition that the offer will lapse unless the offeror receives a certain level of acceptances. The minimum level of acceptances is often set at 66.6% of Voting Securities (since that percentage grants to the offeror full control of the target's ordinary and extraordinary shareholders' meetings).

The offeror may specifically reserve the right to waive or lower such a condition, subject to a CONSOB requirement that the offeror must specify a minimum threshold in its offer document below which the condition may not be waived. There is no statutory minimum percentage which must be acquired by the offeror in order to declare an offer unconditional.

In practice, the offeror may decide to lower the condition to the minimum once it has reached a sufficient percentage to give it control, since most shareholders will not continue to resist an offer once it becomes obvious that it will complete. The condition

allows the offeror to keep its options open while it monitors the target shareholder register for any hostile shareholders that might seek to hold it to ransom.

3. What other pre-conditions or conditions are permitted?

A pre-condition to an offer is different from a condition. With a pre-condition, the acceptance period of the offer does not commence unless the pre-condition is satisfied. With a condition, the offer is made but cannot complete unless the condition is satisfied or waived.

In Italy, there are pre-conditions provided for by law that must be satisfied before the offer commences, and there are conditions that the offeror may decide voluntarily to include in its offer.

The pre-conditions fixed by law include (i) in the case of an offer involving securities as consideration, obtaining any shareholder resolution necessary to approve the issue of such securities; and (ii) where the target is a regulated entity (e.g. a bank), obtaining clearances from the relevant regulatory authorities, in each case before the offer period begins. The offeror may not include pre-conditions to its offer other than those prescribed by law.

The only restriction on the conditions that may be included by an offeror in a voluntary offer is that such conditions must be objective – their satisfaction must not be solely within the control of the offeror. However, if an offeror wishes to include an "unusual" condition in an offer, it would usually discuss the condition with CONSOB prior to the launch of the offer.

Conditions to a mandatory offer are prohibited.

4. What are the most common types of pre-condition and condition?

See paragraph 3 above for pre-conditions.

The exact conditions attached to a voluntary bid will vary depending on the particular circumstances. However, the following conditions have been found valid and enforceable by CONSOB in the past:

- adoption of new by-laws by the target company, or amendment of the target's by-laws to remove limits relating to the possession of shares;
- receipt of antitrust clearances or other authorisations by relevant authorities;
- no increase having occurred in the net indebtedness of the target beyond a certain limit; and
- no material adverse change having occurred in the financial condition of the target group controlled by the target.

These would be in addition to any acceptance condition included (see paragraph 2 above).

5. How long can it take to satisfy the conditions?

The date for satisfaction of the conditions must be specified in the offer document (see paragraph 1 above).

However, there is no legal ultimate deadline by which the conditions must be either satisfied/waived or the offer must lapse. If the conditions have not been satisfied by the end of the acceptance period, the target shareholders who have accepted the offer will be prevented from selling their shares until the offer becomes unconditional or lapses, but will still be able to exercise all other share rights (e.g. casting votes, receiving dividends etc.). For this reason, in case the deadline falls after the end of the offer period, CONSOB may object to a timing that "freezes" the market for the listed shares for a long time.

6. How easy is it to terminate a bid for non-satisfaction of a condition?

In the case of conditions which are completely objective, it is easy to terminate for non-satisfaction.

However, problems may arise where a condition is widely drafted and could be interpreted on a subjective basis by the offeror (i.e. especially in relation to a material adverse change condition). In this case, CONSOB might seek to investigate the offeror's use of the condition.

7. Can a shareholder withdraw its acceptance?

A target shareholder will be able to withdraw its acceptance in the event of a subsequent increased or competing bid. However, any shareholder that withdraws its acceptance may then be under an obligation to accept the increased or competing offer – this is a question which has not yet been finally determined, either by CONSOB or in the courts.

There is no clear rule as to whether withdrawals in other situations are acceptable – the offeror usually specifies in the offer document that acceptances will be irrevocable.

Netherlands

1. How can an offeror withdraw its bid?

Public offers are irrevocable, and an offeror therefore may not simply withdraw its offer after the offer has been formally launched by making an offer document available to the public. However, an offeror will be able to withdraw a voluntary bid at any time before it is formally launched, even if the bid has been announced before that time.

Where an offeror does withdraw an offer before formal launch, but the AFM has already approved its offer document, the offeror will not be allowed to make a new offer within the next six months, under the "shut-up" provisions.

In addition, a voluntary offer will usually be made subject to the satisfaction of a number of conditions (see paragraph 3 below). There are no circumstances in which a bid may lapse other than where conditions are not satisfied or waived.

2. Can a bid be conditional on receiving a certain level of acceptances?

A voluntary offer may be made conditional on receiving a certain level of acceptances. Acceptance conditions are normally set at 95% of the voting rights in the target company, in view of the squeeze-out threshold (see section 12 below), but they are sometimes set at a lower percentage (typically 75% or two-thirds). There is no required minimum level of acceptances.

An acceptance condition may be waived or reduced to a lower percentage at any time. There is no deadline as to when this can be done during the offer period, nor is any consent from the AFM needed.

Increasingly, bidder and target agree on a contractual basis an acceptance condition of 95%, which may be reduced to (typically) 80% if the EGM of the target approves a post-offer restructuring measure to be implemented after the offer is declared unconditional (see paragraph 1, section 12 below).

A mandatory offer may not be subject to the fulfilment of any offer conditions, including conditions requiring a certain level of acceptances.

3. What other pre-conditions or conditions are permitted?

A pre-condition to an offer is different from a condition. The idea of a pre-condition is that the offer period would not commence unless the pre-condition has been satisfied or waived. With a condition, the offer period commences but the offer is not completed unless the conditions are satisfied or waived.

In the Netherlands, an offeror is able to withdraw a voluntary bid at any time before the offer document is published, so there is no regulatory need for pre-conditions. However, it is common for the offeror and the target to agree on a contractual basis, in a merger protocol entered into between them, that a bid will not be made unless certain pre-conditions (or "pre-offer conditions") are satisfied or waived.

A voluntary offer may be made contingent on the fulfilment or waiver of certain conditions. However, conditions where the satisfaction of the condition is at the discretion of the offeror are not permitted (i.e. conditions must all have some element of objectivity, independent of the offeror's judgment or actions). In addition, given the "certain funds" rule, a debt financing condition will not be permitted. The offeror should ensure that any conditions are clearly stated and, where possible, capable of being objectively measured.

If a condition is not met, the offeror must make a public announcement that sets out whether the offer will lapse. If it does lapse, the offeror cannot make a new offer within the next six months.

A mandatory offer may not be made subject to any offer conditions.

4. What are the most common types of pre-condition and condition?

Some of the most common pre-conditions included in merger protocols between an offeror and a target are:

- no public announcement of a competing bid for the target;
- confirmation by the board(s) of the target company of their recommendation of the bid;
- a positive result from consultations with trade unions, and advice of the target works council having been given;
- no material adverse change having occurred in the target; and
- no restraint orders (i.e. no notification having been received from the AFM stating that investment firms are not allowed to cooperate with the Offer, or no court judgment or other regulatory order having been handed down that prohibits the making of the Offer)

Some of the most common offer conditions (which must be satisfied or waived before the offeror declares the offer unconditional) include:

- a minimum percentage of target shares having been tendered to the offer;
- no public announcement having been made regarding a competing offer for the target;
- no material adverse change having occurred in the target;

- no restraint orders (i.e. no notification having been received from the AFM stating that investment firms are not allowed to cooperate with the Offer, or no court judgment or other regulatory order having been handed down that prohibits the making of the Offer);
- relevant antitrust and other regulatory approval(s) having been obtained; and
- the approval by a general meeting of the offeror shareholders of (a) the making of the offer, which may be required for large transactions; and (b) if the offer is an exchange offer, the issue of the offeror shares as consideration.

5. How long can it take to satisfy the conditions?

All offer conditions must be satisfied (or waived) by the end of the offer period. The initial offer period may last up to 10 weeks after publication of the offer document. If one or more of the conditions are not satisfied (or waived) within that period, the offer period may then be extended for a maximum of a further 10 weeks.

If there is a competing offer for the target, the period may instead be extended until the end of the acceptance period for the competing bid.

6. How easy is it to terminate a bid for non-satisfaction of a condition?

It is generally difficult to terminate a formally launched bid for non-satisfaction of a condition, unless the condition has very clearly not been satisfied. In particular, it would be difficult to invoke a material adverse change condition. If a material adverse change condition or any other condition were to be invoked, this would not be policed by the AFM but could give rise to shareholder litigation. In the event a bid is terminated, the offeror will be barred from announcing or launching a public offer for the target company involved during the six months following termination.

7. Can a shareholder withdraw its acceptance?

Target shareholders are usually required by the terms of an offer to tender their shares irrevocably during the initial offer period. Therefore, target shareholders may not withdraw their acceptances during that period.

However, where the initial offer period is extended without the offer becoming unconditional, target shareholders who have tendered their shares during the initial offer period may withdraw their acceptance during the extended offer period. Target shareholders who have tendered their shares during the extended offer period may not withdraw their acceptance.

If the offer price is increased and/or the nature of the consideration is changed and, as a result, an additional document needs to be published, those target shareholders that

had tendered their shares prior to the publication of that additional document will have withdrawal rights during the seven business days after publication.

Spain

1. How can an offeror withdraw its bid?

In general, both voluntary and compulsory takeover bids are irrevocable.

However, one of the most important differences between voluntary bids and mandatory bids under the Spanish takeover regulation is that voluntary bids may be made subject to the following types of condition, so long as the fulfilment or non-fulfilment of such conditions may be confirmed by the end of the acceptance period:

– approval of amendments to the by-laws of the target or adoption of other structural resolutions by the target shareholders at a general meeting;
– acceptance of the bid by the holders of a certain minimum percentage of target securities;
– approval of the bid by the offeror shareholders at a general meeting; and
– any other condition that the CNMV deems admissible under the law.

Where conditions are included, an offer will lapse if the conditions are not satisfied by the end of the acceptance period.

Both voluntary and mandatory bids may be made conditional on antitrust approval (see paragraph 3 below).

After a voluntary or mandatory bid has been submitted, the offeror may withdraw it in the following cases:

– if the antitrust clearance is not obtained by the end of the acceptance period (to the extent the offer is subject to an antitrust condition) (see paragraph 3 below); or
– where, due to exceptional circumstances beyond the control of the offeror, the bid cannot be carried out or is manifestly not viable, provided that the prior approval of the CNMV is obtained.

An offeror may also withdraw a voluntary bid in the following cases:

– where a competing offer is authorised by the CNMV; or
– with the prior approval of the CNMV, if the target shareholders acting at a general meeting adopt a decision or resolution that, in the opinion of the offeror, prevents it from continuing with the bid.

Finally, in the case of a mandatory bid, the offeror may withdraw it if, at the end of the "sealed envelope" process applicable to competing offers, an unconditional competing offer on better terms than the mandatory bid is made by another offeror.

2. Can a bid be conditional on receiving a certain level of acceptances?

A voluntary bid may be conditional on receipt of a minimum level of acceptances. This is typically 90% (so that the offeror will acquire squeeze-out rights), but it may be 75% (the threshold for consolidation of the target within the offeror's group for tax purposes) or the threshold necessary to pass a resolution amending the target's by-laws. Mandatory bids may not include such a condition.

3. What other pre-conditions or conditions are permitted?

Pre-conditions are not recognised practice in Spain. However, takeover bids subject to regulatory approvals other than antitrust clearance may be filed with the CNMV prior to obtaining the necessary approval. The CNMV will not authorise such an offer until the regulatory approval has been obtained.

The conditions which may be included in an offer are very limited – see paragraph 1 above. A material adverse change condition is not permitted however, see paragraph 6 below for the effect of exceptional circumstances.

If the takeover bid (either voluntary or compulsory) is subject to merger regulation in some jurisdiction, the offeror may make its bid conditional upon obtaining the necessary authorisation, or lack of opposition, from the antitrust authorities, such that:

- if the competent antitrust authorities approve (or are deemed to approve) the merger before the end of the acceptance period, the bid shall be fully effective;
- (a) if the competent antitrust authorities declare, before the end of the acceptance period, that the proposed transaction may not be carried out, the offeror must withdraw the bid;
- (b) if the competent antitrust authorities establish, before the expiration of the acceptance period, that the clearance of the merger will be subject to conditions, the offeror may withdraw the bid; and
- (c) if no express or implied decision is made by the competent antitrust authorities before the expiration of the acceptance period, the offeror may withdraw the bid.

If the bid is compulsory and the offeror withdraws it pursuant to bullet points (a) to (c) above, the offeror is required to reduce its percentage of voting rights in the target below 30% within a period of three months (either by selling shares or by terminating any relevant shareholders' agreement).

4. What are the most common types of pre-condition and condition?

The most common types of condition are the removal of "poison pills" by the target company and a minimum level of acceptances. With respect to pre-conditions, see paragraph 3 above.

5. How long can it take to satisfy the conditions?

All conditions must be satisfied by the end of the acceptance period, which gives a maximum period of 70 days.

6. How easy is it to terminate a bid for non-satisfaction of a condition?

There are a limited number of circumstances in which a bid may be withdrawn, as described in paragraph 1 above. However, these circumstances are generally very clear cut when they occur.

If an offeror wishes to withdraw as a result of exceptional circumstances beyond its control (see paragraph 1 above), it will have to consult with the CNMV and obtain prior approval for the withdrawal. The CNMV is very unlikely to give its consent except in very extreme cases – under the former Spanish takeover regulation, there was no experience of any such approval being given.

If a bid is withdrawn in this way, the offeror is not prevented from launching another offer for the target thereafter.

7. Can a shareholder withdraw its acceptance?

A target shareholder can withdraw its acceptance at any time before the last day of the acceptance period.

United Kingdom

1. How can an offeror withdraw its bid?

An offeror is not allowed simply to reserve a right to withdraw its offer once made. However, a voluntary takeover offer will usually be made subject to the satisfaction of a number of conditions, which must not normally be "subjective" (see paragraph 3 below).

An offeror can withdraw its bid by invoking a breach of such conditions, although the circumstances in which this can be done are very limited (see paragraph 6 below). However, the offeror is also required to use all reasonable efforts to satisfy such conditions.

In particular, an offeror may allow its bid to lapse if the acceptance condition has not been satisfied by the first or any subsequent closing date. This is an absolute right, not subject to the Panel's restrictions on the ability to invoke other conditions.

An offer is also required to lapse if it is to be the subject of a full CMA investigation, or proceeds to Phase II in Europe, prior to the later of (i) the first closing date; and (ii) the date on which the acceptance condition is fulfilled (see paragraph 3 of section 7 below). A scheme of arrangement is required to lapse if either of these events occurs before the relevant shareholder meeting(s).

If a bid is withdrawn or lapses, other than as a result of the competition provision referred to above, the offeror and its related concert parties cannot (except with the Panel's consent), within 12 months from the date on which the offer is withdrawn or lapsed:

- (a) announce an offer or possible offer for the target;
- (b) acquire any interest in shares in the target if it would thereby be required to make a mandatory offer;
- (c) acquire any interests in, or procure any irrevocable commitments in respect of, shares which in aggregate (taking into account both interests and irrevocable commitments) carry 30% or more of the target voting rights;
- (d) make any statement raising or confirming a possible offer for the target; or
- (e) take any steps in connection with a possible offer for the target where knowledge might be extended outside those who need to know in the offeror and its advisers.

The Panel will normally only consent to a new bid within the 12-month period where:

- the new offer is recommended by the target board (but there will be a "cooling-off" period of three months if the lapsing followed a "no increase/no extension" statement);
- the new offer follows the announcement by a third party of a firm intention to make an offer for the target;
- the new offer follows the announcement of a whitewash proposal (see paragraph 3 of section 2 above) or a reverse takeover by the target company;
- the Panel determines that there has been a material change of circumstances; or
- it is likely to prove, or has proved, impossible to obtain regulatory clearances for the offer within the Code timetable (and, in this case, the restrictions in bullet points (d) and (e) above will generally not apply in the period prior to the new bid if the offeror is continuing to seek these clearances during that period).

There are special rules about conditions in mandatory bids (see paragraph 6 of section 2 above).

2. Can a bid be conditional on receiving a certain level of acceptances?

The Code requires that any offer (other than a "partial offer" – see paragraph 1 of section 2 above) must contain a condition that it will lapse unless the offeror acquires or agrees to acquire shares carrying more than 50% of the voting rights in the target.

However, in practice, an offeror may wish to be able to withdraw from an offer where it achieves control but cannot guarantee being able to take advantage of the minority squeeze-out procedure in CA06 (see section 12 below). Therefore, an offeror making a voluntary offer will generally impose an additional condition, which exceeds this nominal level of control, requiring the acquisition of no less than 90% (in value and in voting rights) of the target shares for which the offer is made. This will then allow the offeror to withdraw from the bid if insufficient acceptances are received to enable it to acquire all of the minority shares. (This additional condition is not permitted in a mandatory offer.)

In practice, the offeror may decide to waive the 90% condition once it has reached a sufficient percentage over 50%, since most shareholders will not continue to resist an offer once it becomes obvious that it will complete. However, the condition allows the offeror to keep its options open while it monitors the target shareholder register for any hostile minority shareholders who might seek to hold it to ransom.

The 90% acceptance condition can be waived or lowered to 50% at any time during the course of an offer.

Where a scheme of arrangement is being used, a majority in number representing three fourths in value of the members (or of the members of each class of shareholders) present in person or by proxy must vote in favour of the scheme at a meeting convened by the court for that purpose. The vote must be held on a poll. In ascertaining what "classes" of shares a target has, it is sometimes necessary to divide up the shareholders on the basis of different common interests, as well as more straightforward share class rights. Shares held by the offeror (or its concert parties) will not count in the vote, as they effectively constitute a separate class.

Due to this different threshold level, if an offeror were to change from a scheme of arrangement to a takeover by way of offer at some point after its Rule 2.7 announcement, it is unlikely that the offeror would be allowed by the Panel to include more than a 75% acceptance condition in its offer. However, where (i) the target board withdraws its recommendation of the scheme, (ii) the target board announces its decision to propose an adjournment to a shareholder meeting or the court sanction hearing, (iii) any shareholder meeting or the court sanction hearing is adjourned, or (iv) the Panel considers that the target company has not implemented the scheme in accordance with the published timetable, the Panel will normally consent to a request from the offeror to switch to a contractual offer with an acceptance condition set at up to 90% of the shares to which the offer relates.

3. What other pre-conditions or conditions are permitted?

A pre-condition to an offer is different from a condition. With a pre-condition, the offer does not have to be made at all (i.e. the offer document does not have to be published) unless the pre-condition is satisfied, which can take an unspecified length of time. With a condition, the offer is made but cannot complete unless the condition is satisfied or waived, and this must be achieved within a set timetable.

Pre-conditions can only be included if the Panel is consulted in advance. Pre-conditions are generally only permitted where (i) they are pre-conditions relating to the CMA and/or the European Commission; or (ii) they involve another material official authorisation or regulatory clearance relating to the offer, and either the offer is recommended by the target's board or the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the Code timetable for offers. By way of contrast, conditions may be included without any consultation with the Panel, unless they are subjective or unusual.

It is worth noting that the Panel will not accept a pre-condition or condition relating to clearance by the UK Pensions Regulator, as the Panel considers that the offeror can obtain this prior to publicly announcing the bid.

The Code states that a bid must not normally be subject to conditions or pre-conditions which depend solely on subjective judgments by the directors of the offeror or target, or

the fulfilment of which is in their hands. However, the Panel is prepared to accept an element of subjectivity in certain circumstances where it is not practicable to specify all the factors on which fulfilment of a particular condition may depend (e.g. a condition that a regulatory authority will grant a "satisfactory" clearance).

In addition, an offeror is not supposed to make an announcement of a firm intention to bid unless it is in a position to make that offer. Therefore, the Panel will generally not allow any pre-condition or condition which amounts to a "financing" condition, unless exceptional circumstances apply and the offeror proposes a pre-condition that is related to another pre-condition, e.g. where it is not reasonable for the offeror to maintain committed financing for the whole of the likely time period required to obtain a necessary regulatory clearance. In this case, any financing pre-condition must be satisfied within 21 days of the regulatory clearance being given, and the offeror and its financial adviser must confirm in writing to the Panel at the outset that they are not aware of anything that would prevent satisfaction of the financing pre-condition. If, at any time, the offeror or its financial adviser becomes aware, or considers it likely, that the offeror would be unable to satisfy a financing pre-condition it must promptly notify the Panel.

If the offeror requires flexibility regarding pre-conditions, it could consider initially announcing only a possible offer rather than a firm intention to bid. Such an announcement places the offeror under no obligation to proceed with a bid – although as a result target shareholders might see the offeror's proposal as less credible. In addition, an automatic 28-day "put up or shut up" deadline would be triggered by the announcement of a possible offer (see paragraph 1 of section 8 below).

4. What are the most common types of pre-condition and condition?

The only common types of pre-condition are receipt of regulatory clearances and (in limited circumstances) financing of the offer (see paragraph 3 above).

The exact conditions attached to a voluntary bid will vary depending on the particular circumstances. The only conditions which must be included under the Code are the acceptance condition, and a term that the offer will lapse if, prior to the later of the first closing date or the date on which the acceptance condition is fulfilled, the offer is to be the subject of a full investigation by the CMA, or the European Commission initiates Phase II proceedings (see section 7 below).

However, there is a set of further common conditions which will usually form the basis for most offers. These include:

- any resolutions necessary to implement the offer being passed by the shareholders of the offeror;

- where the consideration involves the issue of new listed securities in the offeror, those securities being granted admission to listing and admission to trading;
- all other competition filings, notifications etc. being made in relevant jurisdictions;
- all authorisations for undertaking the business of the target group being in full force and effect;
- no material litigation or arbitration proceedings having been instituted or threatened against the target group, and no material liability of the target group either arising or being disclosed;
- no material adverse change in the target group's financial or trading position having occurred compared with that disclosed in its previous documents or announcements; and
- no material inaccuracy having been discovered in the target's accounts and public announcements.

However, see paragraph 6 below for a description of certain limitations on the offeror's ability to rely on these conditions.

If an offeror makes a possible offer announcement under Rule 2.5(a)(i), a firm offer announcement under Rule 2.7 or publishes an offer document, it must state that it has the right to reduce the offer consideration by the amount of any dividend (or other distribution) which is paid or becomes payable by the offeree company to the shareholders of the offeree company, unless the offeror expressly states in the announcement or offer document that the shareholders of the offeree company will be entitled to receive all or part of a specified dividend in addition to the offer consideration.

5. How long can it take to satisfy the conditions?

For a takeover offer, the first closing date on which the bid can be declared unconditional must be a minimum of 21 days after the publication of the offer document. However, the "final day rule" requires that the acceptance condition must be fulfilled at the latest within 60 days after the publication of the offer document (Day 60 in the offer timetable).

Any other conditions must be satisfied within 21 days of the later of the first closing date or the date when the offer becomes unconditional as to acceptances, so that the latest date when all conditions may be satisfied is Day 81 in the offer timetable. In practice, most offers are declared wholly unconditional when they are declared unconditional as to acceptances, unless there are outstanding regulatory clearances.

However, there is no restriction on the time it may take to satisfy the conditions to a scheme of arrangement. This is because, on a scheme of arrangement, shareholders are still able to deal freely with their shares, even after they have voted on the scheme (which is in contrast to a takeover by way of an offer).

Some conditions may, by their nature, take longer than 81 days to fulfil. In particular, clearance of an offer by the US antitrust authorities may take a longer time to process. In such cases, the Panel should be consulted at an early stage.

A full investigation by the CMA a Phase II inquiry by the European Commission will generally always take longer than 81 days. This is why the Code specifies that an offer must lapse while such an inquiry is carried out (unless it has already been declared unconditional as to acceptances).

In such cases, an offeror might consider announcing a firm bid (or a possible offer, subject to the considerations of the "put up or shut up" deadline) subject to a regulatory pre-condition; although, as discussed above, it remains to be seen how such an approach will interact with the new automatic "put up or shut up" deadline. Alternatively, it could carry out the acquisition by means of a scheme of arrangement. This allows the target to hold the shareholder votes required and then to wait while the reference or Phase II inquiry is completed before submitting the court order for registration.

6. How easy is it to terminate a bid for non-satisfaction of a condition?

Although a voluntary offer usually has a long set of conditions, it is actually very hard to terminate an offer for non-satisfaction of most conditions – especially for breach of a "material adverse change" condition. The Code provides that a bid can only be terminated if the relevant breach of condition is of material significance to the offeror in the context of the bid. This is a high hurdle: for example, in one instance the Panel determined that the events of 11 September 2001 in the USA were not sufficiently material in the context of a bid subject to a "material adverse change" condition.

Any conditions which may be included for the protection of the target (e.g. on a "merger of equals" transaction) are subject to a similar test, and may only be invoked if the circumstances are of material significance to the target shareholders in the context of the bid.

These restrictions are intended to prevent an offeror or target from using widely drafted conditions as a means of circumventing the Code prohibition on subjective conditions. The Panel should be consulted before any such condition is invoked.

In considering its position, the Panel will look at:

- whether the condition was the subject of negotiation with the target;
- whether it was expressly drawn to target shareholders' attention in the offer document, with a clear explanation of the circumstances that might give a right to invoke; and

– whether it was included to take account of the particular circumstances of the target company.

Therefore, if an offeror is particularly concerned about an issue and wishes to include a condition to protect itself, it should make sure that it has complied with all of the above requirements.

However, the acceptance condition and any CMA/EU Merger Regulation conditions are not subject to the provision requiring non-satisfaction to be of "material significance". Therefore, since most shareholders do not accept an offer until after the first closing date, the acceptance condition will in practice give the offeror some protection against a downturn in the business of the target company during the course of the offer.

If a bid is allowed to lapse following non-satisfaction of a condition, the offeror (and its concert parties) will be prevented from announcing any further offer for the target (or indeed making any statement that suggests an offer may be made or taking any steps in connection with a possible offer outside working with its immediate advisers) for a period of 12 months.

7. Can a shareholder withdraw its acceptance?

A target shareholder is entitled to withdraw its acceptance from the date falling 21 days after the first closing date of the offer (usually Day 42 of the offer timetable). This is only possible if the offer has not by that time become or been declared unconditional as to acceptances.

An early declaration by the offeror that the bid is unconditional as to acceptances may therefore be important to prevent existing support from being withdrawn after Day 42, although removing the acceptance condition is also likely to mean that the offeror is irrevocably committed to the offer (see paragraph 6 above). Alternatively, the date on which acceptances can be withdrawn could be delayed by making the first closing date later than Day 21.

There are some other, limited rights of withdrawal (e.g. where an offeror raises its offer after having made a "no-increase" statement). However, a target shareholder cannot withdraw its acceptance just because a competing bid has been made. Therefore, target shareholders usually do not accept a bid until it is clear that no such competing bid is likely to be made.

A vote on a scheme is not capable of "withdrawal", although the court might not be prepared to issue the final order if circumstances change materially after the date of the shareholder vote (e.g. there is a materially higher offer).

SECTION SEVEN: ANTITRUST

EU Process

1. How do you tell which antitrust authority has jurisdiction?

   The European Commission has exclusive jurisdiction (subject to certain limited exceptions) to review takeover offers which are "concentrations with an EU dimension". Whether an offer has an "EU dimension" depends on whether it satisfies a number of turnover thresholds.

   The turnover thresholds are, in brief (and assuming one offeror and one target), either (i) aggregate worldwide turnover of offeror and target of > €5 billion and EU-wide turnover of each party of > €250 million; or (ii) aggregate worldwide turnover of offeror and target of > €2.5 billion, EU-wide turnover of each party of > €100 million and at least three Member States where offeror and target each have turnover of > €25 million and where they have combined aggregate turnover of > €100 million.

   If, however, both the offeror and the target achieve more than two-thirds of their EU turnover in a single Member State then the bid would fall outside the jurisdiction of the European Commission even if the turnover thresholds are otherwise satisfied. In addition, the Commission may in certain circumstances refer an offer which technically comes within its jurisdiction back to the relevant national authority.

   Further, at the request of the offeror, an offer without an EU dimension will also be investigated by the Commission if the offer would be capable of being reviewed under the national competition law of at least three Member States and no relevant Member State objects to a referral of the offer to the Commission. Alternatively, one or more Member States may request the Commission to investigate an offer without an EU dimension if it affects trade between Member States and threatens to affect significantly competition within the territory of the Member State(s) concerned.

2. What is the process?

Offers falling under the EU Merger Regulation must be notified to the European Commission for approval. Notification may be made following the announcement of a public bid or, at the offeror's discretion, following the announcement of an intention to make such a bid.

Offers falling under the EU Merger Regulation generally cannot be completed unless and until the European Commission approves them. Otherwise, fines of up to 10% of worldwide turnover may be imposed for early implementation.

The offeror may be entitled to complete the offer without having first obtained approval from the European Commission if it undertakes not to exercise its voting rights in the target unless and until approval has been obtained.

In most cases the Commission's investigations are completed within 25 working days from formal notification (Phase I).

It is open to the parties to offer undertakings designed to cure any perceived competition problem within 20 working days from notification; in this case the Phase I period will be extended to 35 working days.

Where there is a perceived problem, but no undertakings are offered in time, or those offered are insufficient, the Commission will initiate a second phase investigation (Phase II), lasting 90 working days, unless the parties offer undertakings, in which case the Phase II investigation may be extended to 105 working days; and, in addition, the offeror (within 15 working days from the initiation of the Phase II proceedings) or the Commission (at any time following the initiation of proceedings) with the offeror's consent will have a right to extend Phase II by up to 20 working days.

A transaction cannot be formally blocked unless it has gone through the Phase II process.

France

1. How do you tell which antitrust authority has jurisdiction?

Where a bid does not fall within the exclusive jurisdiction of the European Commission (see EU section), the bid may be reviewed by the French competition authority, if the relevant jurisdictional thresholds are met. Regardless of the target's nationality, a bid may also trigger filing requirements in other jurisdictions (e.g. other EU countries, the US or Canada), if the applicable turnover and other thresholds in those countries are also met.

French merger control provisions are enforced by the *Autorité de la concurrence* (the "Competition Authority").

The thresholds for review by the Competition Authority are governed by the French Commercial Code. Under these provisions, French merger control applies where the following cumulative thresholds are met: (i) aggregate worldwide pre-tax turnover over the previous financial year of all the parties concerned of > €150 million in aggregate; and (ii) individual pre-tax turnover in France over the previous financial year of at least two of the parties concerned of > €50 million each.

In addition, there are also two alternative sets of thresholds. French merger control also applies to concentrations involving parties active in the retail trade, where two or more parties operate retail premises, and where: (i) aggregate worldwide pre-tax turnover over the previous financial year of all the parties is > €75 million in aggregate; and (ii) individual pre-tax turnover in France over the previous financial year of at least two of the parties is > €15 million each.

French merger control also applies to concentrations involving parties operating in French overseas departments and French overseas communities, where at least one party to a concentration has activities in one or more French overseas departments or French overseas communities, and where: (i) aggregate worldwide pre-tax turnover over the previous financial year of all the parties concerned is > €75 million in aggregate; and (ii) individual pre-tax turnover in France over the previous financial year of at least two of the parties concerned is > €15 million in at least one of the French overseas departments or French overseas communities concerned.

If an offer does fall within these parameters, the concentration must be notified to the Competition Authority.

In addition, the Minister for the Economy, who was in the past the relevant competition authority for merger control in France (through the Directorate General for Competition or "DGCCRF"), still holds a residual power in two circumstances: (i) within five working days after the notification of a clearance by the Competition Authority to the Minister,

the Minister can impose the opening of a second phase for the review of the concentration; and (ii) within 25 working days from the notification of a Phase II decision by the Competition Authority to the Minister, the Minister has the ability to substitute his own decision based on public interest grounds (e.g. industrial development, companies' competitiveness in an international context, social welfare etc).

2. What is the process?

2.1. EU Process

See EU section.

2.2. French Process

Filing is mandatory and may be made as soon as the parties are able to present a sufficiently well advanced project that allows for an investigation of the transaction to be commenced.

Filing has a suspensory effect. This means that the acquiror cannot implement the merger before clearance is granted by the Competition Authority. However, in the case of a public takeover bid, the offeror may still acquire shares in the target pursuant to the offer before the offer has been cleared, but it cannot exercise the voting rights attached to those shares until clearance is given.

For a company, the penalties for failure to abide by these rules include a fine of up to 5% of pre-tax turnover in France for the preceding financial year (both of the offeror and, where applicable, the target). For an individual, the sanction is a fine of up to €1.5 million.

The review of a merger takes place in two phases:

First Phase

The Competition Authority may authorise the merger within 25 working days from receipt of a complete filing. This period may be extended for an additional 15 working days if undertakings designed to remedy any perceived competition problem are submitted. In addition, parties may ask for the review period to be suspended ("stop the clock") for a period of up to 15 working days if necessary for the finalisation of such undertakings. In this specific case, the first phase can last up to 55 working days.

Second Phase

If the concentration raises serious concerns as to its compatibility with competition, the Competition Authority will initiate an in-depth examination. The Competition Authority will then issue its decision within 65 working days from the opening of this phase. This time limit is maintained if undertakings are submitted within 45 working days of the beginning of the review period. However, if undertakings are submitted less than 20 working days before the expiration of the 65 working day period, the review period is extended by 20 working days from the receipt of the undertakings.

As in the first phase, parties may ask for a suspension of the review period ("stop the clock") for a period of up to 20 working days if necessary for the finalisation of undertakings. In addition, the Competition Authority may interrupt the review period if the parties fail to inform it of new facts as soon as they arise, or breach their duty to provide information, or if third parties, as a result of the parties' negligence, fail to provide the requested information.

After the expiration of each phase, the parties also need to wait for the expiration of the waiting period for the Minister (see above).

3. What are the implications for the conditionality of an offer?

An offeror may make its offer conditional on a clearance decision being issued at Phase I in Europe, or on clearance being given without a reference in France or in any other Member State of the EU or in the US. (An offer may also now be made conditional upon approval by the antitrust authorities in other jurisdictions in certain circumstances; see paragraph 3 of section 6.) If such a condition is included, the AMF must be provided with a copy of the relevant referrals to the competition authorities, and be kept informed of their progress.

In this case, a conditional offer will lapse if Phase II proceedings are launched, or if the matter is referred for a second phase review by the Competition Authority (or a similar procedure occurs in any relevant foreign state – see above). In this case, the offeror must announce whether it will continue to pursue a clearance from the relevant authorities.

If a bid is not made conditional on antitrust clearance (or where a bid is mandatory), the offeror would be required to close the offer without having received a clearance, but will not be able to exercise the voting rights attached to the acquired target shares until the clearance is given. If the clearance is refused, it may have to sell the target or one or more of the target's businesses.

4. How might obtaining antitrust clearances affect the bid timetable?

The conditions to an offer, including any antitrust condition, must be satisfied or waived by the end of the tender period. However, if a Phase II investigation is initiated, this will obviously take much longer. Therefore, a bid which is conditional upon antitrust clearance will lapse if the offer is referred to a second phase review by the Competition Authority, or Phase II proceedings in Europe are launched (or a similar procedure occurs in another Member State or the US).

Germany

1. How do you tell which antitrust authority has jurisdiction?

   Where a bid does not fall within the exclusive jurisdiction of the European Commission (see EU section), it may fall to be reviewed by the competent national competition authority in Germany if the relevant jurisdictional thresholds are satisfied. Regardless of the target's nationality, a bid may also trigger filing requirements in other jurisdictions (e.g. other EU countries, the US or Canada), if the applicable turnover and other thresholds in those countries are also met.

   The thresholds for review of an offer by the German competition authority (assuming only two parties) are (i) an aggregate worldwide turnover of offeror and target of > €500 million; (ii) turnover in Germany of at least one party of > €25 million; and (iii) turnover in Germany of at least one other party of > €5 million.

   The single German competition authority, which both reviews and makes decisions on offers, is the Federal Cartel Office (the "FCO").

   It is important to note that under German merger control rules even the acquisition of a minority stake below 30% may constitute a transaction that must be notified. For instance, the acquisition of 25% or more of shares or votes in another company constitutes a merger under German merger control rules. Furthermore, "any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking that is material with regard to competition" constitutes a merger under German merger control rules. The latter is of importance with respect to acquisition of shares in a competitor or a company which is active in an upstream or downstream market. In particular, the acquisition of a de facto blocking position in a competitor or supplier constitutes a merger. A de facto blocking position exists when the shareholding is likely to confer to the acquirer 25% or more of the votes present in a shareholders' meeting. These rules may be particularly relevant if an offer fails, but the offeror has acquired a significant minority share in the target, or if the offeror is willing to accept all shares tendered irrespective of whether the offer results in the acquisition of control.

2. What is the process?

   2.1. EU Process

   See EU section.

2.2. German Process

Offers caught by the German regulations must be notified to the FCO.
As a result of an amendment to German law in 2013, the acquisition of shares by means of a public bid (i.e. purchases over the stock exchange, not private transactions) may be closed prior to clearance by the FCO if (i) the offeror does not exercise its voting rights prior to clearance and (ii) notifies the transaction with the FCO without undue delay.

The notification must be made to the FCO. This could be done in advance of the offer being made, but the notification will be public information, which is likely to cause difficulties if the offer has not otherwise been made public (e.g. by prior public announcement).

The FCO will make an initial assessment within one month of receipt of the complete notification ("Phase I") of whether to clear the offer or to initiate the main examination proceedings ("Phase II"). During Phase I proceedings the FCO may neither prohibit an offer nor clear a transaction subject to conditions and obligations. Therefore an offeror cannot obtain clearance at Phase 1 by offering undertakings.

If the FCO considers that there should be a Phase II investigation, it will have four months upon receipt of the complete notification to complete the investigation and either clear the offer (which may be subject to conditions and/or obligations) or block the offer. Phase II proceedings will be extended by one month in case commitments are offered. Moreover, Phase II could be extended under certain circumstances if the FCO needs to request information anew. Further, the deadline for completion of Phase II can be extended with the consent of the notifying parties.

3. What are the implications for the conditionality of an offer?

The Takeover Act permits an offeror to make its offer conditional on a clearance decision being issued at Phase I in Europe or on clearance being given in Germany (or elsewhere) without a Phase II investigation, and on any such clearance decision not being subject to conditions. However, the inclusion of such a condition may make the offer unattractive to target shareholders (see paragraph 4 below).

4. How might obtaining antitrust clearances affect the bid timetable?

Although an antitrust condition is not required to be satisfied within the acceptance period, shareholders in practice tend not to be prepared to tender their shares in an offer when the offer is still subject to a regulatory condition. If the offer is completed

prior to clearance, the offeror takes the risk that the shares will have to be divested if the FCO later prohibits the transaction.

If the offeror is not prepared to take this risk, it is therefore crucial to obtain clearance as soon as possible and refrain from closing the transaction as long as clearance has not been granted.

The offeror may consider notifying the transaction to the FCO as soon as possible (i.e. prior to the announcement). If this is not appropriate, given confidentiality concerns, the FCO could at least be contacted on an informal and confidential basis with a view to clarifying issues up front and accelerating the formal proceedings following the announcement of the bid and the formal notification. In a situation where the FCO considers a market investigation to be necessary, the FCO may then be in a position to send out questionnaires to market participants immediately following receipt of the formal notification and to complete the review within Phase I.

Italy

1. How do you tell which antitrust authority has jurisdiction?

Where a bid does not fall within the exclusive jurisdiction of the European Commission (see EU section), it may fall to be reviewed by the national competition authorities in Italy if the relevant jurisdictional thresholds are satisfied. Regardless of the target's nationality, a bid may also trigger filing requirements in other jurisdictions (e.g. other EU countries, the US or Canada), if the applicable turnover and other thresholds in those countries are also met.

Assuming that there are only two parties to a bid, the thresholds for review of the offer by AGCM, the Italian antitrust authority, would be triggered where (i) the total aggregate Italian turnover of the target and the offeror and its group is greater than €474 million; and (ii) the total Italian turnover of the target is greater than €47 million.

Turnover is taken from the financial statements for the relevant companies for the previous financial year. The thresholds are reviewed and updated annually by the AGCM.

The AGCM is an independent public agency made up of five members jointly appointed, for a period of seven years each, by the Presidents of the Senate and of the Chamber of Deputies. Its decisions are taken by majority vote without any interference from the government.

2. What is the process?

2.1. EU Process

See EU section.

2.2. Italian Process

An offer caught by the Italian regulations must be notified to the AGCM simultaneously with its notification to CONSOB, which is generally taken to be the point at which the offer document is filed with CONSOB.

The AGCM may impose an administrative fine on the offeror for failing to make such notification (or failing otherwise to comply with the relevant regulations), of up to 1% of the previous year's total Italian turnover of the offeror group (although in some cases the AGCM has only taken account of the offeror's turnover in setting a fine).

Following a notification, the AGCM has 15 days to carry out an initial assessment of the transaction and to decide whether to initiate investigation proceedings if it finds that the transaction raises issues which need further consideration. The AGCM cannot prohibit a takeover without going through a further investigation.

Should the AGCM decide to investigate the matter further, it will have 45 days to carry out the investigation and reach its conclusion. However, any failure by the parties to submit any requested information may result in the term being extended by an additional 30 days. At the start of its investigation, the AGCM may order the offeror not to exercise voting rights attached to any target shares acquired prior to the final AGCM decision.

Unlike the EU system, it is not usual practice to offer undertakings to address any perceived competition concerns. Informal discussions addressing the potential competition problems may take place between the offeror and the AGCM, but the AGCM will then issue its clearance as it sees fit. The offeror will then choose whether to comply with any conditions imposed by the AGCM in its clearance decision and proceed with the offer, or let the offer lapse.

3. What are the implications for the conditionality of an offer?

A voluntary offer may be made conditional on the receipt of antitrust clearances, and on such clearances being on terms satisfactory to the offeror. There is no ultimate deadline date by which such condition may be fulfilled – therefore, if the AGCM decides to proceed to a further investigation, the acceptance period may close. However, the target shareholders who have accepted the offer will not be able to sell their shares until the transaction is cleared and the offer becomes binding on them, or the transaction is prohibited and the offer lapses.

A mandatory offer must not be conditional in any respect. In this case (or if for some other reason an offer does not include an antitrust condition), the offeror would be required to close the offer without having received a clearance, but will not be able to exercise votes attached to the acquired target shares until the clearance is given. If the clearance is refused, it may have to sell the target or one or more of the target's businesses.

4. How might obtaining antitrust clearances affect the bid timetable?

See response in paragraph 3 above.

The Netherlands

1. How do you tell which antitrust authority has jurisdiction?

Where a bid does not fall within the exclusive jurisdiction of the European Commission (see EU section), it may be reviewed by the ACM, the national competition authority in the Netherlands, if the relevant jurisdictional thresholds are satisfied. Regardless of the target company's nationality, a bid may also trigger filing requirements in other jurisdictions (e.g. other EU countries, the US or Canada), if the applicable turnover and other thresholds in those countries are met.

Notification to the ACM is required when a proposed transaction reaches or exceeds the statutory turnover thresholds as set out in the Competition Act. These thresholds are met where (i) the undertakings concerned have a combined worldwide turnover of more than €150 million; and (ii) at least two of the undertakings concerned individually achieve a turnover of at least €30 million in the Netherlands. The relevant parties are the offeror which intends to gain control and the target company which is the target of the bid. Specific thresholds for notification to the ACM apply in regard to financial and health institutions.

2. What is the process?

2.1. EU process

See EU section.

2.2. Dutch process

A proposed public offer that will result in a transaction that exceeds the thresholds referred to in paragraph 1 above must be notified to the ACM as soon as possible. Notification can take place when it is sufficiently clear that the parties intend to pursue the offer, as evidenced by a letter of intent or a merger protocol or, in the event of a hostile offer, a press release by the offeror stating its intention to launch a public offer.

An offeror may complete its offer without having first obtained approval from the ACM if it does not exercise its acquired voting rights in the target until such time as approval has been obtained. The offeror can, however, request permission from the ACM to exercise its voting rights, if this is necessary to maintain the full value of its investment. In practice, offerors tend to include the approval of the ACM as an offer condition, which should be satisfied before declaring the offer unconditional (see paragraph 3 below).

In principle, the ACM does not provide an informal pre-clearance procedure before the acquisition is agreed.

The notification process has two phases: Phase I and Phase II.

Phase I

During Phase I, the ACM considers whether the concentration falls within the scope of the Dutch Competition Act and whether a licence would be required. The ACM must make a decision within four weeks of notification. This four-week period is suspended from the day on which the ACM formally requests further information (which occurs frequently) until the day on which it receives such information. In the majority of cases, the ACM will therefore issue its Phase I decision after a period lasting considerably longer than four weeks.

At the end of Phase I, the ACM may decide that:

– there is no need to obtain a licence for the proposed transaction; or
– a licence is required for the transaction; or
– the transaction does not fall within the scope of the merger control provisions of the Competition Act.

As under the EU system, the parties may seek to avoid a requirement for a licence by offering remedies to address the ACM's concerns. Such remedies may be included by the ACM as conditions in a decision that no licence is needed.

Phase II

A proposed transaction will be made subject to a licence requirement if the ACM has reason to assume that "… *competition in the Dutch market or a part thereof could be appreciably restricted, in particular as a result of the creation or strengthening of a dominant position*". The offeror will need to apply for a licence, which will initiate a Phase II investigation into the transaction.

The ACM must make a decision on a licence application within 13 weeks following receipt of the licence application. However, this time period is again suspended if the ACM issues a formal request for additional information. Such requests are frequently made, extending the 13-week period.

At the end of Phase II, the ACM decides whether:

– a licence will be granted, with or without remedies; or
– a licence will not be granted.

If the ACM refuses to grant a licence for a proposed transaction after the Phase II investigation, a request can be made to the Minister of Economic Affairs for a licence to be granted in any case. The grounds for making such a request would be that the transaction is necessary for serious reasons in the general public interest and that these reasons outweigh the anticipated restriction to competition. However, to date Ministers have never used this power to grant a licence on general public interest grounds.

Appeals against decisions of the ACM can be made to a specialist court dealing with competition cases: the Rotterdam District Court. Appeals against judgments by the Rotterdam District Court can be made to the Trade and Industry Appeals Tribunals (*College van Beroep voor het Bedrijfsleven*).

If a licence is refused but the offer has already completed, the transaction must be unwound within 13 weeks. However, this has never occurred to date.

3. What are the implications for the conditionality of an offer?

The Competition Act generally prohibits the completion of a relevant transaction before notification to the ACM and clearance. However, special rules apply to public bids, allowing the acquisition of shares on the condition that notification is immediate and that voting rights are not subsequently exercised by the acquiring party until the transaction is cleared, as mentioned under paragraph 2 above. This exception to the general rule has hardly ever been relied upon, as in practice most bids are made conditional upon ACM approval.

Submission of the notification is often made at the same time as the announcement of the intended public offer, which is at an earlier stage than the launch of the public offer itself. Depending on the substantive issues, ACM approval will often be granted before the end of the initial offer period. Alternatively, the offer period may be extended up to a maximum of 10 weeks, which is generally sufficient to cover both Phase I and Phase II proceedings for transactions without any substantive competition issues.

4. How might obtaining antitrust clearances affect the bid timetable?

As the extended offer period (of a maximum of 10 weeks plus 10 further weeks) is usually sufficient to cover both Phase I and Phase II proceedings, there is generally no impact on the timetable.

Spain

1. How do you tell which antitrust authority has jurisdiction?

Where a bid does not fall within the exclusive jurisdiction of the European Commission (see EU section), it may fall within the scope of the national competition authority in Spain (the CNMC), if certain jurisdictional thresholds are met. Regardless of the target's nationality, a bid may also trigger filing requirements in other jurisdictions (e.g. other EU countries, the US or Canada), if the applicable turnover and other thresholds in those countries are also met.

The thresholds for review of an offer by the CNMC are triggered where: (i) the offer would result in the offeror acquiring a market share of at least 30%, either in the national market or in a defined market within the national market; or (ii) the global turnover of the parties in Spain in the last financial year exceeds €240 million, provided that at least two of the parties also had an individual turnover in Spain of over €60 million.

2. What is the process?

2.1. EU Process

See EU section.

2.2. Spanish Process

If the offer reaches the thresholds mentioned above, the CNMC must be notified. The offeror may, but does not have to, make its offer conditional on obtaining the authorisation of the CNMC. The offeror may complete an offer before the transaction is cleared by the CNMC, provided that it meets the two requirements set out in paragraph 4 below.

Under the new merger control procedure, the Investigation Directorate of the CNMC conducts an initial assessment and prepares a resolution proposal, which is submitted to the Council of the CNMC. The Council must issue a decision within one month from the notification, and will either authorise the transaction, approve it subject to the receipt of certain undertakings from the offeror, or initiate a second phase investigation if it considers that the transaction would impede competition in the whole or a part of the Spanish territory. (The Council of the CNMC may also pass the file on to the European Commission, if appropriate.)

If the Council decides to initiate a second phase investigation, the final decision will be issued within two months from the opening of the second phase investigation. Third parties will be able to submit their opinions and, if the merging parties request, there will be an oral hearing before the Council of the CNMC. After

the second phase investigation, once the Council has received the final proposal from the Directorate of Investigation, the Council will again authorise the transaction, or authorise it subject to undertakings, or reject it.

If: the CNMC authorises the transaction subject to undertakings, or the transaction is submitted to a second phase review, the Council's eventual decision will not become effective until the Minister of Economy forwards it to the Council of Ministers, which must be within 15 days. The Council of Ministers must adopt a decision within one additional month, either approving the transaction (with or without conditions – which may be the same as or different from any conditions proposed by the CNMC) or prohibiting it. The offeror will then choose whether to comply with the conditions (i.e. the requirement for undertakings) and proceed with the offer, or let the offer lapse.

The various penalties provided by the new Spanish Competition Act for breach of the notification rules are as follows:

- up to 1% of the offeror's turnover in the previous financial year if it notifies the offer to the CNMC after the five-day period from the submission of the offeror's request for authorisation to the CNMV elapses, or after the 20-day period from the CNMC's request for notification elapses;
- up to 5% of the offeror's turnover in the previous financial year if it completes the offer before obtaining the authorisation of the CNMC, but has previously failed to comply with the two applicable conditions (see paragraph 4 below);
- up to 10% of the offeror's turnover in the previous financial year if the offeror does not comply with its undertakings, or with the resolution of the CNMC when authorising the transaction.

The CNMC can also impose punitive fines in order to ensure that the parties demerge if the CNMC prohibits the transaction, or to ensure that they implement the conditions imposed by the CNMC when approving a transaction.

3. What are the implications for the conditionality of an offer?

If the offer is conditional upon an authorisation, or declaration of non-opposition, by the relevant antitrust authorities, the following applies.

If the takeover bid (either voluntary or compulsory) is subject to merger regulation in some jurisdiction, the offeror may make its bid conditional upon obtaining the necessary authorisation, or lack of opposition, from the antitrust authorities, such that:

- if the competent antitrust authorities approve (or are deemed to approve) the merger before the end of the acceptance period, the bid shall be fully effective;

- (a) if the competent antitrust authorities declare, before the end of the acceptance period, that the proposed transaction may not be carried out, the offeror must withdraw the bid;
- (b) if the competent antitrust authorities establish, before the expiration of the acceptance period, that the clearance of the merger will be subject to conditions, the offeror may withdraw the bid; and
- (c) if no express or implied decision is made by the competent antitrust authorities before the expiration of the acceptance period, the offeror may withdraw the bid.

If the bid is compulsory and the offeror withdraws it pursuant to bullet points (a) to (c) above, the offeror is required to reduce its percentage of voting rights in the target below 30% within a period of three months (either by selling shares or by terminating any relevant shareholders' agreement).

If the offeror decides to continue with the offer even if no approval has been issued or deemed to have been issued in connection with the transaction, then it may do so. However, in the worst case, it may be required to sell the target if the transaction is not ultimately approved.

4. How might obtaining antitrust clearances affect the bid timetable?

In a change to previous Spanish takeover regulation, under the current regulations it is possible for an offeror to complete a public takeover bid before an antitrust authorisation from the CNMC is obtained. However, the Competition Act imposes the following two conditions if this is to be done: (i) the offeror must notify the offer to the CNMC within five days of the notification to the CNMV; and (ii) prior to receiving clearance, the offeror must refrain from exercising the voting rights attached to the target shares acquired in the offer, or exercise only those rights needed to maintain the value of the investment.

United Kingdom

1. How do you tell which antitrust authority has jurisdiction?

Where a bid does not fall within the exclusive jurisdiction of the European Commission (see EU section), it may fall to be reviewed by the CMA, if the relevant jurisdictional thresholds are satisfied. The CMA replaced the Office of Fair Trading and the Competition Commission on 1 April 2014 and the CMA is the sole authority responsible for merger control in the UK. Regardless of the target's nationality, a bid may also trigger filing requirements in other jurisdictions (e.g. other EU countries, the US or Canada), if the applicable thresholds in those countries are met.

The relevant UK thresholds are set out in the Enterprise Act 2002, which came into force in June 2003. The CMA may investigate mergers that meet either the "turnover test" or the "share of supply test". The turnover test is met if the target company has UK turnover exceeding £70 million per annum. The share of supply test is met if, as a result of the merger, the merging parties would supply at least 25% of goods or services of a particular description, either in the UK as a whole or in a substantial part of it.

If an offer falls within these parameters, an initial review (a Phase 1 investigation) will be conducted by the CMA to determine whether the merger may be expected to result in a substantial lessening of competition in the UK (known as the "SLC test"). If the CMA believes that this test is met, it must either refer the merger for further consideration (a Phase 2 investigation) or accept undertakings in lieu. Such undertakings in lieu can be structural (which is the preferred route) or behavioural (which is less common), and would be intended to remedy the perceived competitive harm resulting from the merger.

If the CMA deems it necessary, it will conduct a full investigation to determine whether the merger may be expected to result in a substantial lessening of competition. If so, the CMA will either prohibit the merger or impose structural or behavioural remedies.

2. What is the process?

2.1. EU Process

See EU section.

2.2. UK Process

In contrast to the position under the EU Merger Regulation, in the UK there is no system of compulsory notification of mergers and there are no penalties for failure to notify. However, even if a merger is not notified by the parties, it may still be reviewed by the relevant authorities, who may order a subsequent divestment of

all or parts of the merged entity if they consider that there are reasons to do so. In practice, therefore, where a merger gives rise to substantive competition issues, the offeror will normally decide to notify on a voluntary basis prior to completion of the offer, so as to avoid the risk of subsequent forced divestiture.

Notifications are made to the CMA and may be made in three ways:

- Informal confidential advice: The CMA provides informal advice on mergers that are confidential. The CMA deals with applications on the following basis: (a) there is a good faith intention to proceed with the transaction; (b) there must be an issue that the CMA could materially assist on (i.e. a theory of harm that the CMA might reasonably rely on as a credible case for reference); and (c) the format of informal advice will be tailored to the particular case, e.g. advice could come through discussions over the phone or at a meeting. Any request should be summarised to the CMA in no more than five pages and should identify the reasons why informal advice is required, the theory of harm that arises and the key substantive issues. The CMA will try to indicate whether it accepts an application within five working days and then schedule a meeting within 10 to 15 working days.
- Pre-notification discussions: CMA is willing to have confidential pre-notification discussions to consider the information to be included in the notification and may review drafts of the Merger Notice. The CMA case team will aim to review submissions within five to ten working days of receipt.
- Merger Notice: The formal "Merger Notice" process has the advantage of triggering a binding statutory timetable allowing a maximum period of 40 working days for the CMA to conduct a Phase 1 merger investigation. The 40 working day deadline may be extended if the parties have failed to provide evidence on request by the CMA, or if the matter is particularly complex. The Merger Notice may only be submitted once the merger is announced

The following merger fees will be required to be paid to the CMA when it makes a decision as to whether or not the merger should be referred to the Competition Commission. The purpose of these increases is to recoup a greater level of costs incurred by the competition authorities so as to reduce the burden on general taxation.

Value of the UK turnover of the target	Current level
£20m or less	£30k
Over £20m but not over £70m	£60k
Over £70m and up to £120m	£90k
Over £120m	£90k

3. What are the implications for the conditionality of an offer?

The Code permits an offeror to make a voluntary (but not a mandatory) offer conditional on the European Commission having issued a Phase I clearance decision, or the CMA having issued a decision that the offer will not be the subject of a full investigation, and on any such clearance decision being on terms satisfactory to the offeror (i.e. in terms of the undertakings which may be required to obtain a clearance decision).

Further, a term must be included in the offer that it will lapse if Phase II proceedings are launched by the European Commission, or if there is to be a full investigation conducted by the CMA, before the first closing date or the date when the offer becomes unconditional as to acceptances, whichever is the later.

In addition, should the competition law of other jurisdictions have a bearing on the offer, the offeror may also make its offer conditional on there being satisfactory resolution of the competition issues in those other jurisdictions. As described at paragraph 6 of section 6 above, the Panel will only allow the offeror to invoke this kind of condition where breach of the relevant filing requirement would be material in the context of the bid.

4. How might obtaining antitrust clearances affect the bid timetable?

Depending on how quickly after announcement a final notification can be submitted to the European Commission or CMA (as the case may be), and depending on how long the first phase review takes, it may or may not be possible to secure clearance before Day 39 in the offer timetable. If there is no decision either way by Day 39 of the offer timetable, the Panel will normally extend Day 39 to the second day following the announcement of the decision. Day 46 (the last date for revision of the offer) and Day 60 (the last date for the offer becoming unconditional as to acceptances) will also be adjusted accordingly.

If Phase II proceedings are initiated by the European Commission or if the offer is placed under a full investigation by the CMA, unless the offeror has made its offer subject to a pre-condition, the following will apply:

– where a formal offer has been made, it will lapse (and the offer period will end) if the second phase proceedings are initiated prior to the later of (i) the first closing date; and (ii) the date on which the acceptance condition is satisfied. In general, shareholders will not accept an offer until it is clear that no second phase proceedings will occur, so an offer will almost certainly lapse in this case. A scheme will also lapse if second phase proceedings occur before the shareholder vote. However, this is very unlikely to be the case, given the normal timetable for the shareholder meeting – shareholders are generally happy to vote on a scheme because it will not prevent them from dealing in their shares thereafter.

– where a possible offer has been announced, the offer period will also end at that point.

During the second phase proceedings that follow, the offeror or potential offeror and its concert parties cannot (except with the consent of the Panel):

– announce an offer or possible offer for the target;
– acquire any interest in shares in the target if it would thereby be required to make a mandatory offer;
– acquire any interests in, or procure any irrevocable commitments in respect of, shares which in aggregate (taking into account both interests and irrevocable commitments) carry 30% or more of the target voting rights;
– (a) make any statement raising or confirming a possible offer for the target; or
– (b) take any steps in connection with a possible offer for the target where knowledge might be extended outside those who need to know in the offeror and its advisers.

If the offeror/potential offeror decides to pursue a clearance with a view to making a new offer, the restrictions in bullet points (a) and (b) above will not normally apply to it. If, on the other hand, it decides not to pursue a clearance, it must make an announcement of this fact and will then be prohibited from making another offer for the target within the following six months.

A new offer period is deemed to begin at the time the second phase proceedings conclude, provided that the offer is not prohibited. Where the final decision is a clearance, the offeror or potential offeror may (but is not obliged to) make a new offer for the target. Each offeror/potential offeror is required to announce either a firm intention to make an offer or that it does not intend to make an offer within a period that is normally 21 days after the announcement of the clearance (subject to Panel consent). If no offer is made, the renewed offer period will last until the announcement by all cleared offerors or potential offerors that they do not intend to make an offer.

Where an offeror is prohibited from making an offer by the competition authorities, or a cleared offeror does not make a new offer for the target, the offeror will also be prohibited from making another offer for the target within the following six months.

SECTION EIGHT: ANNOUNCEMENTS

France

1. When must you announce?

An announcement will be required in circumstances where there has been a leak in relation to a proposed offer. Regulations provide the following guidelines:

- An issuer must inform the public, as soon as possible, of any event that may have a significant influence on the trading price of its listed securities or on the situation of its securities holders. However, this announcement may be postponed if the disclosure of information is prejudicial to the issuer and confidentiality can be maintained.
- Parties other than the issuer must inform the public, as soon as possible, of any transaction they are proposing to carry out that may have a significant influence on the trading price of listed securities. However, this can be postponed if confidentiality is necessary for the transaction and can be maintained.
- Information must be communicated to the public through press releases (*communiqués*).

If information about the offer is leaked, the parties involved should issue a press release as soon as possible (and will be asked by the AMF in most cases to do so), and the stock exchange may suspend the trading of the target securities pending release of the announcement.

A leak announcement may simply set out the offeror's intentions and include various pre-conditions, in which case there will be no obligation to continue with the offer if the offeror decides not to proceed.

The AMF also has the power to require a potential offeror to clarify its intentions publicly if the AMF has reason to believe the potential offeror is likely to launch an offer for a target company (based on rumours, speculation or share price movements): an announcement of this type may be called a "put up or shut up" announcement.

In these circumstances, if the potential offeror confirms that it is preparing to launch an offer for the target in question, the AMF will set the date for the offeror to issue a press release containing the main terms and conditions of the offer (which will not bind the offeror to make the offer but will start the pre-offer period) or, depending on the circumstances, the date for filing the offer, which will bind the offeror and will start the offer period. If the potential offeror fails to comply with this timetable, it will be deemed not to be preparing an offer and will be bound by the rules applicable where a potential offeror confirms that it is not preparing to launch an offer (see below).

The rules relating to the buying of shares during the pre-offer and offer periods are set out in section 3 above.

If the potential offeror confirms that it is not preparing to launch an offer for the target in question, the potential offeror will be prohibited from making an offer for the target for six months. This prohibition may be lifted if the potential offeror demonstrates to the satisfaction of the AMF that substantial modifications have occurred in the business environment or in the situation or the shareholdings of the companies involved. During the six-month period, the potential offeror will also be prohibited from taking any actions that would trigger a mandatory bid (see section 2 above).

A potential offeror that has declared that it is not preparing to launch an offer must also immediately issue a press release if it increases its holdings of target shares and securities giving access to shares or voting rights in the target company by 2% or more, as well as announcing its intentions for the rest of the six-month period.

When an offeror files its offer, the AMF is technically authorised to require the Market Manager that runs the regulated market on which the target shares are admitted to trading, any relevant multilateral trading facility or any regulatory authority to suspend trading in the target's securities while it considers the terms of the offer. Any such suspension is lifted once the AMF considers it appropriate (generally at midday on the day the offer is filed, although it may be the day after the offer is filed, the day it is declared effective, or some other time). However, the AMF has announced that it will no longer use this suspension right.

Once the filing is made, the offeror is generally considered to be obliged to proceed with the bid, unless the AMF does not clear the offer, or the Paris Court of Appeal overturns a decision of the AMF to clear the offer.

Following the filing, the AMF publishes the main terms and conditions of the offer, including details of the offer price and nature of the consideration, and the identity of the sponsoring bank(s).

On the same day as the filing with the AMF, the offeror must also publish a press release summarising the main points of its offer document (which it must also file with the AMF, and publish on the AMF's website and its own website).

2. Does the target board need to advise its shareholders when an announcement is made?

The offeror announcement is not required to be sent to target shareholders. However, as soon as the offeror's announcement has been published, the target company may publish another announcement outlining the initial opinion of its board of directors or supervisory board (or, in the case of a foreign company, of its equivalent governing body) on the offer. Such announcement would include the underlying reasons for its opinion, the benefits (if any) of the offer and the consequences of the offer for the target company, its shareholders and employees.

See also section 10 below, which sets out the various documents to be sent to shareholders.

Germany

1. When must you announce?

The offeror is required to publish its decision to make an offer "without undue delay". The primary responsibility for the announcement lies with the offeror; if a consortium acts as offeror, the responsibility lies with each member of the consortium. Assuming that the offeror is a company, "without undue delay" generally means as soon as the management has resolved to make the offer (or, in the case of a German stock corporation, the supervisory board has approved the resolution of the management board). However, an offeror considering an offer will generally ensure that a firm resolution is not passed until it is ready to make an announcement.

In some cases, the making of a public offer may require the consent of the offeror's shareholders, in particular if the offeror intends to offer its own shares as a consideration for the target shares. In these cases, the FFSA may grant an exemption from the immediate notification requirement until after shareholder approval is obtained, but only if the offeror is able to take appropriate measures to avoid market distortion (e.g. if the offeror has few shareholders, it may call the meeting by individual letters with no publicity). For a publicly listed offeror, this approach is not practical and therefore they would usually use their existing authorised share capital (i.e. capital that has previously been authorised by the shareholders' meeting to be issued by the management), if the amount of the authorised share capital is sufficient, in order to avoid the need to call a shareholder meeting.

The Takeover Act also requires an announcement to be made without undue delay if a person becomes obliged to make a mandatory bid for a target and, in any event, within seven calendar days of when the offeror knew, or ought to have known, that such obligation existed. Such obligation will normally arise if the person acquires 30% or more of the voting rights in the target. However, in such case, the Securities Trading Act will also separately require an interest in excess of the 30% threshold to be disclosed within the (usually shorter) period of four trading days. Whereas the announcement pursuant to the Takeover Act must be "published" via the internet and does not specifically address the target company, the disclosure under the Securities Trading Act must be made in a prescribed form and be sent to the FFSA and the target company. Offeror companies will usually fulfil the two obligations simultaneously.

There are no legal requirements regarding the contents of an announcement. However, the announcement should contain the name of the target and the class of shares that will be subject to the offer. The announcement will also often disclose the type of consideration, offer price and any conditions to the offer, although there is no legal obligation to do so. The announcement must also contain the internet address where the offer document will be published.

The announcement of an intention to make an offer does not create an obligation for the offeror to proceed with the offer. However, the offeror will be under an obligation to file an offer document with the FFSA within four weeks after the announcement. If the offer document has not been filed within this period, the FFSA will prohibit the offer, and the offeror will not be permitted to make any new offer for the target (except for a mandatory offer, if relevant) within the next one year. The FFSA may grant an exemption to this restriction, if the target company consents.

The offeror does not have any obligation under the Takeover Act to make an announcement just because there is a "leak". However, the offeror and the target must observe the general notification obligations under the German securities trading laws and, as from 3 July 2016, the Market Abuse Regulation, which require a listed company to make "ad hoc notifications" (or announcements) of any new inside information which directly affects it and is not in the public domain, if such information may significantly influence the price of its listed securities (see section 3 for details). Therefore, the offeror may need to make an ad hoc notification if there is a leak and the offeror's share price could be significantly influenced, and the target may (to the extent it has knowledge) need to make an ad hoc notification if the target's share price could be significantly influenced.

2. Does the target board need to advise its shareholders when an announcement is made?

The target is not required to send the official announcement to its shareholders. However, it is required to publish a reasoned opinion on the offer once the offer document has been published.

The target board must, however, notify the works council or (in the absence of a works council) all its employees of the announcement.

Italy

1. When must you announce?

An offeror must disclose its intention to launch an offer by announcement to CONSOB and to the market as soon as the formal decision to launch the offer is taken or the obligation to make a mandatory offer is triggered.

The Regulation requires the announcement to contain a minimum set of information including, *inter alia*, the main terms and conditions of the offer (price, securities subject to the offer, conditions etc.), the reasons for the offer, the method of financing the offer, a statement that the offeror will be able to fulfil its payment obligation, details of any shareholding in the target held by the offeror and its concert parties and details of any required authorisations (e.g. from antitrust or other regulatory authorities).

As soon as the offer is made public, the board or the managing board of the target company and of the offeror must inform the representatives of their employees or, if there are no representatives, the employees themselves.

Once the announcement has been made to CONSOB, the offeror is obliged to file the offer document with CONSOB as soon as possible and, in any event, no later than 20 days from the date on which such announcement was made (or, in the case of a mandatory bid, from the date on which the obligation to launch the offer arose).

Where there are widespread rumours about a potential takeover bid in the market, or there are irregularities in the trading of a potential target company's securities, CONSOB may require the potential offeror to disclose its intentions early. In this case, the offeror may either make a formal announcement (see above) or simply announce that it is considering an offer (in which case, it will not be protected by the "passivity rule" – see paragraph 1.2 of section 13 below).

2. Does the target board need to advise its shareholders when an announcement is made?

The target is not required to send the official announcement of the offeror to its shareholders. However, it is required to release a statement containing (i) all information needed to evaluate the offer; and (ii) its own evaluation of the offer (see section 10 below). In addition, in some circumstances, the independent directors may be required to publish a separate opinion on an offer made by a 30%+ shareholder or on a management buy-out.

When both the intention to launch a bid and the offer document have been made public, the board of the target company (and of the offeror) has an obligation to inform the representatives of their respective employees or, if there are no such representatives, the employees themselves.

The Netherlands

1. When must you announce?

A public bid must be publicly announced no later than when the offeror and the target company have reached conditional agreement on the offer. This is referred to as the "initial public announcement".

Although in practice an offeror usually approaches the target company and attempts to reach an agreement on the terms of the offer before making an announcement, it is not required to do so. A potential offeror is allowed to announce that it is considering launching an offer without having contacted the target company; for example, because the offeror believes that reaching an agreement with the target company on acceptable terms is not feasible (see paragraph 3 of section 13 below for details).

The initial public announcement must state what conditions the offer is subject to (if any, and to the extent already known). Such conditions may include antitrust approval, successful consultations with trade unions and positive advice from the relevant works council(s). If, following the initial public announcement, additional conditions become known, the offeror will be obliged to announce these additional conditions promptly.

An initial public announcement is also deemed to have been made if the offeror publicly discloses certain 'concrete' information regarding the proposed bid, such as the name of the target company in combination with the contemplated offer price or an indication of this price, or an anticipated timeline in respect of the offer. Other statements concerning a potential offer may also qualify as 'concrete' information regarding the offer for these purposes. Given that an initial public announcement has certain implications under the Offer Rules (for example, the commencement of the offer time line – see section 9), a potential offeror should exercise care in the disclosures that it makes about the bid.

However, the publication of such 'concrete' information will not be regarded as an initial public announcement triggering the regulatory timeframe if the target company announces, immediately after the publication of such information by the offeror, that it is negotiating with the potential offeror but that no agreement has yet been reached.

The FMSA also requires a public announcement to be made in certain circumstances if the confidentiality of the bid can no longer be ensured, or if a leak relating to that bid may have occurred and the target company is the subject of rumour or speculation, or if there is an untoward movement in its share price (see paragraph 6 of section 4 above for details).

Not later than four weeks after the initial public announcement, the bidder must publicly announce either (i) the latest date on which it will file an offer document for approval with the AFM; or (ii) that the proposed offer is no longer proceeding.

Within 12 weeks of the initial public announcement and, in any event, no later than the date on which the offer document is filed for approval with the AFM, the offeror is required to make a public announcement stating that (i) it is able to raise the cash consideration necessary to complete the offer; or (ii) it has taken all reasonable measures to secure the implementation of any other form of consideration. This is referred to as the "certain funds announcement" (see paragraph 4 of section 5 above).

In addition, the Offer Rules contain various other obligations to make public announcements during the bid process, such as any increase in the offer price, the fulfilment or non-fulfilment of any offer condition and the purchase by the offeror of any securities in the target company between the date on which the offer is made and the expiry of the offer period.

The Offer Rules also provide for a "put up or shut up" rule. The AFM has the ability, at the request of a target company, to impose disclosure obligations on a potential offeror. The target may make such a request if the potential offeror publishes or causes information to be published that may generate the impression that the target company could become the subject of a public offer. The potential offeror must then "put up or shut up" – i.e. either announce a public offer for the target company or indicate that there is no intention to launch a public offer – within a period of six weeks. In making a request to the AFM for the "put up or shut up" rule to apply, the target company must make a case that it would otherwise experience adverse effects from the uncertainty over the potential offer.

The offeror must either make an initial public announcement that triggers the commencement of the regulatory timetable set out in the Offer Rules or announce that it does not have any intention to launch a public offer. If the potential offeror takes this second option, both it and its concert parties will be barred from announcing or launching a public offer for the target company involved during the six months following that announcement. If the potential offeror is instructed by the AFM to "put up or shut up" within a six week period and does not make its own announcement within this period, it and its concert parties will be prohibited from announcing or launching a public offer for the target company for a period of nine months.

Any public announcement in connection with a potential offer must be made by issuing a press release, which should simultaneously be sent to the AFM. The public announcement must also be placed on the relevant company's website.

2. Does the target board need to advise its shareholders when an announcement is made?

There is no requirement on the target company to inform its shareholders when an initial public announcement by a potential offeror has been made. However, it has various obligations to comment on the offer once it is made (see section 10 below for details).

In particular, pursuant to the Offer Rules, the target company is required to convene an informational general meeting of shareholders at least six business days prior to the end of the offer period to discuss the offer, on the basis of a position paper regarding the offer prepared by the board(s) of the target company.

The position paper should be made available at least four business days prior to the meeting of target shareholders. In the case of a recommended offer, the position paper will in practice be appended to the offer document.

At this meeting, the shareholders of the target company do not vote to approve or reject the offer. In practice, the shareholders will often be asked to vote upon certain items related to the offer, such as the appointment of new members of the supervisory board and/or the management board or certain changes to the articles of association of the target company, subject to the offer being completed.

The meeting of shareholders will be convened in accordance with the target's articles of association and the Civil Code. Pursuant to the Civil Code, a notice convening the shareholder meeting needs to be published in a national daily newspaper at least 15 days prior to the date of such meeting. The position paper will also contain a notice that an extraordinary meeting of target shareholders will be held.

It is current market practice that initial contact with the works council is established immediately before the initial public announcement is made. Initial contact with the trade unions is in practice also established on the day of the initial public announcement.

Spain

1. When must you announce?

A decision to make a voluntary offer must be promptly announced to the market as soon as it is formally approved by the relevant body of the offeror. This announcement must set out the offeror's intention to make an offer and the price, but there are no other specific content requirements.

If the consideration is in cash, the offeror must ensure that it will have access to the necessary funds before announcing an intention to make the offer (for example, through availability of credit lines, money in the bank etc.), although there is no specific guidance from the CNMV on what is required. In the case of an exchange offer, the offeror must instead have taken all reasonable measures to ensure that the consideration will be available.

In the case of a mandatory offer, the party that triggers the obligation to make an offer must promptly make an announcement. The announcement must also specify if the party intends to apply for a waiver of the obligation and, in the case of an indirect acquisition of control, if it intends to reduce its interest in the target below the applicable threshold. If the waiver is rejected, the offeror must then make a further announcement of its obligation to make an offer.

Any announcement must be made by the same method as the disclosure of relevant information ("*hecho relevante*") by a listed company and therefore (i) it must be sent to the CNMV before it is circulated to any other media and as soon as the relevant fact or decision is known or made; and (ii) the content of the announcement must be accurate, complete and not misleading. If applicable, the announcement must also be included in the web page of the offeror.

Once the offer has been approved by the CNMV, the offeror must publish an official announcement of the offer in the Official Gazette of the relevant Spanish Stock Exchange where the target's shares are listed and in at least one national Spanish newspaper. This official announcement must contain a summary of the terms of the offer and must be in the same form as the announcement filed with the CNMV with the offer prospectus.

All announcements must now follow the official forms brought into force by the CNMV in December 2008, which include information on, inter alia, the identity of the offeror, any target shares and voting rights controlled by the offeror, the securities covered by the offer, the consideration, the conditions and any financing.

Under former Spanish regulations, if there was a leak, the target was required to make an announcement confirming or denying the bid, and the CNMV would also normally

request the offeror to make an announcement. There are no precedents yet under the current regulations, but it is expected that the CNMV will continue to apply this principle. The offeror's announcement will have to confirm whether it intends to bid or not, and its actions thereafter must be consistent with the announcement to avoid the possibility of fines or claims for damages resulting from a misleading announcement.

2. Does the target board need to advise its shareholders when an announcement is made?

The target is not required to send the official announcement to its shareholders. However, it is required to issue a report on the offer after it has been authorised by the CNMV (see section 10 below for details).

As soon as the offer is announced, the offeror and target boards must inform their respective employees about the offer.

United Kingdom

1. When must you announce?

Before any approach has been made to the target board, the responsibility for making any announcement about an offer lies with the offeror. The offeror will have to comply with the Code requirements on announcements and, if it is UK listed, will also have to comply with the UKLA Rules.

Once an approach has been made to the target board, the responsibility for complying with the Code requirements lies instead with the target, although the offeror will obviously still have to comply with the UKLA Rules. If the target "unequivocally" rejects a particular approach without providing for further negotiation, responsibility will generally revert to the offeror. The Panel's guidance provides that it is important, in these circumstances, for the offeror and target to reach agreement on where responsibility lies, or consult the Panel.

An announcement of an offer is primarily required when a firm intention to make an offer is notified to the board of a target by or on behalf of an offeror. However, an offeror making an approach to a target will generally ensure that its proposal is not made "firm" until discussions have been completed and the parties are ready to make their announcement.

In this case, the announcement made will probably be a firm or Rule 2.7 announcement. This type of announcement places an obligation on the offeror to go ahead with its bid in almost all circumstances. The only circumstances in which the Panel may not require an offeror to go ahead with its bid are: (i) if the offeror is permitted to invoke a pre-condition or would be permitted immediately to invoke a condition to the offer if the offer were made; or (ii) a competing offeror subsequently announces a firm intention to make a higher offer. As such, a Rule 2.7 announcement must only be made after the most careful and responsible consideration, and only when the offeror believes it is able to implement the offer.

The Rule 2.7 announcement must contain:

- the terms of the offer;
- the identity of the offeror;
- all pre-conditions/conditions to which the offer or the making of an offer is subject, which cannot thereafter be unilaterally amended;
- details of any arrangements to which the offeror is a party which relate to the circumstances in which it may or may not invoke a pre-condition or condition to its offer and the consequences of it doing so, including details of any break fees payable as a result;

- details of any arrangements to which the offeror (or any concert party) is a party which amount to an inducement to deal/not to deal in offeror or target shares;
- a summary of any "offer-related arrangement" or other agreement, arrangement or commitment permitted under, or excluded from, Rule 21.2 (e.g. confidentiality agreements, irrevocable commitments or letters of intent etc.);
- the address of the website on which the required documents are being published, together with a list of the relevant documents;
- (where the offer is for cash or includes an element of cash) a cash confirmation by the financial adviser (see paragraph 4 of section 5 above);
- confirmation that the offeror is making its Opening Position Disclosure on the same day as the announcement, or has already done so. Where it has not been practicable to make enquiries of all its concert parties prior to the date of the announcement, the offeror must also make clear that a further Opening Position Disclosure, including any additional information on their interests, will be published as soon as possible; and
- a statement that any financial adviser, reporting accountant or valuer whose advice report or opinion is included in the announcement has given consent to such inclusion.

(The announcement must also contain a standard form summary of the provisions of Rule 8 relating to disclosure obligation (see paragraph 4.2 of section 3 above).)

A firm Rule 2.7 announcement must also be made without delay if a person becomes obliged to make a mandatory offer for a target. In these circumstances, the announcement must not be delayed while full information is being obtained for the announcement – additional information can instead be included in a further supplementary announcement.

Once a firm announcement has been made, copies of the following documents must be published on a website as soon as possible and in any event by no later than 12 noon on the business day following the Rule 2.7 announcement:

- any irrevocable commitment or letter of intent;
- any document relating to the financing of the offer;
- any indemnity and other dealing arrangements, or, if not reduced to writing, a memorandum of the terms;
- any offer-related arrangement or other agreement, arrangement or commitment permitted under, or excluded from, Rule 21.2; and
- any agreements or arrangements, or, if not reduced to writing, a memorandum of the terms, which relate to the circumstances in which the offeror may or may not invoke or seek to invoke a pre-condition or a condition to its offer.

The Panel may agree that the offeror can withhold the publication of "market flex" provisions in debt facility agreements that are intended to be syndicated, but only up to

the point at which the offer document is published (giving a maximum period of 28 days for syndication to be completed before the market flex is disclosed).

An announcement will also be required in circumstances where there is likely to be a "leak", or where there has actually been a leak, in relation to a proposed offer.

In relation to the first of these situations, the Code requires an announcement to be made if negotiations in relation to a possible offer are going to be extended (beyond the parties themselves and their advisers) to more than a very restricted group of people. This is taken by the Panel to allow an offeror to contact up to six parties about the proposed offer before it has to consult with the Panel about a possible announcement. This places quite serious restrictions on an offeror that is arranging a consortium offer or seeking finance (although a party that is approached but decides not to become involved will generally not be counted as one of the six). If a target board is itself seeking a purchaser, it should consult the Panel or make an announcement before contacting more than one possible offeror.

There are also specific rules about collecting irrevocable undertakings to accept an offer (see paragraph 5 of section 4 above).

In relation to the second of these situations, the Code requires an announcement to be made in certain circumstances if the target is the subject of rumour or speculation, or if there is an untoward movement in its share price (see paragraph 6 of section 4 above for details). Any announcement required to be made must be capable of being released within "a matter of minutes", so it is important to have a draft announcement ready to release.

An offeror would also be under an obligation to make an announcement under the UKLA Rules where it has caused a "leak", if knowledge of the proposed offer would be likely to lead to a substantial movement in its own share price.

In the cases referred to above, the announcement made is unlikely to be a firm or Rule 2.7 announcement. Instead, the offeror or target may make a brief holding announcement that talks are in progress, specifying the deadline by which the potential offeror must "put up or shut up" – that is, make a firm announcement of a bid or withdraw (see below for detail).

This kind of "possible offer" announcement does not oblige the offeror to proceed with its bid, although it does mark the start of an offer period, which has a number of consequences (see below and other sections generally). In particular, any announcement made by the target company which commences an offer period must identify any potential offeror with whom the target company is in talks or from whom an approach has been received. (Further, any subsequent announcement by the target company which refers to a new potential offeror must identify that potential offeror

unless it is made after an offeror has announced a firm intention to make an offer for the target company.) It will also require the target to announce, by 9.00 a.m. on the next business day, details of its relevant securities in issue. Unless it has stated that its offer will be solely in cash, any named offeror will be subject to the same requirement. Further announcements updating the position will be required whenever the details of the relevant securities change.

Following this kind of "possible offer" announcement, the Code has always tried to balance the desirability of allowing an offeror the opportunity to prepare and put its bid before target shareholders with the undesirability of the target remaining "under siege" for a long period. The Code has protection for targets against protracted virtual bid periods and stipulates that after the date of the announcement in which it is first identified, a potential offeror is subject to a 28-day deadline by which it must either "put up or shut up".

Notwithstanding the above, the Panel may consent to an extension of the automatic deadline if this is requested by both the offeror and the target company, and indeed the Panel has indicated that it will normally consent to an extension in such circumstances. However, extensions will only be granted when the 28-day period is close to expiry. This is because the 28-day deadline could quickly become meaningless if potential offerors, in every case, made their approach conditional upon the board of the target company requesting an extension at the outset of the offer period. The Panel will therefore decide whether an extension is appropriate only on the basis of the status of negotiations shortly before the expiry of the initial 28-day deadline. Where the Panel consents to an extension of the deadline, the target company must make an announcement setting out the new deadline and must comment on the status of negotiations between the target company and the potential offeror and the anticipated timetable for their completion.

The Panel has stated that the requirement for potential offerors to be identified, coupled with the standardised and automatic "put up or shut up" deadline, is expected to have the effect of discouraging potential offerors from making premature approaches to offeree companies with regard to possible offers. It also hopes that the knowledge that a potential offeror will be identified upon the commencement of an offer period will act as an incentive for a potential offeror to ensure that the secrecy of its possible offer is maintained and that appropriate steps are taken to minimise the chances of a leak of information.

Despite the automatic "put up or shut up" deadline, such a deadline will not apply, or will cease to apply, to a potential offeror if another offeror has already announced, or subsequently announces, a firm intention to make an offer for the target company. In that situation, the potential offeror must announce a firm intention to make an offer or announce that it does not intend to make an offer by 5.00pm on Day 53. This is because

once a firm offer has been announced, the uncertainty caused by a "virtual bid" no longer exists and the bid timetable takes over.

In addition, the Panel will normally grant a dispensation from the requirement for potential offerors to be publicly identified and from the 28-day "put up or shut up" deadline where an offer period commences with an announcement by the target company that it is seeking one or more potential offerors by means of a formal sale process.

If an offeror, having made a "possible offer" announcement, subsequently makes an announcement that it does not intend to make an offer, it will be prevented from making an offer for a period of six months. Except with the consent of the Panel, such a statement may only be set aside if:

- the board of the target company agrees (however, where the statement is made after an announcement by a third party of a firm intention to make an offer, the statement may not normally be set aside unless that offer is withdrawn or lapses);
- a third party subsequently announces a firm intention to make an offer;
- the target company announces a "whitewash" proposal or a reverse takeover;
- (a) there is a material change of circumstances; or
- the statement was made outside an offer period (i.e. before a "possible offer" announcement is made) and an event has occurred which was specified in the statement as being an event which would enable the statement to be set aside.

In relation to bullet point (a) above, the Panel will normally regard a switch by a third party offeror from a scheme of arrangement to a contractual offer (or an announcement of its firm intention to do so) as a material change of circumstance; a switch from a contractual offer to a scheme of arrangement, however, will not normally be regarded as such.

During such six-month period, the offeror (and its concert parties) will be required to abide by the same limitations as are set out in paragraph 1 bullet points (a) to (e) of section 6 above. Concert parties may be specifically excluded from the obligation not to make an offer during this period; however this will not normally be permitted if the statement has been made during an offer period (i.e. after a "possible offer" announcement has been made).

2. Does the target board need to advise its shareholders when an announcement is made?

The Code requires that, promptly after the commencement of an offer period (except where an offer period begins with a Rule 2.7 announcement), a copy of the relevant announcement must be sent by the target to its shareholders. Similarly, promptly after the publication of a Rule 2.7 announcement, a copy of the announcement or a circular summarising the terms and conditions of the offer in question must be sent by the

target to its shareholders. In both cases, the document must also be sent to persons with information rights and, where practicable, holders of securities convertible into, rights to subscribe for and options over, shares of the same class as those to which the offer relates.

In practice, the target board will generally send its shareholders a copy of the announcement with a very short covering letter. If the target board has already decided whether to recommend or oppose the bid, it may give its advice in the covering letter, but it will generally promise to send further information in due course. (The target must also inform its shareholders that their addresses/electronic addresses which they have made available to the target will now be made available to the offeror.)

In addition, the relevant announcement (or circular) must be made available by the target (and, in the case of the Rule 2.7 announcement or circular, by the offeror as well) to their employee representatives or, where there are no such representatives, to the employees themselves. At the same time as making the relevant documents available, the target company must also inform them of the right of the employee representatives to have a separate opinion appended to the target board's circular, and of the target company's responsibility for any costs reasonably incurred by the employee representatives in obtaining advice required for the verification of the information contained in that opinion (see paragraph 4.1 of section 10 and paragraph 2 of section 14 below).

On 20 May 2013 amendments to the Code took effect which extended the Code Rules relating to the provision of documents and information to pension scheme trustees of the offeree company, and to give pension scheme trustees the right to have their opinion on the effects of the offer on offeree company pension schemes published (see revised Rule 25.9).

All announcements made by the offeror and offeree during an offer period (whether or not they concern the offer) must also go on the relevant company's website, alongside the other relevant offer documentation.

SECTION NINE: TIMETABLE

France

1. What are the key dates in the timetable?

The timetable for an offer will differ depending on whether it is recommended or hostile, and (if recommended) on whether a fairness opinion by an independent expert is required or not. (The timetable would also be different if the offeror uses the simplified offer procedure (see paragraph 1 of section 2 above) but that is not shown in detail here.)

1.1. Recommended offer, assuming that no fairness opinion is required

Day	Action
Pre-offer Period Commencement Date (if any)	AMF publishes a press release informing the market of the potential offeror's intention to file an offer, including details of its main characteristics.
Announcement Day - 1 trading day (at the latest)	Board of target recommends the offer.

Day	Action
Announcement Day	Offeror files offer documents (i.e. the filing letter and draft offer prospectus) with the AMF. AMF publishes a filing notice (*avis de dépôt*). Any relevant Market Manager may be requested by the AMF to suspend trading of target's shares (generally until midday). Draft offer prospectus (*note d'information*) is published online on the AMF website and the websites of the offeror and the target and is made available free of charge to target shareholders by the offeror, target and the financial institutions sponsoring the offer. Offeror and target publish a joint press release containing the main terms of the offer prospectus through an authorised newswire.
Announcement Day + 2 calendar days (at the latest)	Meetings of the Works' Councils of the target and offeror (if there is no Works' Council, the employees are directly informed of the offer by their respective employers) – see, however, paragraph 2 of section 14 for possible postponement of this obligation. Target's Works' Council may decide to appoint a financial expert.
Announcement Day + 7 calendar days (at the latest)	Meeting of the target's Works' Council, which the offeror must attend if requested by the Works' Council (the offeror is legally obliged to comply with any such request received at least three days before the meeting).
Announcement Day + 3 weeks (at the latest)	Issuance of the report of the financial expert appointed by the Target's Works' Council.
Announcement Day + approx. 30 calendar days (at the latest)	Target's Works' Council issues its opinion on the offer. Failing that, the Target's Works' Council is deemed to have been validly consulted.

Day	Action
Announcement Day + approx. 30 calendar days (in any case after issuance of target Works' Council's advice)	Target files a draft offeree document in response to the offer prospectus (*note en réponse*) with the AMF. Draft offeree document is published online on the AMF website and the target website and is made available free of charge to the target shareholders by target. Target publishes a press release in a national newspaper containing the main terms and conditions of the target's offer document, including the opinion of its board.
Effective Day (Announcement Day + 25 trading days at the latest)	The AMF clears the offer and the offer prospectus (*décision de conformité*) 5 trading days following the filing of the draft offer prospectus (at the earliest). (In practice, the timing depends on the meeting dates of the AMF *collège*, which take place twice a month; and the AMF may also delay the clearance by requesting additional information). The clearance decision is published on the AMF website.
Effective Day + 2 trading days	Offeror and target each file with the AMF a document disclosing legal, financial and accounting information relating to offeror/target called the "Other Information" document and incorporating a report issued by their respective auditors on the accounts included in such document. Each document is also published online on the AMF website and on the website of the offeror or the target (as applicable) (see paragraph 2(b) below). The offeror, the target and the sponsor also file a statement with the AMF that all information required to be included in the "Other Information" documents has been filed and has been or will be published in the timeframe set forth in the General Rules. AMF publishes an opening notice (avis d'ouverture). Euronext publishes the offer timetable. Offeror and target publish a joint press release through an authorised newswire, explaining how to obtain the offer prospectus and their respective "Other Information" documents. (This must be one trading day before the opening of the tender period, at the latest.)

Day	Action
Effective Day + 3 calendar days (at the latest)	Offer prospectus sent to the target's Works' Council by the offeror (or, if there is no Works' Council, to the target itself, which must provide such prospectus directly to its employees without delay).
Effective Day + 3 trading days (at the latest)	Opening of tender period (unless delayed because of pre-conditions).
Effective Day + 10 calendar days	Expiration of the time period for any challenge to the decision of the AMF to clear the offer and the offer prospectus.
Effective Day + 22 trading days	Deadline for offeror to improve the terms of its offer and for third parties to file competing offers with the AMF (this must be 5 trading days before the closing of the offer).
Effective Day + 27 trading days (at the latest)	Closing of tender period. (In the case of a simplified offer procedure, the offer period may be reduced to 10 trading days if the consideration offered is cash and to 15 trading days otherwise).
Effective Day + 30 trading days	AMF publishes interim results of the offer (only if a minimum acceptance condition has been included or if the legal minimum threshold is applicable).
Effective Day + 36 trading days	AMF publishes final results of the offer.
Effective Day + approx. 39 trading days	Settlement and delivery (exact date to be determined by Euronext).
Date of publication of final results + 10 trading days	Squeeze-out procedure is implemented (but only if more than 95% of the target's shares have been tendered in the initial offer and the offeror announced its intention to implement a squeeze-out procedure in the draft offer prospectus (*note d'information*)).
Effective Day + 46 trading days (at the latest)	If the offer is successful (and no squeeze out has been implemented), automatic re-opening of the offer. AMF publishes the extended period timetable. Beginning of the additional tender period.
Effective Day + 55 trading days (at the earliest)	Closing of the additional tender period (the offer is re-opened for at least 10 trading days).

Day	Action
Effective Day + 64 trading days (Closing Date)	AMF publishes the results of the additional tender period.
Effective Day + 66 trading days	Settlement and delivery (exact date to be determined by Euronext).
Closing Date + 3 months	Offeror may exercise squeeze-out rights if it owns more than 95% of the share capital and voting rights following the additional tender period, and if the offeror announced its intention to implement a squeeze-out procedure in the draft offer prospectus (*note d'information*).

1.2. Recommended offer, in the event a fairness opinion is required

In almost all recommended offers, a fairness opinion is required.

Day	Action
Pre-offer Period Commencement Date (if any)	AMF publishes a press release informing the market of the potential offeror's intention to file an offer, including details of its main characteristics.
At least 1 month before the Announcement Day	Presentation of the contemplated terms of the offer to the AMF. Appointment of the independent expert appointed to issue the fairness opinion for the target (at least 15 trading days before issue of report).
Announcement Day - 1 trading day (at the latest)	Board of target recommends the offer.

Day	Action
Announcement Day	Offeror files offer documents (i.e. the filing letter and draft offer prospectus) with the AMF. AMF publishes a filing notice (*avis de dépôt*). Target files a draft prospectus with the AMF containing the independent expert's fairness opinion. Any relevant Market Manager may be requested by the AMF to suspend trading of target's shares (generally until midday).[2] Draft offer prospectus (*note d'information*) is published online on the AMF website and the offeror's website and is made available free of charge to the target shareholders by the offeror and the financial institutions sponsoring the offer. Offeror publishes a press release containing the main terms of the offer prospectus through an authorised newswire.
Announcement Day + 2 calendar days (at the latest)	Meeting of offeror's Works' Council which occur on the Announcement Day (if there is no Works' Council, the offeror must inform its employees of the offer directly)[1]. Meeting of target's Works' Council (if there is no Works' Council, the target must inform its employees directly of the offer). Target's Works' Council or employees may decide to appoint a financial expert.
Announcement Day + 7 calendar days (at the latest)	Meeting of the target's Works' Council, which the offeror must attend if requested by the Works' Council (the offeror is legally obliged to comply with any such request received at least three days before the meeting). The target will indicate to its Works' Council if the offer has been solicited or not.
Announcement Day + 3 weeks (at the latest)	Issuance of the report of the financial expert appointed by the Target's Works' Council which examines the industrial and financial strategy that the offeror wishes to implement and the impact of this strategy on employment at the target's level.

[1] This meeting may also take place upon announcement.

Day	Action
Announcement Day + 30 calendar days (at the latest)	Target's Works' Council issues its advice on the offer. Failing that, the Target's Works' Council is deemed to have been validly consulted.
Announcement Day + 30 calendar days at the latest (in any case after issuance of target Works' Council's advice)	Target files a draft offeree document in response to the offer prospectus (*note en réponse*) with the AMF. Draft offeree document is published online on the AMF website and the target website and is made available free of charge to the target shareholders by the target. Target publishes a press release in a national newspaper containing the main terms and conditions of the offeree document, including the opinion of its board.
Effective Day (Announcement Day + 25 trading days at the latest)	The AMF clears the offer and the offeror's offer prospectus and target's offer document (*décision de conformité*) 5 trading days following the filing of the draft offer prospectus (at the latest). (In practice, the timing depends on the meeting dates of the AMF *collège*, which take place twice a month, and the AMF may also delay the clearance by requesting additional information). The clearance decision is published on the AMF website.

Day	Action
Effective Day + 2 trading days	Offeror and target each file with the AMF a document disclosing legal, financial and accounting information relating to offeror/target called the "Other Information" document and incorporating a report issued by their respective auditors on the accounts included in such document – each document is also published online on the AMF website and on the website of the offeror or the target (as applicable) (see paragraph 2.2 below). The offeror, the target and the sponsor also file a statement with the AMF that all information required to be included in the "Other Information" documents has been filed and has been or will be published in the timeframe set forth in the General Rules. AMF publishes an opening notice (*avis d'ouverture*). Euronext publishes the offer timetable. Offeror and target each publish a press release through an authorised newswire, explaining how to obtain the offer prospectus and the offeror's "Other Information" document, as well as the target offeree document and "Other Information" document. (This must be one trading day before the opening of the tender period at the latest.)
Effective Day + 22 trading days	Deadline for offeror to improve the terms of its offer and for third parties to file competing offers with the AMF (this must be 5 trading days before the closing of the offer).
Effective Day + 27 trading days (at the latest)	Closing of tender period. (In the case of a simplified offer procedure, the offer period may be reduced to 10 trading days if the consideration offered is cash and to 15 trading days otherwise.)
Effective Day + 30 trading days	AMF publishes interim results of the offer (only if minimum acceptance condition has been included or if the legal minimum threshold is applicable).
Effective Day + 36 trading days	AMF publishes final results of the offer.
Effective Day + approx. 39 trading days	Settlement and delivery (exact date to be determined by Euronext).

Day	Action
Date of publication of final results + 10 trading days	Squeeze-out procedure is implemented (but only if more than 95% of the target's shares have been tendered to the initial offer, and if the offeror announced its intention to implement a squeeze-out procedure in the draft offer prospectus (*note d'information*)).
Effective Day + 46 trading days (at the latest)	If the offer is successful (and no squeeze out has been implemented), automatic re opening of the offer. AMF publishes the extended period timetable. Beginning of any additional tender period.
Effective Day + 55 trading days (at the earliest)	Closing of any additional tender period (the offer is re-opened for at least 10 trading days).
Effective Day + 64 trading days (Closing Date)	AMF publishes the results of the additional tender period.
Effective Day + 67 trading days	Settlement and delivery (exact date to be determined by Euronext).
Closing Date + 3 months	Offeror may exercise squeeze-out rights if it owns more than 95% of the share capital and voting rights following the additional tender period, and if the offeror announced its intention to implement a squeeze-out procedure in the draft offer prospectus (*note d'information*).

1.3. Hostile offer

Day	Action
Pre-offer Period Commencement Date (if any)	AMF publishes a press release informing the market of the potential offeror's intention to file an offer, including details of its main characteristics.
Announcement Day - 1 trading day (at the latest)	Board of offeror decides to file the offer.

Day	Action
Announcement Day	Offeror files offer documents (i.e. the filing letter and draft offer prospectus) with the AMF and sends draft offer prospectus to target. AMF publishes a filing notice (*avis de dépôt*). Any relevant Market Manager may be requested by the AMF to suspend trading of target's shares (generally until midday).[3] Draft offer prospectus (*note d'information*) is published online on the AMF website and the offeror's website and is made available free of charge to the target shareholders by the offeror and the financial institutions sponsoring the offer. Offeror publishes a press release through an authorised newswire containing the main terms and conditions of the offer prospectus. Target may at any time publish a press release containing the opinions of its board.
Announcement Day + 2 calendar days (at the latest)	Meeting of offeror's Works' Council (if there is no Works' Council, the offeror must inform its employees of the offer directly). Meeting of target's Works' Council (if there is no Works' Council, the target must inform its employees directly of the offer). Target's Works' Council or employees may decide to appoint a financial expert.
Announcement Day + 7 calendar days (at the latest)	Meeting of the target's Works' Council, which the offeror must attend if requested by the Work's Council (the offeror is legally obliged to comply with any such request received at least three days before the meeting). The target will indicate to its Works' Council if the offer was solicited or not.
Announcement Day + 3 weeks (at the latest)	Issuance of the report of the financial expert appointed by the Target's Works' Council which examines the industrial and financial strategy that the offeror intends to implement and the impact of this strategy on employment at the target's level.

Day	Action
Announcement Day + 30 calendar days (at the latest)	Target's Works' Council issues its opinion on the offer. Failing that, the Target's Works' Council is deemed to have been validly consulted.
Announcement Day + 30 calendar days at the latest (in any case after issuance of target Works' Council's advice)	Target files a draft offeree document in response to the offer prospectus (*note en réponse*) with the AMF. Draft offeree document is published online on the AMF website and the target website and is made available free of charge to the target shareholders by target. Target publishes a press release in a national newspaper containing the main terms and conditions of the target offeree document, including the opinion of its board.
Effective Day (Announcement Day + 25 trading days at the latest)	The AMF clears the offer and the offer prospectus (*décision de conformité*). (In practice, the timing depends on the meeting dates of the AMF *collège*, which take place twice a month, and the AMF may also delay such clearance by requesting additional information.) The clearance decision is published on the AMF website.

Day	Action
Effective Day + 2 trading days	Offeror and target each file with the AMF a document disclosing legal, financial and accounting information relating to offeror/target called the "Other Information" document and incorporating a report issued by their respective auditors on the accounts included in such document. Each document is also published online on the AMF website and on the website of the offeror or the target (as applicable) (see paragraph 2.2 below). The offeror, the target and the sponsor also file a statement with the AMF that all information required to be included in the "Other Information" documents has been filed and has been or will be published in the timeframe set forth in the General Rules. AMF publishes an opening notice (*avis d'ouverture*). Euronext publishes the offer timetable. Offeror publishes a press release through an authorised newswire, explaining how to obtain the offer prospectus and its "Other Information" document. (This must be one trading day before the opening of the tender period at the latest.) Target publishes a press release through an authorised newswire, explaining how to access its "Other Information" document (one trading day before the opening of the tender period at the latest).
Effective Day + 3 calendar days (at the latest)	Offer prospectus sent to target's Works' Council by the offeror (or, if there is no Works' Council, to the target itself, which must provide such prospectus directly to his employees without delay).
Effective Day + 3 trading days (at the latest)	Opening of tender period (unless delayed because of pre-conditions).
Effective Day + 10 calendar days	Expiration of the time period for any challenge to the decision of the AMF to clear the offer and the offer prospectus.
Effective Day + 11 trading days (at the latest)	AMF clears target offeree document (*visa*). Target publishes a press release in a national newspaper, explaining where its offeree document can be consulted.

Day	Action
Effective Day + 32 trading days (at the latest)	Deadline for offeror to improve the terms of its offer and for third parties to file competing offers with the AMF (this must be 5 trading days before the closing of the offer).
Effective Day + 37 trading days (at the latest)	Closing of tender period. The timetable depends on the date of publication of the target's offer document. The period between the publication of the target offer document and the closing of the offer will be 25 trading days, provided that the offer period may not exceed 35 days.
Effective Day + 40 trading days	AMF publishes interim results of the offer (only if minimum acceptance condition has been included or if the legal minimum threshold is applicable).
Effective Day + 46 trading days (at the latest)	AMF publishes final results of the offer.
Effective Day + approx. 49 trading days	Settlement and delivery (exact date to be determined by Euronext).
Date of publication of final results + 10 trading days	Squeeze-out procedure is implemented (but only if more than 95% of the target's shares have been tendered to the initial offer, and if the offeror announced its intention to implement a squeeze-out procedure in the draft offer prospectus (*note d'information*)).
Effective Day + 56 trading days (at the latest)	If the offer is successful (and no squeeze out has been implemented), automatic re-opening of the offer. Offeror amends offer prospectus (optional). AMF publishes the extended period timetable. Publication of a press release in a French national newspaper. Beginning of any additional tender period.
Effective Day + 65 trading days (at the earliest)	Closing of any additional tender period (the offer is re-opened for at least 10 trading days).
Effective Day + 74 trading days (Closing Date)	AMF publishes the results of the additional tender period.

Day	Action
Effective Day + 77 trading days (at the latest)	Settlement and delivery (exact date to be determined by Euronext).
Closing Date + 3 months	Offeror may exercise squeeze out rights if it owns more than 95% of the share capital and voting rights, and if the offeror announced its intention to implement a squeeze-out procedure in the draft offer prospectus (*note d'information*).

2. Can the timetable be varied?

2.1. Preconditions to the offer

A French offer is always made pre-conditional upon the AMF receiving confirmation that all material regulatory authorisations of the offer required by law have been obtained. Where an offer is subject to a pre-condition, the commencement of the tender period will be postponed until the pre-condition is satisfied (see paragraph 3 of section 6 above for the distinction between conditions and pre-conditions).

2.2. AMF requirements

If the AMF requires extra time to review the terms of the offer or the offeror's offer prospectus, the commencement of the tender period will also be postponed.

In addition, if either the offeror or the target releases material new information, which may have an impact on the offer, towards the end of the tender period, the AMF may require the tender period to be extended to allow target shareholders reasonable time to take note of the new information.

Finally, the "Other Information" documents containing the legal, financial and accounting information relating to the offeror and target are not subject to prior approval of the AMF but will be reviewed by the AMF after publication. If the AMF considers that the published legal, financial and accounting information relating to the offeror or target is materially inaccurate, misleading or incomplete, it will require the offeror or target to publish a rectification or additional information. In such case, the AMF may decide to postpone the closing of the tender period to allow target shareholders reasonable time (at least five trading days) to take into account this new information. Therefore, it is generally recommended that the offeror (and the target in a recommended offer) submit the relevant documents informally to the AMF for its review in advance of their publication.

2.3. Competing offers

Competing offers may be launched at any time from the start of the tender period until five trading days prior to the closing date of the initial offer. The initial offer will automatically move on to the timetable of any subsequent competing offer. The AMF can then set a deadline for receiving the “last bid” from each competing offeror if more than 10 weeks have passed since the start of the initial tender period, and may also set a single closing date for all the competing offers. However, such deadlines cannot be set if any legal proceedings in connection with the offer(s) are still pending (see below).

2.4. Litigation

The timetable may also be extended if litigation is commenced (for instance, if the decision of the AMF on the offer prospectus is challenged before the Paris Court of Appeal). The Court of Appeal and the AMF used to postpone the closing of the offer so that the Court of Appeal could decide on the merits of the claim before the offer actually closes. The Court of Appeal used to render its decision in a timely manner (four to six months), but in the last couple of years the Court of Appeal has taken approximately 12-16 months. In response to this situation, (i) the AMF/the Court of Appeal has decided, in some recent precedents not to postpone the closing of the Offer and thus to allow the Offer to close before the Court of Appeal has rendered its decision and (ii) the law has been amended so that the Court of Appeal must render its decision within five months from the date the litigation is commenced, but has not provided for any sanction if it fails to comply.

Germany

1. What are the key dates in the timetable?

Day	Action
Announcement Day	Announcement must be made promptly after the formal decision to make an offer has been taken. The announcement has to be published on the internet and by an electronically operated information distribution system (e.g. Reuters, Bloomberg). If shares are acquired which trigger a mandatory offer, disclosure to the FFSA and target must be made within four trading days (pursuant to the Securities Trading Act/Market Abuse Regulation). In addition, an announcement (pursuant to the Takeover Act) must be made within 7 days from the acquisition of control.
Immediately following Announcement Day	Offeror informs the management board of the target. Management board of the target must immediately inform the target employee representatives (works council) or, if there is no works council, the individual target employees.
Submission Day (no later than Announcement Day + 4 weeks)	Deadline for submission of offer document by the offeror to the FFSA. This date may be extended by the FFSA by 4 extra weeks in the case of cross-border offers or in certain other circumstances.
Publication Day (no later than Submission Day + 10 working days)	Offer document must be published on the internet and in the Federal Gazette as soon as approved (or deemed approved) by the FFSA. Offer document may be approved earlier by the FFSA but is deemed approved if the FFSA does not comment within 10 working days. Transmission of proof of publication of offer document to FFSA. Transmission of offer document to target management board.

Day	Action
Promptly following Publication Day	The management board of the target must communicate the offer document to the target company's works council or (if there is no works council) directly to the target employees. The offeror must also send the offer document to its works council or its employees, as the case may be.
Promptly following Publication Day (generally within 10 days at the latest)	Publication of target management's and supervisory board's opinions on the offer and opinion of works council. (The opinions must also be re-issued after any amendment to the offer document.) Transmission of opinions to target works council or employees.
Weekly intervals after Publication Day	Announcement of level of acceptances (minus, if applicable, any withdrawals), and announcement of (i) number of target shares held by the offeror and any concert parties (directly and by way of attribution), and (ii) any instruments held by the offeror and any concert parties that include either a right or a possibility of acquiring target shares (see paragraph 4 of section 3 above).
Publication Day + 4 weeks	First possible closing date for acceptance period.
Last week of Acceptance Period	Daily announcement of level of acceptances (minus, if applicable, any withdrawals), and announcement of other interests of the offeror and any concert parties (held either directly or by way of attribution) in target shares (see above).
Immediately after expiry of Acceptance Period	Announcement of level of acceptances (minus, if applicable, any withdrawals), and announcement of other interests of offeror and any concert parties (held either directly or by way of attribution) in target shares (see above).
Publication Day + 10 weeks	Last possible closing date for Acceptance Period (unless offer increased in last 2 weeks). Last possible date for increase of the offer.
Publication Day + 12 weeks	Last possible closing date for Acceptance Period (if offer increased in last 2 weeks of original Acceptance Period).

Day	Action
Offer wholly unconditional + 2 weeks (only in the case of a successful voluntary takeover bid)	Acceptance Period automatically extended for extra 2 weeks if the offer is unconditional by the end of the previous Acceptance Period (except for conditions that can be fulfilled after the Acceptance Period has expired, e.g. merger control).
No statutory deadline	Fulfilment of final offer conditions (e.g. merger control).
Promptly after the relevant acceptance level for a squeeze-out/sell-out has been reached	Announcement of the number of shares held by the offeror and any concert parties (held either directly or by way of attribution), and of any other interests of the offeror and any concert parties in target shares (see above).
Within 3 months of end of Acceptance Period	Application to the court for transfer of minority shares under the squeeze-out procedure in the Takeover Act.

2. Can the timetable be varied?

2.1. Competing offer

Where a competing offer has been submitted, both offers will normally be bound by the timetable established by the publication of the competing offer document, and the acceptance period for the first offer will be extended accordingly.

2.2. Inability to meet certain requirements

Where it is not possible for an offeror to act within the timetable due to requirements relating to cross-border offers or the need to hold an offeror shareholder meeting (e.g. to increase share capital), the FFSA may extend the four-week period for submission of the offer document, up to a maximum of a further four weeks.

2.3. Shareholders' meeting of the target

Where a shareholders' meeting of the target is called in connection with the offer (e.g. to approve a frustrating action), the acceptance period is automatically extended to 10 weeks from the publication of the offer document, provided that the notice of meeting is issued after the publication of the offer document and before the end of the original acceptance period.

2.4. Publication of amendment

Where an increase in the offer is published within the last two weeks of the acceptance period, the acceptance period is automatically extended by a further

two weeks. However, no further increases in the offer are allowed during the extended acceptance period.

Italy

1. What are the key dates in the timetable?

Day	Action
Announcement Day	Announcement must be made promptly after the formal resolution to make an offer or after the obligation to launch a mandatory bid has been triggered. Announcement is made simultaneously to CONSOB, to the target and to the market. Target and offeror employee representatives (or, if there are no representatives, the employees themselves) must be informed of the offer. The "passivity rule" period commences.
Announcement Day + 20 days	Deadline for the filing of the offer document by the offeror with CONSOB.
Filing Day + not more than 15 calendar days (or 30 calendar days if target shares or offeror shares used as consideration are not listed)	Approval of offer document by CONSOB (may be delayed in practice by requests for further information). Offer document is deemed approved if CONSOB does not make further information requests within the relevant period.
Publication Day (no later than Filing Day + 16 (or 31) calendar days)	Offer document must be published as soon as approved by CONSOB (offer then becomes irrevocable). The offer document is delivered to the custodian banks being used for the offer, or published by any other means agreed with CONSOB. The method of publication is communicated to the public by way of a press release. A copy of the offer document must be sent to CONSOB. In addition, the offer document must be provided to the representatives of the employees of the target company or, if there are no such representatives, to the employees themselves.

Day	Action
Commencement Day – 3 trading days	Target board response (*Comunicato dell'emittente*) submitted to CONSOB for review (must be submitted at least 3 trading days prior to release).
Commencement Day – 1 trading day	The target board response is published by transmission to at least two press agencies, to CONSOB and to Borsa Italiana. The response must also be published on the target's website.
Commencement Day *either* (Publication Day, or a date falling after the Publication Day) *or* (Publication Day + at least 5 trading days)	The Acceptance Period can commence on or after: (a) the Publication Day, if the target board response is attached to the offer document; or otherwise (b) 5 trading days after the Publication Day.
Commencement Day + 15 trading days	First possible closing date for Acceptance Period.
Closing of Acceptance Period – 5 trading days	Deadline for launching competing offers.
Publication of competing offer + 5 trading days	Deadline for increased offer in response to competing bid.
Closing of Acceptance Period – 1 trading day	Deadline for amendments to offer if there are no competing offers.
Commencement Date + 40 trading days (or 25 in the case of a mandatory offer)	Last possible closing date for original Acceptance Period (subject to CONSOB's overall right to extend – see paragraph 2.5 below).
Closing of Acceptance Period + 5 trading days	Usual timing for settlement of consideration (provided for in offer document). Final results of the offer are published prior to settlement.
Closing of Acceptance Period + 3 months	Squeeze out of minority to take effect (if offeror has acquired more than 95% of target).

2. Can the timetable be varied?

2.1. Regulatory delay

In a bid to acquire control of a bank or another target which is subject to regulatory supervision by a public authority (e.g. an insurance company), the acceptance period cannot begin until any required regulatory clearance or approval has been obtained. After publication of the target board response, the timetable will

therefore be put on hold until they are obtained. If they are not obtained, the offer will lapse.

2.2. Exchange offers

In an exchange offer, the acceptance period cannot begin until the offeror's competent corporate bodies have approved the issue of the securities to be offered in exchange. If the securities are not already available for issue before the offer is announced, the offeror shareholder meeting should be convened before the announcement is made and then must be held in the period between the Announcement Day and the approval by CONSOB of the offer document.

2.3. Competing offer

Where one or more competing offers are launched, the acceptance period of all previous offers will extend to coincide with the acceptance period of the last competing offer, unless the relevant offeror(s) notify CONSOB of their intention to continue with their original acceptance period within five trading days from the announcement of the subsequent competing offer(s). There are no provisions for any "auction" structure in a competing offer situation.

2.4. Shareholders' meeting of the target

Where a shareholders' meeting of the target is called to approve any frustrating action within the last 10 trading days of the acceptance period, the acceptance period is automatically extended to provide for at least 10 trading days between the relevant shareholders' meeting and the end of the acceptance period.

2.5. Extension by CONSOB

CONSOB may, at any time during the acceptance period, decide to extend such period to up to 55 trading days from the Commencement Date, if it considers that this is required for the protection of investors and to ensure the fair execution of the offer.

The Netherlands

1. What are the key dates in the timetable?

Day	Action
Initial public announcement	This announcement is generally made in a press release stating that the offeror and the target company have reached agreement (usually conditional) on an intended public offer. See paragraph 1 of section 8 for details. Initial contact with the works council is usually established immediately before the initial public announcement. Initial contact with the trade unions is established following the initial public announcement.
Shortly after the initial public announcement	Submission of a formal request for advice to the works council and consultations with trade unions (if applicable).
Initial public announcement + up to 4 weeks	Announcement of: (i) the latest date on which the offeror will file an offer document for approval with the AFM; or (ii) that the contemplated offer will not be pursued.
Initial public announcement + up to 12 weeks	Submission of the offer document for approval with the AFM. "Certainty of funds" announcement to be made on or before the date that the offer document is submitted to the AFM, confirming that the offeror is able to raise the cash consideration necessary to complete the offer or has taken all reasonable measures to secure the implementation of any other form of consideration.
Submission of offer document to AFM + up to 10 business days (to be extended by AFM if it requires additional information)	Approval of offer document by the AFM.

Day	Action
Approval of offer document + 6 business days	Either (i) publication of the offer document, or (ii) announcement by the offeror that the offer will not be pursued. Immediately after publication of the offer document, the target is required to inform employee representatives and to provide them with a copy of the offer document.
Publication of the offer document + 1 to 3 business days	Commencement of initial offer period.
At least 4 business days prior to target general meeting (see below)	Management board and the supervisory board of the target company must provide the shareholders and the employee representatives with a position paper setting out the boards' position on the bid. (This may be included as an appendix to the offer document if the bid is recommended.)
At least 6 business days prior to end of initial offer period	Extraordinary meeting of shareholders of the target company must be convened to discuss the offer.
Commencement of initial offer period + 8 to 10 weeks	Tender of shares
End of initial offer period + up to 3 business days	Announcement by the offeror as to: • whether or not the offer is unconditional; and • whether the offer period is being extended (by 2 to 10 weeks)
Offer becoming unconditional + 3 business days (or more)	The offeror may initiate a post-tender period for at most 2 weeks to enable shareholders who have not yet accepted the offer to accept the offer on the basis of the same price and the same terms and conditions as the original offer.
Offer period + 3 to 5 business days	Settlement of tendered shares will usually take place 3 to 5 business days after expiration of the offer period.
Period ending 1 year after offer is made	The offeror is not allowed to acquire shares at a price which exceeds the offer price except in case of on-market purchases and squeeze-out proceedings.

Day	Action
Offer becoming unconditional + 12 to 24 months	If the offeror holds 95% or more of the target shares, the offeror can initiate squeeze-out proceedings to acquire 100% of the target shares. Timing is dependent on the workload of the Enterprise Chamber.

2. Can the timetable be varied?

2.1. Regulatory delay

Most offers are conditional on regulatory approval. Regulatory delay does not have an automatic effect on the offer period. However, the offeror typically reserves the right to extend the offer period. As a result, the offeror normally extends the offer period where any regulatory clearance remains outstanding at the expiry of the original acceptance period.

2.2. Competing offer

The launch of a competing offer does not automatically have an effect on the offer period of the original offer. However, the original offeror may extend the offer period to match the end of the offer period of such competing offer.

2.3. Offeror's choice

As set out in the timetable above, the offeror has certain options to reduce or extend the timetable, because many terms are maximum terms (such as the 12-week period for submission of the offer document for approval). The term of the offer period must be between 8 and 10 weeks, at the election of the offeror. Extension of the initial offer period with a maximum period of 10 weeks and the announcement of a post-tender period of a maximum two weeks are also both optional.

Spain

1. What are the key dates in the timetable?

Day	Action
As soon as the formal decision to launch the takeover offer is made	Offeror must announce its intention to launch the offer.
Filing Day (within the month following the announcement of the decision to launch the offer)	Offer filed with the CNMV by the offeror. The offer document (subject to the CNMV's comments) and supporting documentation must be included in the filing (see paragraph 2 of section 10 below). Announcement made to the market by the offeror. Trading of all target securities briefly suspended by CNMV.
Within 7 business days after Filing Day	Filing of supplemental documents (including documents supporting the consideration guarantee).
Authorisation Day (no later than Filing Day + 20 business days) (although in practice, often significant delay)	CNMV notifies authorisation of the offer to target and offeror. CNMV may extend the 20-business day period in practice by requesting supplementary documentation. There is no absolute maximum. CNMV often waits for the decision of the relevant Competition Authority, where applicable.
Announcement Day (no later than Authorisation Day + 5 business days)	Last date for publication of the offer document. On the same date, terms of the offer must be published in the Trading Bulletin of the Spanish Stock Exchanges and in at least one national Spanish newspaper.
Announcement Day + 1 business day	Commencement of the Acceptance Period of the offer, which may range from 15 to 70 calendar days (to be specified in the offer document by the offeror).
Commencement of Acceptance Period + 10 calendar days	Last date for publication of target board report on the offer.
Five calendar days prior to the end of the Acceptance Period	Last date for filing of competing offers. Last date for amendment of offer (except in a competitive situation).

Day	Action
Three calendar days prior to the end of Acceptance Period	Last date for extending closing date for original Acceptance Period.
Announcement Day + 16 calendar days	First possible closing date for Acceptance Period.
Announcement Day + 71 calendar days	Last possible closing date for Acceptance Period.
End of Acceptance Period + up to 5 business days	Stock Exchanges notify acceptances to CNMV.
End of Acceptance Period + up to 7 business days	CNMV confirms and notifies results of the bid to the Spanish Stock Exchanges, offeror and target (within 2 days of notification from the Spanish Stock Exchanges).
End of Acceptance Period + up to 8 business days	Publication of results by the Spanish Stock Exchanges on the day after CNMV confirmation.
Publication of results + 3 business days (it is expected that this term will be reduced to 2 business days from October 2016)	Normal despatch of consideration to target shareholders.
End of Acceptance Period + 3 months	Last possible date for despatch by offeror of compulsory acquisition notices to minority shareholders to activate squeeze-out procedure.

2. Can the timetable be varied?

2.1. CNMV requirements

If CNMV requires extra time to review the offer document, it may request supplementary documentation, which will delay the date of authorisation of the offer.

The offer may be subject to regulatory approvals in Spain which do not relate to competition matters (e.g. Bank of Spain, National Energy Commission), in which case the offer will generally not be authorised until the outcome of the regulatory process is known.

2.2. Competing offer

Competing offers may be launched up to the fifth calendar day before the end of the acceptance period of the first offer. Where a competing offer has been announced, both offers will be bound by the timetable established by the last to expire of the acceptance periods, and the acceptance period for the other offeror

will be extended accordingly. Alternatively, where a competing offer arises, the original offeror is generally allowed to withdraw its offer.

Both the original offeror and any subsequent offeror are permitted to increase their bids in accordance with a specified procedure. On the fifth business day following the last day for launching competing offers, the original offeror and any subsequent offeror may each submit to the CNMV a sealed envelope containing the improved terms of their offers. (The Royal Decree allows the use of other means to communicate the improved terms to the CNMV provided that confidentiality is preserved and this may be agreed on a case-by-case basis.) The CNMV will then announce the new offers on the next business day, following which the original offeror will be allowed to further increase its offer if the difference between the value of its offer and the value of the highest offer is less than 2%.

The CNMV will then authorise any offer which has complied with the requirements above, and the relevant offeror(s) must publish the revised conditions of their offer within five business days of authorisation. If several improved offers are authorised by the CNMV, they must all be authorised and published on the same date. The acceptance period for each offer will then automatically be extended to the date falling 15 calendar days after publication.

United Kingdom

1. What are the key dates in the timetable?

The timetable for an offer will differ depending on whether it is structured as a takeover offer or a scheme of arrangement. All time periods are in calendar days (not business days), unless otherwise indicated.

1.1. Timetable for a takeover offer

Day	Action
Rule 2.4 Announcement	If required (see paragraph 1 of section 8 above), issue of announcement to a RIS – and to the Panel and the advisers to the target (and any competing offeror) at the same time. Target must send any announcement to its shareholders, persons with information rights, employee representatives, pension scheme trustees and, where practicable, holders of relevant convertible securities, options or subscription rights "promptly" after its publication.
Rule 2.7 Announcement Day (no later than Rule 2.4 Announcement + 28 days)	Approach to target board (must be made immediately prior to publication of a Rule 2.7 announcement but is likely to be earlier, particularly if the offeror is actively seeking a recommendation). Issue of announcement to a RIS – and to the Panel and the advisers to the target (and any competing offeror) at the same time. Target must send announcement to its shareholders, persons with information rights, employee representatives, pension scheme trustees and, where practicable, holders of relevant convertible securities, options or subscription rights "promptly" after its publication.

Day	Action
Day 0 (no later than Rule 2.7 Announcement Day + 28)	Offeror must publish offer document and prospectus or equivalent document (where applicable) and send forms of acceptance to target shareholders. The offeror and target must also make the offer document readily available to their employee representatives or (if there are none) to the employees themselves, and also to the trustees of the target's pension scheme(s). If applicable, offeror must also send shareholder circular, prospectus or equivalent document and forms of proxy to its own shareholders. Announcement of publication must also be made by offeror.
Day 14	Latest date for publication by the target of a circular advising target shareholders of the merits of the offer (in a recommended offer, this would be done in the offer document). The target must also make the circular readily available to its employee representatives or (if there are none) to the employees themselves, and to the trustees of its pension scheme(s). (If a separate opinion is received from the target's employee representatives or pension scheme trustees in good time before the circular is published, then the opinion must be appended to the circular.)
Day 21	Earliest first closing date for acceptance of offer (although offeror may obviously extend the offer beyond this date, up to Day 60).
First business day after the first closing date (and all subsequent closing dates) by 8.00 a.m.	Announcement of specified details about acquisitions/acceptances of the offer and of any extension of the offer (stating next closing date). (Non-compliance with this requirement by 3.30 p.m. will, if the bid has been declared unconditional as to acceptances, allow shareholders to start withdrawing their acceptances until the offeror rectifies the situation.)

Day	Action
Day 39	Latest date for target to publish new information, such as profit forecasts or preliminary/interim results. This date may be extended by the Panel, e.g. if there is a significant delay by the CMA/European Commission in deciding whether there is to be a reference or initiation of proceedings.
Day 42 (assuming first closing date is Day 21)	Shareholders who have accepted the offer can withdraw their acceptances if the offer has not yet become or been declared unconditional as to acceptances. Target may consider sending a form of withdrawal to target shareholders.
Day 46	Last date for offeror to publish any revised offer document improving its offer. Also last date for offeror to publish information which may increase the value of its bid where it is offering securities, such as quantified financial benefits statements, profit forecasts or preliminary/interim results. This date will be extended if Day 39 is extended.
Day 53	5.00 p.m.: Latest time by which a potential competing offeror who has either been announced publicly, or who has been publically referred to by the offeree company, must either announce a firm intention to make an offer or announce that it does not intend to make an offer.

Day	Action
Day 60	1.00 p.m.: Latest time by which acceptances can be received or purchases made. 5.00 p.m.: Latest time by which announcement of acceptances and purchases should be made and offer should be declared unconditional as to acceptances. Midnight: If offer has not been declared unconditional as to acceptances, it will be deemed to have lapsed. This date will be extended if Day 39 is extended.
Day 74 (assuming offer became unconditional as to acceptances on Day 60)	Earliest date on which the offer can close.
Day 81 (assuming offer became unconditional as to acceptances on Day 60)	Last date by which all other conditions to the offer must be fulfilled or satisfied.
14 days after offer becomes wholly unconditional	Last date for sending consideration to target shareholders.
3 months after the last day on which the offer can be accepted (assuming the target is listed on a regulated market)	Last possible date for despatch by offeror of compulsory acquisition notices to minority shareholders to activate squeeze-out procedure.

1.2. Timetable for a scheme of arrangement

Day	Action
Before any Announcement	Approach to target board (will be necessary as a scheme of arrangement is generally only used in recommended offers where there is no reasonable likelihood of a competing bid). Book court dates (as early as possible).

Day	Action
Rule 2.4 Announcement*	If required (see paragraph 1 of section 8 above), issue of announcement to a RIS – and to the Panel and the advisers to the target (and any competing offeror) at the same time. Target must send any announcement to its shareholders, persons with information rights, employee representatives, pension scheme trustees and, where practicable, holders of relevant convertible securities, options or subscription rights “promptly” after its publication.
Rule 2.7 Announcement Day (no later than Rule 2.4 Announcement + 28 days)*5	Issue of announcement to a RIS – and to the Panel and the advisers to the target (and any competing offeror) at the same time. Target must send announcement to its shareholders, persons with information rights, employee representatives, pension scheme trustees and, where practicable, holders of relevant convertible securities, options or subscription rights “promptly” after its publication. Issue claim form in the high court with supporting documents (including scheme document).
Between Rule 2.7 Announcement Day and Day 0	Hearing of target’s claim form seeking directions for convening of meeting of shareholders and seeking the sanction of the court to the scheme if it is approved by the court meeting. The court orders the meeting to be held and adjourns the claim form until after the court meeting. (Documents must be in nearly final form.)

Day	Action
Day 0 (no later than Rule 2.7 Announcement Day + 28)*	Target must send scheme document (satisfying the requirements for both an offer document and a target response circular, and containing the expected timetable for the scheme and notices of shareholder meetings), forms of proxy and (where alternative forms of consideration are offered) forms of election to target shareholders and persons with information rights. Offeror must send prospectus or equivalent document (where applicable) to target shareholders and persons with information rights (together with the target documentation). The offeror and target must also make the scheme document readily available to their employee representatives or (if there are none) to the employees themselves, and to the trustees of the target's pension scheme(s). If applicable, offeror must also send shareholder circular, prospectus or equivalent document and forms of proxy to its own shareholders. Announcement of publication must also be made by offeror and the announcement must include the expected timetable.
Day 7*	Latest date the terms of the scheme (i.e. the offer) can be revised assuming court meeting and general meeting will be held on Day 21. (NB: Where a scheme is used, there is no specific end date for the release of new information by the target, such as profit forecasts or preliminary/interim results.)

Day	Action
Day 14	5.00 p.m.: Latest time by which a potential competing offeror who has either been announced publicly, or who has been publically referred to by the offeree company, will normally be required by the Panel to confirm their position. Depending on the facts (which will include the interests of offeree company shareholders) the Panel may allow a potential offeror to confirm its position after Day 21 but before Day 44.
No earlier than Day 21	Court meeting and general meeting of target shareholders held to approve the scheme and related resolutions. Under the Code, these meetings must normally be convened no earlier than Day 21. (NB: The Code does not set a date by which the target must hold these meetings, nor – where a scheme is used – a last date by which all of the conditions to the offer must be fulfilled or satisfied.)
Day 22*	Announcement must be made by the target of the results of the meetings by 8.00 a.m. at the latest. Complete report of Chairman of meeting submitted to court. Witness statement sworn and filed as to service of notices convening court meeting and general meeting and result of meetings.
Day 31*	First day offeror can shut off target shareholders' rights to withdraw their election for a particular form of consideration assuming the court sanction hearing is to take place on Day 44.
Day 38	Court hearing to grant order sanctioning the scheme of arrangement. (Sometimes two court hearings are held close together, to deal more effectively with optionholders.) All conditions must be satisfied prior to the hearing. Announcement must be made by target of the decision of the court.

Day	Action
Day 40*	Court order filed with the Registrar of Companies and the scheme becomes effective once it is delivered to the Registrar of Companies. Announcement must be made by target (or the offeror) that the scheme has become effective. Offeror acquires 100% control of the target. End of offer period under the Code.
Day 54*	Last date for sending consideration to target shareholders assuming Day 40 was the date on which the scheme became effective.

While there are some dates in a timetable for a scheme of arrangement that are binding under the Code in the same way as an offer timetable (see asterisks above), most dates are for agreement between the parties. As a result of this, the target company must ensure that the scheme circular sets out the expected timetable for the scheme, including the expected dates for certain specified events (see paragraph 4.1 of section 10 below).

2. Can the timetable be varied?

2.1. Regulatory delay

The Panel has the discretion to suspend the offer timetable:

- if there is a significant delay in a decision to undertake a full CMA investigation; or
- if the European Commission delays significantly in deciding whether or not to initiate Phase II.

This is because an offer must generally lapse if there is such reference or initiation of Phase II, so target shareholders tend to delay in accepting the offer until the uncertainty has been cleared up.

If there is such a delay, the Panel will usually extend Day 39 to the second day following the announcement of the decision. Day 46 (the last date for revision) and Day 60 (the last date for the offer to become unconditional as to acceptances) will also be adjusted accordingly.

2.2. Competing offer

Where a competing offer has been announced, both offers will normally be bound by the timetable established by the publication of the second competing offer document, and the timetable for the first offeror will be extended accordingly.

If a competitive situation continues to exist at 5.00 p.m. on Day 46, and no other procedure has been agreed between the competing offerors, the board of the offeree company and the Panel, the Panel will impose an auction procedure on the competing offerors, requiring final revisions to their offers to be announced by Day 46 of the latest competing offer. After Day 46, the competing offerors will be able to revise their offer a maximum of five times within a period of five business days. If no revised bid is made by either of the competing offerors on any day, the auction will end.

2.3. Offeror's choice

An offeror may always choose to make a statement that its offer will not be extended beyond a specified date unless it has become unconditional as to acceptances, thereby shortening the timetable.

An offeror might choose to take this course in order to force the target shareholders into making a decision. However, it will not thereafter be able to change its mind, unless it specifically reserves the right to set it aside in specified circumstances. Such circumstances may include a subsequent competing offer or a target recommendation. (In the case of a competing offer, an announcement of the extension must be made within four business days of such competing offer being announced and shareholders who accepted the offer after the date of the "no-extension" statement must be given an eight-day right of withdrawal.)

SECTION TEN: DOCUMENTATION

France

1. What are the main documents?

   There are a number of key documents necessary in the context of a public takeover bid, which vary depending on whether the bid is hostile or recommended. As regards a recommended offer, the documents may vary depending on whether an independent fairness opinion is required.

   Set out below is a table illustrating the main relevant public documents for each type of takeover.

Recommended		Hostile
Fairness opinion not required	Fairness opinion required	
Press release of the offeror announcing its intention to file an offer and the main characteristics of the offer (if there is a pre-offer period)	Press release of the offeror announcing its intention to file an offer and the main characteristics of the offer (if there is a pre-offer period)	Press release of the offeror announcing its intention to file an offer and the main characteristics of the offer (if there is a pre-offer period)
AMF press release confirming the intention of the potential offeror to file an offer and the main characteristics of the offer (if there is a pre-offer period)	AMF press release confirming the intention of the potential offeror to file an offer and the main characteristics of the offer (if there is a pre-offer period)	AMF press release confirming the intention of the potential offeror to file an offer and the main characteristics of the offer (if there is a pre-offer period)

Recommended		Hostile
Fairness opinion not required	Fairness opinion required	
Press announcement (offeror/target)	Press announcement (offeror/target)	Press announcement (offeror)
Filing letter from the sponsoring bank to the AMF	Filing letter from the sponsoring bank to the AMF	Filing letter from the sponsoring bank to the AMF
Joint offer prospectus (incorporating notice of offeror shareholders' meeting, if applicable) (offeror/target)	Offer prospectus (incorporating notice of offeror shareholders' meeting, if applicable) (offeror)	Offer prospectus (incorporating notice of offeror shareholders' meeting, if applicable) (offeror)
		Rejection press release (target)
	Target offeree document	Target offeree document
Press release containing the main terms and conditions of the offer (offeror and target)	Press release containing the main terms and conditions of the offer (offeror)	Press release containing the main terms and conditions of the offer (offeror)
	Press release containing the main terms and conditions of the target offeree document (target)	Press release containing the main terms and conditions of the target offeree document (target)
Offeror "Other Information" document: specific document disclosing legal, financial and accounting information relating to offeror and related press release (offeror)	Offeror "Other Information" document: specific document disclosing legal, financial and accounting information relating to offeror and related press release (offeror)	Offeror "Other Information" document: specific document disclosing legal, financial and accounting information relating to offeror and related press release (offeror)

Recommended		Hostile
Fairness opinion <u>not required</u>	Fairness opinion <u>required</u>	
Target "Other Information" document: specific document disclosing legal, financial and accounting information relating to target and related press release (target)	Target "Other Information" document: specific document disclosing legal, financial and accounting information relating to target and related press release (target)	Target "Other Information" document: specific document disclosing legal, financial and accounting information relating to target and related press release (target)
Press release explaining how to access the final offer prospectus (offeror/target)	Press release explaining how to access the final offer prospectus (offeror)	Press release explaining how to access the final offer prospectus (offeror)
	Press release explaining how to access the final target offeree document (target)	Press release explaining how to access the final target offeree document (target)
New amended offer prospectus (if terms and conditions changed) (offeror/target)	New amended offer prospectus (if terms and conditions changed) (offeror)	New amended offer prospectus (if terms and conditions changed) (offeror)

Note: In addition, there will be a number of AMF and/or press announcements e.g. to inform shareholders of any new information, acceptance levels, extensions of the offer: etc. In general, more announcements are made in the context of a hostile offer than in relation to a recommended offer.

2. Which regulators review these documents?

The AMF reviews the offer documentation. In order to declare that the offer complies with the applicable legal rules (*déclaration de conformité*), the AMF will ensure that the offer document (*note d'information*) is complete and comprehensible, that the information contained in it is relevant and that it complies with all the applicable regulations. The clearance includes the formal approval, or visa, of the offer document.

Legal, financial and accounting information relating to the target and the offeror is published in separate documents called the "Other Information" documents, which are not subject to prior approval of the AMF. While these will only formally be reviewed by the AMF after the opening of the tender period, the offeror and/or the target may submit the documents for informal review in advance in order to avoid any possible delay. If the AMF considers that any of the information is materially inaccurate, misleading or incomplete, it will require the target or the offeror to publish a rectification/additional information. The AMF may then decide to postpone the closing of the tender period to allow target shareholders reasonable time (at least five trading days) to take into account this new information.

Where an offer includes newly issued securities as consideration, the offeror is exempted from the obligation to prepare a prospectus, but it must include in the Other Information document all of the information that would be required in a listing or offering prospectus under the Prospectus Directive. However, the "Other Information" document is not an "equivalent document" within the meaning of the Prospectus Directive. Therefore, if the offeror wants to offer its securities to shareholders of the target located in other Member States, it will have to file a proper prospectus (although this may incorporate by reference the offer document and the Other Information document) in order to "passport" the prospectus into the relevant Member States.

Legal, financial and accounting information relating to the target is published and reviewed by the AMF in the same manner as the information relating to the offeror.

An offer document which is an "equivalent document", or a prospectus, which in each case has been approved by the relevant authority in another Member State, may be passported into France.

3. What general standards of care apply to these documents?

The general principles of market transparency and integrity apply to all the public documents. The AMF will only clear a document after carrying out a review of the consistency of the information provided to investors and having checked that the document is complete and understandable and complies with all applicable regulations. However, the AMF clearance does not constitute an approval of the offer price or the profitability of the offeror/target, nor a certification of the accounting and financial statements submitted.

A legal representative of the offeror, generally its chief executive officer, will be required to sign the offer prospectus, as well as the Other Information document relating to the offeror, to confirm that the information contained in each such document is true, accurate and not misleading. A legal representative of the target, generally its chief executive officer, will likewise be required to sign the target offeree document, and also the Other Information document relating to the target. If the offeror and target issue a

joint offer document, each chief executive officer would assume responsibility for their own part of that document.

In addition, a legal representative of the offeror's sponsoring bank will sign a statement concerning the accuracy of the information relating to the presentation of the tender offer and of the data used to determine the proposed offer price or exchange ratio.

No statement from the auditors will be required in connection with the offer documents. However, the auditors of each company will have to sign a statement regarding the financial information included in the document which contains the legal, financial and accounting information related to the relevant company. The statement will be disclosed to the AMF but not to the public.

False information in an offer prospectus could give rise to criminal liability. Alternatively, the shareholders could sue for damages on a civil basis.

4. What are the main content requirements for these documents?

Documents issued during an offer period must comply with the general standards of care referred to in paragraph 3 above.

Against the background of those general requirements, there are a number of specific content requirements for the various different documents.

4.1. Filing letter with the AMF

The tender offer proposal is filed with the AMF by one or more of the sponsoring banks, acting on behalf of the offeror(s), who must be generally authorised to act as underwriters.

The filing is made by means of a letter addressed and signed by the sponsoring bank to the AMF, pursuant to which the sponsoring bank guarantees the irrevocable nature of the commitments made by the offeror.

The letter must set out:

- the aims and intentions of the offeror;
- the number and type of target securities that the offeror currently holds or may acquire at its option, alone or in concert, as well as the date and terms on which such holdings were acquired or may be acquired in the future;
- the offer price or (in a securities exchange offer) the exchange ratio for the offer, the basis on which such price or ratio was determined, and the proposed conditions of payment or exchange;
- the conditions to the offer, if any;

- if applicable, the number of shares that the offeror needs to acquire to reach the minimum acquisition threshold; otherwise, the reason why the offeror is requesting that the AMF does not apply the minimum acquisition threshold; and
- the specific settlement procedures by which the financial instruments of the target company will be acquired and, where applicable, the identity of the investment services provider appointed as an intermediary to acquire them on behalf of the offeror.

Copies of the draft offer prospectus, as well as any prior notifications made to bodies empowered to authorise the transaction (e.g. the banking sector regulator) must be appended to the letter.

4.2. Tender offer prospectus (offeror/target (if recommended and if no fairness opinion is required))

An offeror must prepare a draft offer prospectus. If no fairness opinion is required in a recommended offer, this will be prepared jointly with the target company.

The offeror's tender offer prospectus must include the following information:

- the offeror's identity;
- the terms of the offer, including:
  - the offer price or exchange ratio proposed, based on the valuation methods normally applied, the characteristics of the target and of its share market, specifying the basis of calculation used;
  - the number and the type of target shares/securities proposed to be acquired;
  - the number and the type of target shares/securities the offeror already holds, directly or indirectly, alone or with concert parties, or that the offeror has the unilateral power to acquire at its sole option (e.g. via call options), together with the dates and the terms on which such shares have been acquired in the past 12 months or may be acquired in the future (pursuant to call options etc.);
  - if applicable, all the conditions to which the offer is subject;
  - the anticipated offer timetable;
  - if applicable, the number and the type of shares/securities proposed as consideration;
  - the method(s) of financing the offer and the likely impact of such financing on the assets, business and earnings of the offeror and target; and
  - if applicable, the number of shares that the offeror needs to acquire to reach the minimum acquisition threshold; otherwise, the reason why the offeror is requesting that the AMF not apply the minimum acceptance threshold.
- the offeror's intentions for at least the next 12 months, consistent with its operational, employment and financial strategy, in respect of:
  - the structure of the offeror's operation;
  - the continuation of the business of the target;

  - its employment policy and any foreseeable changes in the size of the workforce and the organisation of personnel, both of the offeror and the target;
  - the proposed industrial and governance organisation of the new group;
  - the benefits of the offer for both companies and their shareholders;
  - the synergies anticipated, if any, and the estimated amount and date of the revenues and the costs savings expected;
  - the costs relating to the offer;
  - if relevant, notice of intention to proceed with a merger after the offer is complete;
  - if relevant, notice of intention to proceed with an immediate squeeze-out procedure, if the offeror holds 95% of the share capital and of the voting rights of the target following the offer;
- the national law which will govern contracts entered into between the offeror and the holders of the target company's securities in connection with the bid and the courts competent to resolve any disputes thereunder;
- details of any agreements relating to the offer to which the offeror is party, or of which it is aware, as well as the identity and nature of persons acting in concert with the offeror or with the target of which the offeror is aware;
- the views of the offeror's board of directors or supervisory board (or equivalent) regarding the benefits of the offer and its consequences for the offeror company, its shareholders and employees, if the offeror's board of directors or supervisory board has made a decision on the offer. The document must specify whether the board decision was unanimous or not, and include the names and positions of dissenting board members, if they so request;
- if an offeror (and its concert parties) files an offer for a company (Company A), which itself holds more than 30% of the capital or voting rights in the target company (Company B), and that holding constitutes an essential asset of Company A, a company whose equity securities are traded on an EU regulated market or on an equivalent market in a country outside the European Union, an undertaking by the offeror to launch an offer to acquire all the shares of Company B; and
- the specific settlement procedures by which the financial instruments of the target company will be acquired and, where applicable, the identity of the investment services provider appointed as an intermediary to acquire them on behalf of the offeror.

If the offer prospectus relates to a competing offer, the document must also compare the new offer with the terms and conditions of the preceding offer.

The offer prospectus needs to be signed by the legal representative of the offeror (generally its chief executive officer), as a guarantee of the accuracy of the information contained in the document. It must also include a statement from the banks sponsoring the offer, or their advisers, supporting the accuracy of the information relating to the presentation of the offer and the data used to determine the proposed offer price or exchange ratio.

In a recommended offer where no fairness opinion is required, the initial offer prospectus, if made jointly, would also include the target company information referred to in paragraph 4.3 below.

4.3. Target offeree document (applies to situations where a fairness opinion is required)

In a recommended offer where no fairness opinion is required, the target would jointly issue the initial offer prospectus with the offeror. Where a fairness opinion is required, the target company must issue its own offer prospectus, which must include the following information:

- details of any agreements (e.g. put/call options or pre-emption right agreements) entered into by the target, the offeror or their shareholders, providing for preferential terms of sale or acquisition of shares admitted for trading on a regulated market which have been submitted to the AMF, if such agreements are likely to affect the assessment or the results of the offer;
- the following information (which must also be included in the annual report of the target if it is likely to affect a future takeover bid), updated as at the opening of the offer period if applicable:
  - the structure of the target's capital;
  - any restrictions on voting rights or on transfer of securities provided for in the by-laws or any clause of any agreement providing for preferential conditions for the transfer of securities representing at least 0.5% of the share capital;
  - any shareholding that the target is aware of as a result of any disclosure of a shareholding required by law or by its articles of association (see paragraph 4 of section 3 above);
  - details of the holders of any securities with special control rights and a description of those rights;
  - the system of control of any employee share scheme where the control rights are not exercised directly by the employees;
  - any agreements between shareholders which are known to the board of directors and which may result in restrictions on the transfer of securities and/or voting rights;
  - the rules governing the appointment and replacement of board members and the amendment of the articles of association;
  - the powers of board members, and in particular the power to issue or buy back shares;
  - any agreements or arrangements to which the board of directors is a party and which take effect, alter or terminate upon a change of control of the company, except where the nature of the agreements or arrangements is such that their disclosure would be significantly prejudicial to the company (this exception does not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements); and

  - any agreements or arrangements between the company and its board members or employees providing for compensation if the board member/employee resigns or is made redundant without cause or if their employment otherwise ceases, in each case because of a takeover bid;
- if applicable, the independent expert's fairness opinion. However, the target may decide to withhold certain elements of the fairness opinion if their publication is likely to affect the legitimate interests of the target, provided that such withholding is not likely to mislead investors;
- the opinion of the target Works' Council on the proposed offer and, if applicable, the report of the financial expert appointed by the target Works' Council.
- the views of the board of directors or supervisory board (or equivalent) of the target regarding the benefits of the offer and its consequences for the target company, its shareholders and employees. The document must specify whether the board decision was unanimous or not, and include the names and positions of any dissenting members, if they so request;
- if available and if they differ from the views of the board of directors, the opinion of the Works' Council, the employee representatives or the employees themselves;
- the intentions of members of the board of directors or supervisory board as to whether they will accept the offer in respect of their shares and if the offer has several alternatives, which alternative they intend to elect for; and
- the number and the type of target shares/securities the target already holds, directly or indirectly, alone or with concert parties, or that it may acquire at its sole option, along with the dates and conditions at which such shares have been or may be acquired.

The target offer document needs to be signed by the legal representative of the target (generally its chief executive officer) as a guarantee of the accuracy of the information contained in the document.

4.4. Legal, financial and accounting information relating to the offeror/target

Other information relating to the offeror is published in a separate document called the "Other Information" document that must contain the following information:

- the identity and characteristics of the offeror; and
- certain financial and accounting information.

If the offer is made only in cash, the offeror is only required to provide a summary of its by-laws and its latest annual individual or consolidated accounts.

If the consideration offered includes securities, the offeror must include in this document all of the information that would be required in a listing or offering prospectus under the provisions of the Prospectus Directive. However, where the offeror has already published that information within the prior year in its annual

report (*document de reference*), the offeror is only required to file an update. If the AMF is the competent authority to review the periodic and permanent information of the offeror, the offeror is also required to publish an estimate of:

– the acquisition costs;
– the goodwill arising and its accounting treatment;
– the methods of financing; and
– the likely impact of the offer on its main accounting indicators and on its consolidated accounts.

The reports of the statutory auditors of the offeror are also filed with the AMF.

The statutory auditors must provide a statement that any projected, estimated or pro forma financial statements included in the separate document have been adequately prepared on the accounting basis referred to in the prospectus and that such accounting basis is consistent with the accounting methods used by the target.

The statutory auditors must also review all information other than the projected, estimated or pro forma financial statements and provide a letter to the offeror (*lettre de fin de travaux*) confirming, in light of this review, the statements given by them in such information and any other comments that they may have. A copy of this letter must be provided to the AMF.

With respect to legal, financial and accounting information relating to the target, the target is required to publish an update of the material elements of the permanent and periodic information published by it during the 12-month period before the filing of the offer.

5. Are there any special reports required on particular types of information included in a document?

The offeror's sponsoring bank is always required to sign off on certain aspects of the offer (see paragraph 3 above).

The reports of the statutory auditors of the offeror and of the target in relation to their published financial statements need to be filed with the AMF. In addition, if the offer consideration includes securities, the statutory auditors of the offeror are required to issue a letter to the offeror (which is then forwarded to the AMF) confirming that they have reviewed the information contained in the offer prospectus and setting forth any other comments that they may have.

In addition, an independent expert's fairness opinion will be required in cases where the proposed offer may give rise to conflicts of interest at the target board level, may

compromise the objectivity of the board's opinion regarding the proposed offer, or may compromise the equality of treatment between shareholders or holders of financial instruments covered by the offer. Given the broad interpretation of such provision by the AMF, each situation should be carefully reviewed. The following situations are examples of such conflicts of interest:

- where the target is already controlled by the offeror;
- where the management or the controlling shareholders of the target have entered into an agreement with the offeror which is likely to affect their independence;
- where the controlling shareholders do not intend to tender their shares in connection with a repurchase offer launched by the issuer;
- where there are one or several related transactions which may have a significant impact on the price of the proposed offer (e.g. a related sale of part of the assets of the target company to the bidder or to one of the shareholders of the target company);
- where the offer involves different consideration terms for different categories of target shareholders which are likely to affect the equality between the shareholders;
- where the consideration proposed consists of securities other than shares, giving access to the capital or to the voting rights of the offeror or of a company in the offeror's group; and
- where the offeror intends to carry out the squeeze-out procedure in respect of the target securities (except in circumstances where a fairness opinion is not required) (see section 12 below).

The expert providing the fairness opinion is appointed by the target's board of directors. The expert must confirm that it is independent from the offeror, target and sponsoring banks and that it is not aware of any past, present or future link with the persons involved in the offers, which is likely to affect its independence. The expert has at least 15 trading days to deliver its opinion to the target's board.

The purpose of the fairness opinion is to help the target's board of directors with the assessment of the financial benefits of the offer in issuing its opinion on the offer.

The fairness opinion relates to the consideration for the offer. The report of the expert must include:

- a description of the expert;
- a list of the assignments carried out by the expert during the 12 months before the offer is filed;
- confirmation of the independence of the expert (as referred to above);
- the expert's fees;
- the expert's registration with a professional association registered with the AMF;
- a description of the tasks carried out by the expert in producing the opinion;

- the valuation of the target and of the consideration; and
- an analysis of the valuation work carried out by the offeror's bank advisers.

Germany

1. What are the main documents?

There are a number of key documents necessarily involved in a public takeover bid. Although in practice, depending on whether the bid is hostile or recommended, these can vary significantly in number, style and content, the main documentation for recommended and hostile offers does not differ.

Set out below is a table illustrating the main relevant public documents.

Recommended/Hostile
Notification to FFSA and stock exchanges (offeror)
Announcement of offer (offeror)
Notification to target's management board in writing (offeror)
Notification to target's works council/employees (target)
Offer document (offeror) – including financing confirmation from a financial services provider
Acceptance form (offeror)
Opinion of target board(s) (target) *[NB: This is always a separate document]*
Invitation for an offeror shareholder meeting (if applicable) (offeror)
Invitation for a target shareholder meeting (if applicable) (target)
Prospectus for offeror shares where required (offeror) (unless the information relating to the shares is included in an "equivalent document" – e.g. the offer document itself)

Recommended/Hostile
Note: In addition, there will be a number of press announcements, for example, weekly/daily announcements of acceptance levels etc. In a hostile bid, there are also likely to be further documents sent to target shareholders by both the offeror and the target at regular intervals over the offer period, setting out their arguments.

2. What regulators review these documents?

The offer document (and any prospectus) must be approved by the FFSA before publication to ensure that it complies with the relevant requirements. If the FFSA decides that the offer document does not meet the relevant criteria, the offeror must amend the draft submitted. The offer document must not be published before it has been approved.

If the offer document is not approved, the FFSA "disallows" the entire bid, in which case the offeror is barred from re-launching an offer for the same target for one year. Any share acquisitions and transfers made as part of a "disallowed" bid are void.

Where shares are offered by the offeror as consideration, the offeror will have to publish either a prospectus or an "equivalent document". Under the Regulation, information to be included in an offer document covering securities offered as consideration (i.e. in an "equivalent document") must be essentially identical to the information in a listing or offering prospectus under the Securities Prospectus Act. An offeror will therefore need to consider whether it would be better off electing to use a prospectus or an equivalent document.

An offer document or a prospectus, which in each case has been approved by the relevant authority in another Member State, may under certain circumstances be passported into Germany under the Takeover Act or the German Prospectus Act, as applicable.

3. What general standards of care apply to these documents?

An offer document must contain all information necessary to allow a reasonably informed decision to be made about the offer, and must be complete and correct. By signing the offer document, the offeror (and any other party who assumes responsibility for the document – for example, the offeror's parent company where the bid is launched through an acquisition vehicle) assumes responsibility for its completeness and correctness and will be exposed to liability for the offer document if it is incorrect or incomplete.

The offer document is deemed to be incorrect or misleading if a correct or complete statement would have materially altered the legal or factual basis for assessing the merits of the offer. This is to be judged from the point of view of an average investor.

The offeror and other potential defendants may escape liability if they can prove that they did not know of the incorrect or incomplete information, and that their lack of knowledge was not due to gross negligence. The standard of care applicable to determine such gross negligence may differ. It depends, inter alia, on the status of the defendant and the nature of the incorrect or incomplete information. The offeror will normally find it difficult to justify ignorance of its own affairs, but may be excused for ignorance of matters outside its sphere of influence.

There is no equivalent standard of care for the opinion of the target board(s).

4. What are the main content requirements for these documents?

4.1. Offer document

The offer document must comply with the general standard referred to in paragraph 3 above. It must also contain all information necessary to allow a reasonably informed decision to be made about the offer, and be written in German in a manner and style that is easy to read.

Against the background of these general requirements, there are a number of specific content requirements for the offer document.
The offer document must, inter alia, include:

– details of the offer, such as the identity of the offeror and the target, the classes of target securities which are the subject of the offer, the acceptance period and any conditions to the offer;
– the offer consideration, the method used for its determination and an explanation of why such consideration is "adequate";
– where securities are being offered as consideration, all of the basic information required for a prospectus (see below) – if a prospectus for the relevant securities has separately been published in German and is valid throughout the offer period, it is instead sufficient for the offer document to contain information about where the prospectus can be obtained;
– a description of the measures taken to ensure that the offeror has sufficient financing available and confirmation by an "independent" investment service provider that any cash consideration will be at the offeror's disposal when it is due;
– the plans of the offeror as to the future business of the target, including the expected impact on target employees and their representative bodies (e.g. plans for dismissals, transfer of the target's domicile or closing down of branches);

- information on payments and other benefits granted or promised to members of the management board or supervisory board of the target;
- the steps which target shareholders must take to accept the offer, including the costs of taking such steps, and the date by which shareholders will receive the offer consideration;
- information about regulatory clearance proceedings (in particular, merger clearances) required for the acquisition of securities in the target;
- the number and amount of voting rights in the target already held by the offeror, any concert parties and any persons whose voting rights are otherwise attributable to the offeror in accordance with the Takeover Act (see paragraph 3 of section 2 above), the number of shares to be notified as a result of rights or obligations or instruments giving the possibility to acquire shares (see paragraph 4.1 of section 3 above) and information on previous acquisitions within the last three months prior to the publication of the decision to make an offer;
- a statement as to which law will govern the contract between the offeror and each target shareholder;
- information about the withdrawal rights of the target shareholders in the event of a competing bid or an amendment to the offer;
- information about compensation for the loss of rights removed as a result of the application of the breakthrough rule (i.e. only if the target has opted to apply the breakthrough rule), the method of its determination and the way in which that compensation is to be paid;
- a declaration by the persons or entities responsible for the offer document (generally the offeror itself) that, to their knowledge, the information in the offer document is correct and no material information has been omitted; and
- the signature of a representative on behalf of the offeror, and any other person who has assumed responsibility for the offer document (e.g. a parent company).

In the case of a recommended offer, the offer document may also refer to the fact that the target management board has agreed to support the offer.

Under the Regulation, an offer document which is an “equivalent document” must include the same information as is required to be included in a listing or offering prospectus under the Securities Prospectus Act. The Securities Prospectus Act implements the provisions of the Prospectus Directive and contains the content requirements for a prospectus. An offeror may elect to publish either an “equivalent document” or a prospectus, depending on the circumstances.

4.2. The target board opinion

The opinion of the target board must include a commentary on (i) the nature and amount of the consideration; (ii) the likely consequences of a successful offer for the target, its employees and their representatives; (iii) the strategic objectives of

the offeror; and (iv) the intentions of the members of the board or supervisory board on whether to accept or decline the offer in respect of their own shares.

If the target's works council or, in the absence of a works council, its employees have submitted a position paper to the board within the relevant period, that position paper must be attached to the opinion of the target board.

5. Are any special reports required on particular types of information included in a document?

   There are no requirements for any special reports by a third party on any particular matter.

Italy

1. What are the main documents?

There are a number of key documents necessarily involved in a public takeover bid. These are the same documents for both a recommended and a hostile offer.

Set out below is a table illustrating the main relevant public documents.

Recommended/Hostile
Announcement to CONSOB (offeror)
Notice to the market and to the target (offeror)
Offer document (offeror)
Acceptance form (offeror)
Guarantee of payment (offeror)
Statement from target (target) (*in a recommended offer, this would be sent out with the offer document*)
Revised offer document, if the offer is amended (offeror)
Note: In addition, there will be a number of press announcements; for example, of acceptance levels etc. In a hostile bid, there is also likely to be further information disseminated by both the offeror and the target, by way of announcements to the market.

2. What regulators review these documents?

CONSOB will review all relevant documents to monitor compliance with the CFA, the Regulation and other applicable rules. The offer document and the statement by the target must be "pre-approved" by CONSOB before publication.

An offer document which is also an "equivalent document" used in an exchange offer will be reviewed for the content requirements set out in the Prospectus Directive. In practice, offerors will always use this route, rather than publishing a separate prospectus.

An offer document which is an "equivalent document", or a prospectus, which in each case has been approved by the relevant authority in another Member State, may be passported into Italy.

3. What general standards of care apply to these documents?

The standard of care to be complied with in preparing any offer documentation is dictated by the general "transparency rule" which applies to offers in Italy. The transparency rule requires, inter alia, that:

- statements and other communications relating to the offer must disclose the party making such statement/communication and must be prepared in accordance with principles of clarity, completeness and accessibility to all interested parties;
- between the date on which the intention (or the obligation) to launch an offer is communicated to CONSOB and the date of payment of the offer consideration, statements about the offer and the target company by the interested parties must only be made by way of announcement to the market. This requires release to at least two press agencies and to CONSOB or – where the offeror and/or the target are listed – by way of a market communication, transmitted to CONSOB and to the Italian Stock Exchange at least 15 minutes before it is published. All announcements must also be made available on the offeror's or target's website; and
- each statement or other communication promoting or rejecting the offer must make its nature clear and the information contained in such statements must be (i) clear, fair and justified; (ii) consistent with information already disclosed; and (iii) not misleading as to the details of the offer and the securities involved.

The offer document must specify the entity which takes responsibility for its contents (i.e. the offeror). The offeror must also state that, to the best of its knowledge, the information contained in the offer document is true and correct and there are no omissions which would affect the content of such document.

If these provisions are breached, the breach may result in an administrative fine for the person(s) in default, or CONSOB has the power to suspend the offer or even declare it forfeited.

4. What are the main content requirements for these documents?

Documents issued by the offeror/target must obviously comply with the general standards of care referred to in paragraph 3 above. The offer document must also contain all of the information which is necessary for a complete evaluation of the offer by the public.

In addition, the CFA and the Regulation also lay down certain specific content requirements for the announcement, the offer document and the target's statement.

4.1. Announcement to CONSOB

The announcement is made by means of a notice addressed to CONSOB, signed by the offeror.

The announcement must, inter alia, (i) specify any clearances required for the acquisition of the target securities and what requests have therefore been submitted by the offeror to the relevant public authorities; and (ii) in the case of an exchange offer, confirm that the shareholders' meeting required to authorise the issue of the offeror securities to be used as consideration has been duly called.

4.2. Notice to the market and the target

See paragraph 1 of section 8 above.

4.3. Offer document

The contents of an offer document will vary depending on whether the target is listed or unlisted.

The Regulation therefore sets out two different basic "schemes" applying to offer document contents, and an offeror must comply with the scheme that applies to its offer.

In particular, the scheme relating to takeovers of targets with listed shares provides that the offer document must include, among other things, the following information:

- the offeror's identity, together with a general description of its structure and business (e.g. its share capital, main shareholders, subsidiaries, financial statements etc.);
- the type and quantity of target securities subject to the offer, and the procedure for acceptance of the offer;
- the number of target securities owned by the offeror;
- the consideration offered per target security;
- the date and method for settlement of the consideration, together with details of the guarantee(s) of due performance of the payment obligation;
- the reasons for the offer and a description of the future plans of the offeror; and
- a summary of any agreements between the offeror and the target or its shareholders and directors.

In an exchange offer, the offer document must contain information equivalent to that contained in an offering/listing prospectus under the Prospectus Directive. No separate offering/listing prospectus is then required. In practice, an offeror will always issue an "equivalent document" rather than a prospectus.

4.4. Target statement

The board of directors of the target company must also release a statement, which shall:

- indicate the names of the directors and the statutory auditors attending the meeting in which the tender offer has been examined, as well as the names of those absent;
- indicate any directors who have notified the fact that they have a possible (direct or indirect) conflict of interest relating to the tender offer, specifying the nature, terms, origin and scope thereof;
- contain all relevant information to evaluate the tender offer, together with a reasoned opinion on the offer and the fairness of the price by the board of directors, with an indication, where applicable, of its approval by majority vote and the names of those dissenting and abstaining, specifying the reasons for any dissent or abstention. The statement shall also specify, positively or negatively, any participation of the members of the board in negotiations to define the transaction (including the tender offer);
- indicate whether, in forming their opinion on the tender offer, the issuer made use of independent expert opinions or specific assessment documents. In these latter cases, the methods used and the results of each criteria applied shall be indicated;
- provide information on material matters not covered in the latest annual report or the latest interim report published;
- provide information on the issuer's recent performance and prospects if they are not reported in the offer document; and
- in some cases, contain an assessment on the effects that the tender offer would have on the target's interests, as well as on employment and the location of production sites; and
- where a merger is envisaged between the target and certain other entities (e.g. a shareholder holding a stake exceeding 25% or 30%, as the case may be, or anybody acting in concert with it) and that involves an increase in the debt of the target, provide information on the company's debt resulting from the merger; in this case, also indicate the effects of the transaction on the loan agreements in place and on the related guarantees as well as on the need to stipulate new loan agreements.

In a recommended offer, this statement would be published together with the offer document.

5. Are any special reports required on particular types of information included in a document?

There are no special requirements for any special reports by a third party on any particular matter.

However, if the target board has based its evaluation of the offer on any analysis by external advisers, this must be disclosed. Such disclosure must include information about the methodologies used, and the relevant report of the external advisers must be appended to the offer document.

The Netherlands

1. What are the main documents?

There are a number of key public documents involved in a public takeover bid, whether recommended or hostile.

The following table sets out the main relevant public documents.

Recommended/hostile
Initial public announcement (offeror)
Four-week announcement (offeror)
"Certainty of funds announcement" (offeror)
Notice for an offeror shareholder meeting (if applicable) (offeror)
Offer document (offeror) (and additional documentation if the offer price is raised and/or the composition of the consideration is changed)
Prospectus for offeror shares (if applicable) (offeror)
Position paper (target company)
Notice for a target company shareholder meeting (target company)
Note: In addition, there may be requirements to make further public announcements

In addition to these public documents, there will be a number of non-public documents prepared in connection with a public takeover, most importantly the merger protocol and irrevocable undertakings from large shareholders. However, this section 10 focuses on the key public documents.

2. What regulators review these documents?

The AFM will review all public documents issued by the parties to a bid to ensure that they comply with the requirements of the Offer Rules. The offer document and, in the

event of an exchange offer, the prospectus, are the only public documents which require pre-approval from the AFM. All other public documents will be reviewed by the AFM following their publication.

Under the Offer Rules, the offeror must prepare and submit the offer document to the AFM within 12 weeks after the initial public announcement. Within 10 business days after the offer document has been submitted for approval to the AFM, the AFM must approve or reject the offer document. However, the AFM may extend this period if it requires additional information or amendments to the offer document.

If the offeror is issuing securities as consideration in a public bid, the offer document must contain information regarded by the AFM as equivalent to that of a prospectus. In practice, the AFM requires the offeror to submit a separate prospectus to the AFM, which will be appended to the offer document.

In situations where the relevant takeover falls within the authority of the competent regulator of another Member State, which supervises the public offer process and approves the offer document, but the target company has a secondary listing on a regulated market in the Netherlands, the approved offer document may be passported into the Netherlands. The AFM may then request the inclusion of additional information in the offer document, such as an explanation to the shareholders in the Netherlands of how to tender their shares in the offer, and a Dutch translation of the offer document. A prospectus which has been approved by the relevant authority in another Member State may also be passported into the Netherlands pursuant to the FMSA and the Prospectus Directive.

Public announcements are not reviewed by the AFM prior to publication, but will be reviewed by the AFM following publication. If the information contained in a public announcement is ambiguous or incomplete, the AFM may require the offeror or the target company, as the case may be, to issue an additional public announcement.

3. What general standards of care apply to these documents?

The key requirement in the FMSA relating to offer documents, prospectus, public announcements or other documents relating to a listed company is that the information contained in those documents must be true and accurate. The AFM will only approve the offer document if it contains all information which is required to enable a person, who is reasonably informed and acting with due care, to make an informed assessment of the offer.

Pursuant to the Offer Rules, the offer document must contain a responsibility statement stating which persons are responsible for each part of the offer document. In addition, the names of the individuals at the offeror who have taken responsibility for drafting the offer document should technically be listed. However, in practice, the offeror company

will take responsibility for the information contained in the offer document and no individuals at the company will be listed.

The responsibility statement should also state that, to the best knowledge and belief of the person responsible, having taken all reasonable care to ensure such is the case, the information contained in the offer document is in accordance with the facts and does not omit anything likely to affect the import of such information, in each case at the date of the offer document.

The FMSA provides that a prospectus must contain a similar responsibility statement.

The offer document must also contain a review statement from an auditor in respect of certain financial information. However, in the event of a hostile takeover, a review statement from an auditor in respect of the financial information relating to the target company is not required.

Failure to comply with the relevant requirements relating to the public documents may result in the imposition of fines by the AFM.

4. What are the main content requirements for these documents?

Documents issued during an offer period must obviously comply with the general standards of care referred to in paragraph 3 above.

4.1. Initial public announcement

The initial public announcement should contain at a minimum the following details:

- the name of the offeror and the target company;
- if already agreed upon, the intended offer price or exchange ratio;
- any agreed pre-conditions to making the offer;
- any agreed offer conditions; and
- any other material information (for example, provisions relating to competing offer provisions or any agreed break fees).

The Offer Rules also set out specific rules for identifying circumstances in which this initial public announcement is deemed to be made (see section 8 for details).

4.2. Offer document

In order for the offer document to be approved by the AFM, the offer document must contain all information required to enable a person, who is reasonably informed and acting with due care, to make an informed assessment of the offer.

In addition, the Offer Rules contain specific requirements on what information should be included in the offer document. Although the requirements for the contents of the offer document will depend on the type of offer, the following details will need to be included in most offer documents:

- details of the offer, including:
    - a statement as to whether the target company has been consulted and whether such consultation resulted in an agreement; and, if applicable:
        - which body within the target company has been consulted;
        - the nature of the agreement relating to the public offer between the offeror and target company; and
        - any agreed termination or penalty clauses, giving details of the scope of such provisions as well as an overview of the contents of the agreement and the reasons for agreeing to such clauses;
    - a statement that the public offer is directed towards all holders of the categories or classes of target shares to which the public offer applies;
    - a statement that the same offer (including the same terms and conditions) will be made to each holder of a category or class of target shares;
    - (a) details of the acceptance period and the way in which target shares may be tendered, as well as a statement that this period may be extended in accordance with the Offer Rules;
    - (b) the arrangements concerning the transfer of, and payment for, the target shares tendered, and details of what institution is acting as the exchange agent;
    - (c) a statement regarding the financing of the offer;
    - the forecasts used to determine the offer price (to the extent possible, substantiated with financial information relating to such forecasts);
    - the offeror's intentions with respect to the continuation of the target's business operations;
    - the place where the target will have its registered office;
    - a statement relating to the offeror's intentions in respect of retaining the employees and directors of the target company and also the offeror, including any proposed material change to employment conditions;
    - (d) if applicable, the compensation offered for statutory rights that cannot be asserted by holders of categories or classes of target shares, due to the breakthrough rule as set out in paragraph 2 of section 359b of the Civil Code (see section 13 below), including details with respect to the nature of the compensation offered and the valuation method for such compensation;
    - (e) the name and position of any individuals, or the name and statutory seat of any legal entities, who are responsible for the offer document, or any particular part thereof;
    - a statement given by the responsible persons that, to their best knowledge and belief, having taken all reasonable care to ensure such is the case, the information contained in the offer document is in accordance with the facts and

does not omit anything likely to affect the import of such information, in each case at the date of the offer document;

- if the offeror has obtained written advice about the offer from an adviser (other than an adviser that can assert privilege – i.e. a lawyer), or an opinion about the fairness of the offer: (1) the substance of the advice; and (2) the name of the organisation that rendered the advice, the capacity in which it acted, and any other functions the organisation fulfils in relation to the offer;
- the laws that govern the offer and the agreements between the offeror and the shareholders arising from the offer, and the competent courts in relation to the offer;
- any costs incurred or anticipated by the offeror and the target company relating to the public offer, so far as the offeror is aware, and who will bear such costs; and
- a Dutch translation, if the offer document is prepared in a language other than Dutch or English, and a Dutch summary if the offer document is provided in English, referring to the underlying offer document and, at a minimum, including the information mentioned under bullet points (a) to (e) above;

– details of the offeror and the target company, including:
  - the name, address or registered office and legal form of the offeror and the target company:
    - if the offer is made by several individuals or legal entities together, evidence of their mutual financial and corporate relations; and
    - the shareholder structure of the offeror;
  - the identity of any person acting in concert with the offeror or with the target company, and, if such persons are legal entities, their legal form, their name and registered office, and their relation to the offeror and the target company;
  - a description of any interest, direct or indirect, in each other's share capital existing at the time of submission of the request for approval of the offer document;
  - a description of any provisions in the target's articles of association and any contractual provisions that are effective at the time of submission of the request for approval of the offer document, which may conflict with the exercise of a shareholder's rights;
  - a statement by the offeror detailing any shares held in the target company at the date of the offer document by (1) any member of the management or supervisory board of the offeror, or (2) any member of the management or supervisory board of the target company (if the offer document is prepared in consultation with the target company), or (3) any of their respective spouses, registered partners and/or children under the age of 18, or (4) any legal entity under the control of such persons;
  - a statement by the offeror about any transactions that have been effected, or agreements that have been concluded, in connection with the target shares in the year prior to the date of the offer document by any of the persons referred to

in bullet point (b) above, and any legal entities that are members of the offeror's group, stating:

- their names;
- the amount and the category or class of shares in the target company concerned, as well as the price or exchange ratio applied to the relevant transactions, or that has otherwise been agreed upon with respect to such transactions; and
- in the case of the offeror, if any transaction concerns shares to which the public offer applies and the price or exchange ratio is higher than the price or exchange ratio offered as part of the offer, the grounds for such difference;

- if applicable, disclosure of any amounts payable to any member of the target company boards who are intending to resign as and when the offer is declared unconditional; and
- if applicable, any change of control bonuses payable as and when the public offer is declared unconditional to (1) any member of the target company boards (ascertainable from publicly available information if the offer document is not prepared in consultation with the target company); and (2) any member of the offeror's boards.

- specific details of a full offer: if an offer is made to all categories and classes of shares in a target company, the offer document is required to contain also the following information:
  - the proposal to acquire securities in accordance with a specified final price or exchange ratio, listing the securities or, if applicable, the categories or classes of securities to which the full offer relates;
  - the number or percentage of securities that would need to be tendered for the offer to satisfy any offer condition, stating the offeror's right to declare the public offer unconditional even if a smaller number or percentage of securities are registered;
  - all of the other conditions to the offer;
  - a clear explanation of the reasons for the price or exchange ratio offered, including:
    - the rationale and forecasts that the offeror used to determine the amount of the full offer, an explanation of this rationale and these forecasts, and the calculation method used for the price or exchange ratio;
    - the ratio between the price or exchange ratio offered and the average listed price of the securities to which the offer relates over the past 12 months; and
    - the movements in the listed price of the securities to which the offer relates over the 12 months prior to the date on which the request for approval of the offer document was delivered, in the form of a graph or table;
  - if the full offer relates to more than one category or class of securities, and if applicable, a clear explanation of the reasons for the differences between the

prices or exchange ratios offered for the various categories or classes of securities;
  - if the offer document is drawn up in English, a Dutch translation of the summary; and if the offer document is drawn up in a language other than Dutch or English; a Dutch translation of the whole document;
  - if applicable, any plans concerning the composition of the boards of directors and the supervisory boards of the offeror and the target company after the full offer is declared unconditional;
  - if the offeror has it, information concerning the equity and results of the target company, including the following:
    - a comparative statement of the balance sheet, the income statement and the cash flow statement from the approved financial statements for the last three years, and the most recent set of financial statements made generally available, including explanatory notes;
    - an auditor's opinion on the information specified under (1);
    - such financial data concerning the current financial year as the target company is required to publish under the relevant legislation implementing the Transparency Obligations Directive; and
    - an auditor's review report on the information as specified under (3) above, unless specific circumstances occur (which must be described in the offer document) which render it impossible for the offeror to obtain such report;
  - if applicable, any plans to amend the target company's articles of association after the full offer is declared unconditional; and
  - if applicable, the fact that holders of securities of a category or class to which the full offer pertains have already announced their willingness to accept the offer, specifying the total par value of those securities or the percentage of the total issued capital that they represent; and
- specific details regarding a tender offer or a partial offer – an offer is a partial offer or a tender offer, and the information which is required to be set out in the offer document about a partial offer will be limited when compared with the information required for an offer for all categories or classes of shares in a target company.

4.3. Position paper

A position paper, which is not subject to pre-approval from the AFM, should set out the reasoned opinion of the management board and supervisory board of the target company regarding a public offer. In the case of a recommended offer, this information would be appended to the offer document. The position paper must at a minimum include:

- the views of the target boards on (A) the bid price or the exchange ratio; (B) the rationale and forecasts used to determine the bid price (substantiated by financial information); and (C) the consequences of declaring the public offer unconditional

with respect to the employment and terms of employment of target employees, and the places of business of the target company;

- updated financial information concerning the target company, which should be provided in order for its shareholders to make an informed assessment of the offer;
- a statement by the target company about any transactions that have been effected, or agreements that have been concluded, in connection with any target shares or shares offered by the offeror in an exchange offer, in the year prior to the date of the offer document by (A) any member of the management or supervisory board of the target company; or (B) any of their respective spouses, registered partners and/or children under the age of 18; or (C) any legal entity under the control of such persons; or (D) legal entities with which the offeror is affiliated (by virtue of being members of the same group), stating:
  - their names; and
  - the relevant amount and category or class of shares, as well as the price or exchange ratio applied to these transactions or that has otherwise been agreed upon with respect to such transactions.
- a statement from the relevant works councils (if applicable) in respect of the consequences of the offer on employment; and
- if the target company has obtained written advice about the offer from an adviser (other than an adviser that can assert privilege – i.e. a lawyer), or an opinion about the fairness of the offer: (1) the substance of the advice; and (2) the name of the organisation that rendered the advice, the capacity in which it acted, and any other functions the organisation fulfils in relation to the offer.

5. Are there any special reports required on particular types of information included in a document?

An offer document should contain certain financial information about the target company. This information includes:

- a comparative overview of the balance sheets, profit and loss statements and cash flow statements from the approved financial statements for the three most recent financial years and the most recently published annual accounts of the target company; and
- financial details regarding the current book year.

With regard to the information under (i), an auditor’s statement should be included in the offer document, and with regard to the information under (ii), a review statement of an accountant should be included in the offer document, unless in each case such statement cannot be obtained (for instance, in the event of a hostile offer where the auditor of the target company is not allowed by the target company to issue such statements).

Spain

1. What are the main documents?

There are a number of key public documents involved in a public takeover bid, whether recommended or hostile.

The following table sets out the main relevant documents that must be filed with the CNMV.

Recommended/Hostile
Initial public announcement (offeror)
Formal application to the CNMV (offeror)
Announcement of the offer (offeror)
Offer document duly executed (this may also be an "equivalent document" to a prospectus for the purposes of any share issue) (offeror)
Documents to be filed with the CNMV (including corporate documentation, valuation reports, guarantee for payment of consideration, certificates re. immobilisation of securities, as applicable) (offeror)
Target board report on the offer (target)
Note: In addition, there may be a number of press announcements; for example, of extensions of the offer etc. There could also be a separate prospectus if the consideration includes new shares.

2. What regulators review these documents?

The offer document and any announcements to be published by the offeror must be pre-approved by the CNMV before publication (as must any prospectus). The CNMV has the power to make comments, suggestions and amendments.

The target board report does not need to be pre-approved by the CNMV before publication.

The vetting process by the CNMV is likely to be the same for either a prospectus or an "equivalent document", and the content requirements are the same. In practice, unless there is already an existing prospectus in place, offerors generally publish an equivalent document.

An offer document which is an "equivalent document", or a prospectus, which in each case has been approved by the relevant authority in another Member State, may be passported into Spain.

3. What general standards of care apply to these documents?

There is a regulatory requirement that the offer document must be drafted so that it can be easily analysed and understood by the reader and that it must not include false representations or false information. Any breach of this requirement may lead to administrative penalties (i.e. fines) or could lead to a claim for damages from the target company's shareholders.

There is no requirement for the directors of the offeror or the target to assume personal responsibility for any document, although there may be personal liability for the signatories of the offer document or the persons (i.e. the directors) who declare that a prospectus or "equivalent document" is "correct and complete" if this turns out not to be the case. The offeror and target do not issue joint documents at any time.

4. What are the main content requirements for these documents?

4.1. Offer document

Documents issued by the offeror must comply with the general standards of care referred to in paragraph 3 above. The offer document must also contain enough information for the target shareholders to be able to form a reasoned opinion on the offer.

In particular, the offer document must consist of five chapters, containing the following specified information:

- Chapter I must contain information relating to:
  - the persons responsible for the content of the document;
  - the corporate resolutions relating to the offer and the applicable legislation under which the offeror operates (and if the offeror is not Spanish, the CNMV will probably require a legal opinion confirming that the resolutions are valid and binding);
  - basic information on the target;
  - information on the offeror and its group;

  - description of any agreement relating to the offer between the offeror and the shareholders, directors or officers of the target;
  - details of any securities of the target owned by the offeror and persons acting in concert with the offeror;
  - details of any transactions in the securities of the target entered into by the offeror and persons acting in concert with the offeror during the 12 months prior to the announcement of the offer; and
  - a description of the activities and financial situation of the offeror.
- Chapter II must contain information relating to the securities to which the offer relates, the consideration available in the offer, the conditions to the offer and the guarantees and financing of the offer.
- Chapter III must describe the procedure for the acceptance and settlement of the offer.
- Chapter IV must describe the reasons for the transaction, including the offeror's strategic plans and intentions for the future activities of the target, its employees and officers, and setting out any plans for the disposal of assets and the offeror's dividend policy.
- Chapter V must give details on authorisations or consents required, including the application of antitrust regulations.

The offer document may also include any additional information that the offeror and/or the CNMV consider appropriate.

If securities are being issued as consideration, the offer document must contain all the additional information that is equivalent to that which is required for a prospectus relating to the public offer of securities, in order to qualify as an "equivalent document". If there is a prospectus already filed, or a prospectus is issued in connection with the offer, it would only be necessary to cross-refer. In practice, most offerors will produce an equivalent document.

4.2. Target board response

The target board response is always a separate document, even in a recommended offer. It must contain, among other things:

- the target board's comments on the offer;
- details of any agreement (e.g. on break fees) between the offeror and the target, members of the target board or shareholders of the target; or between shareholders of the target and members of the offeror board;
- the opinion of the target board on the bid (for or against);
- the target board members' intentions as to whether to accept the offer in respect of their own shares (if any);
- the target board's views on the eventual consequences of the offer and the impact of the strategic plans of the offeror on the interests of the target, its employees and the location of its centres of activity;

- any minority opinions within the board; and
- information on securities of the offeror owned, directly or indirectly, by the target or by persons acting in concert with the target, and details of any securities of the target and the offeror owned or represented, directly or indirectly, by the members of the target board.

If the target board receives a report from the representatives of the target employees on the consequences of the offer for the employees of the target prior to the publication of the target response, such report must also be attached to the report of the board.

5. Are any special reports required on particular types of information included in a document?

If the consideration in an offer consists of securities which are not listed on an official Spanish Stock Exchange or on any other regulated market of a Member State, the offeror must provide a report from an independent expert on the value of those securities.

An independent expert's report is also required where a competing offer has improved the terms of a previous offer other than by increasing the offer price or increasing the percentage of shares targeted.

There is no requirement for a separate third party report on any other matter, including any profit forecast or asset valuation.

United Kingdom

1. What are the main documents?

There are a number of key documents necessarily involved in a public takeover bid. However, depending on whether the bid is hostile or recommended, these can vary significantly in number, style and content.

Set out below is a table illustrating the main relevant public documents for each type of takeover:

Recommended	Hostile
Rule 2.7 Press announcement (offeror/target)	Rule 2.7 Press announcement (offeror)
Letter circulating announcement to shareholders etc. (target)	Letter circulating announcement to shareholders etc. (target)
	Rejection press announcement (target)
Offer Document (or Scheme Document) (offeror/target)	Offer Document (offeror)
Acceptance Form (offeror) (or Scheme Forms of Proxy (target))	Acceptance Form (offeror)
Circular to offeror shareholders, where their approval is required (offeror)	Circular to offeror shareholders, where their approval is required (offeror)
Prospectus or equivalent document, where required (offeror/target)	Prospectus or equivalent document, where required (offeror)
	First Defence Document (target)
	Final New Information Defence Document (target)

Recommended	Hostile
	Revised Offer Document, where applicable (offeror)
Note: In addition, there will be a number of press announcements: for example, of acceptance levels, extensions of the offer etc. In a hostile bid, there are also likely to be further documents sent to target shareholders by both the offeror and the target at regular intervals over the offer period, setting out their arguments and including, for example, profit forecasts and asset valuations.	

Subject to recipients asking to receive documents in hard copy form, the offeror or target company can decide to send any relevant documents to shareholders in hard copy or electronic form (provided the recipient has provided its electronic address to the target for general purposes), or to publish them on a website, with a separate website notification (containing details of the website publication and little else) being sent to the shareholder. All such documents must also be published on the relevant company's website, which must be capable of access by all shareholders who would otherwise be able to receive hard copies (see paragraph 5 of section 5 above in relation to the possibility of restricting access to certain non-EEA jurisdictions).

Shareholders must be informed of their rights to request hard copy documents, and hard copies must be despatched within two business days of any request being received. Acceptance forms, withdrawal forms, proxy cards and any other form connected with an offer may only be published in hard copy form.

2. What regulators review these documents?

The Panel may review any documents published by the parties to an offer to ensure that they comply with the requirements of the Code. However, a document will only need to be "pre-approved" by the Panel if there is something in the document which is controversial or which requires Panel consent. Parties will often ask the Panel to check sections of documents to be that they think might be controversial.

If a UK listed offeror is required to send a circular to its own shareholders (because it requires their consent to the bid) and/or to issue a prospectus or equivalent document (because it is issuing new (listed) securities as consideration), those documents will need to be pre-approved by the UKLA before publication. The minimum time for approval of a prospectus is 10 clear business days but, in practice, it will take longer (five to seven weeks is a guideline).

Although an equivalent document is not required to be pre-approved in the same way as a prospectus, in practice the FCA applies a near-identical full vetting and approval process to equivalent documents. It also requires an equivalent document to include all of the same information as a prospectus. An offeror will therefore need to consider whether it would be better electing to use a prospectus or an equivalent document (see paragraph 4.3 below). In practice, an offeror will often choose to issue a prospectus.

The passporting provisions in FSMA allow an offeror to use (for UK purposes) a prospectus approved by the competent authority of another Member State. However, they do not allow the use of "equivalent documents" approved by other EEA competent authorities.

If a takeover is to be implemented by way of a scheme of arrangement, the scheme document will be presented to the court prior to it ordering the holding of any meetings necessary to gain shareholder approval of the scheme. However, this is not really a "review" process. The scheme document will usually be submitted to the court, with a sworn statement from one of the directors setting out the facts relevant to the scheme, approximately two days before such court hearing.

3. What general standards of care apply to these documents?

The key requirement in the Code relating to documents and advertisements published, and statements made, during an offer period is that they must be prepared in accordance with the highest standards of care and accuracy and the information must be "adequately and fairly presented". For example, the source of any material piece of information must be provided and quotations must be substantiated and must not be taken out of context.

If the offeror also has to issue a prospectus or equivalent document, the highest accuracy is required for this document. There is a statutory right of compensation under FSMA for any person who suffers loss as a result of any untrue or misleading statement included in the prospectus, or any omission of any information required to be included.

To reinforce the Code standards of care, the Code requires that the directors of the offeror and/or the target must take specific responsibility for the contents of any document and advertisement published in connection with the offer. This does not specifically apply to press announcements, although in practice parties to a bid often also include responsibility statements in their press announcements. In addition, it does not apply to any separate opinion provided by the employee representatives of the target company, or any trustees of its pension scheme(s) (see paragraph 4.1 below).

The Panel has issued some proposed changes to standards of care in the Code and the consultation period for these changes will close in April 2016. The majority of these

changes codify existing practice, including restricting the use of social media, unless the full text of a document or announcement is published or a link to the full text is provided.

The form of responsibility statement states that, to the best of the knowledge and belief of the relevant directors (having taken all reasonable care to ensure that such is the case), the information contained in the document or advertisement is in accordance with the facts and, where appropriate, does not omit anything likely to affect the import of such information.

If a director is to be excluded from providing such a responsibility statement, the Panel must be consulted in advance and it will only give its consent to such an exclusion in exceptional circumstances. If such consent is given, the omission and the reasons for it must be stated in the relevant document. One circumstance where the Panel has given its consent to an exclusion in the past is where the offeror is a non-UK company with a board including non-executive directors who would not, under the laws of the relevant jurisdiction, usually expect to accept the same level of responsibility as the executive directors. However, the Panel will look at all circumstances on a case-by-case basis.

If the offeror is controlled, directly or indirectly, by another person or group, the Panel will generally require the directors of the ultimate controlling company also to take responsibility for the offer documentation.

In the case of a recommended offer, joint documents will often be published – in which case the practice is for the offeror directors to take responsibility for information relating to the offeror and the target directors to take responsibility for information relating to the target. In the case of a hostile offer, a responsibility statement may carve out any information about the other party which is simply compiled from published sources and the directors may take responsibility only for the correctness and fairness of its reproduction.

Notwithstanding the above, if the offeror is required to publish a prospectus or equivalent document, under the UKLA Rules both the offeror and its directors must take responsibility for all of the contents of that document. The directors of the target may also agree to take responsibility for those parts relating to the target, but this will be in addition to the responsibility of the offeror directors. In addition, any other person named as a proposed director of the offeror must also take responsibility for the prospectus – this means that, if the offeror has agreed to appoint target directors to its board following the offer (for example, in a merger of equals), those directors will be fixed with responsibility for the whole of any prospectus or equivalent document that is to be published, including all of the information about the offeror.

By taking responsibility for the offer documentation, directors may have common law liability for any inaccuracies or omissions. Directors also have statutory liability for

prospectuses, on the basis referred to above. Directors may also risk the commission of a criminal offence or of market abuse under FSMA if they allow false or misleading documentation to be published.

If the target is listed, it is also a criminal offence to breach the Code requirements prescribing the contents of the offer document and of the target's response (or "defence") document. The offence is committed by the bidder and/or its directors, or by the directors of the target, if they knew or were reckless as to whether the document failed to comply and also failed to take all reasonable steps to ensure that it did comply.

4. What are the main content requirements for these documents?

Documents published during an offer period must obviously comply with the general standards of care referred to in paragraph 3 above. In addition, the Code requires that target shareholders be given sufficient information to enable them to reach a properly informed decision on the offer and that no relevant information must be withheld.

Against the background of these general requirements, the Code sets out a number of specific content requirements for an offer (or scheme) document, a responding target company circular and any "follow-up" documents by either party. In a recommended offer, the offer (or scheme) document will actually comprise both the "offeror" document and the responding target circular combined and will therefore have to comply with both sets of content requirements. In a hostile offer, there will be a separate offer document and responding target circular.

In addition, the content requirements for prospectuses in the Prospectus Rules (forming part of the UKLA Rules) will be relevant both for prospectuses and equivalent documents, and if there is a class 1 circular the Listing Rules (also forming part of the UKLA Rules) will additionally be relevant.

4.1. Offer document/target response

The offer document will set out in detail the terms of the offer, the conditions attached to it and the acceptance procedure. It will also set out the offeror's arguments in support of the offer and an explanation of its plans for the target (which will be most important to target shareholders if the offer includes securities rather than cash).

In a recommended offer, it will also include a recommendation from the target board. In a hostile offer, the target board will publish its own circular, recommending that shareholders turn down the offer and setting out the target's arguments against the bid and in favour of independence and/or a higher offer.

The first section of a recommended offer document (or the "front end") will usually include:

- a section (usually in the form of a letter from the chairman of the offeror) summarising the offer and encouraging the target shareholders to accept it. If any price comparison is used in relation to the consideration being offered, the document must also contain a prominent comparison between the current value of the offer consideration and the market price of the target shares on the business day prior to commencement of the offer period;
- a letter from the chairman of the target stating whether the target directors intend to accept the offer (and, if so, which alternative they intend to elect for) and containing the target board's recommendation of the offer. This must also contain the substance of the independent financial advice that the target board has received – the usual wording being that the directors have been "so advised" that the terms of the offer are fair and reasonable. It must also contain the target board's views on the effects of implementation on the target's interests and on the offeror's strategic plans for the target, and particularly on the likely repercussions for employees, location of target places of business and target pension scheme(s) (see below). If the target board is split, this will have to be explained and any director who has a conflict (e.g. if he is involved with the offeror in a management buy-out situation) should also be excluded from the recommendation; and
- a formal letter from the offeror's financial adviser making the offer on behalf of the offeror. This will usually set out the principal terms of the offer, the consideration for the offer (including any "mix-and-match" elections or cash, loan note or securities alternatives), the background to and reasons for the offer, general information on the offeror and target, the way in which the offer is to be financed, the effect of full acceptance of the offer on the offeror's earnings, assets and liabilities, a summary of any offer-related arrangement or other agreement, arrangement or commitment permitted under, or excluded from, Rule 21.2 and any other important information. The Code also requires the offer document to cover a number of specific points on the offeror's intentions which will generally be covered in the financial adviser's letter (if not in the chairman's letter):
    - the offeror's intentions regarding the future business of the target company and an explanation of the long-term commercial justification for the offer;
    - (a) the offeror's intentions with regard to the continued employment of the employees and management of the target group, including any material change in the conditions of employment;
    - (b) the offeror's intentions regarding the target's pension scheme;
    - (c) the offeror's strategic plans for the target, and their likely repercussions on employment, the location of the target's places of business and the target's pension scheme(s);
    - (d) the offeror's intentions regarding any redeployment of any fixed assets of the target; and

- – the offeror's intentions regarding the maintenance of any existing trading facilities for the relevant securities of the target company.

If the offeror has no intention to make changes in relation to the matters described under bullet points (a) to (d) above, or if it considers that its strategic plans for the target company will have no repercussions on employment or the location of the target company's place of business, it must make a statement to that effect.

Assuming that the offeror will be "affected by" the offer, it will also need to state its intentions with regard to its own future business and comply with bullet points (a) and (c) above in relation to itself and its employees.

The detailed terms of the offer, and the majority of the information required by the Code, are usually contained in appendices set out after the front end (the "back end"). These will include:

- the conditions to which the offer is subject;
- further terms of the offer including:
  - detailed terms of any cash, loan note or securities alternatives; and
  - a standard set of terms explaining the procedures for accepting the offer, and setting out such things as the rights of withdrawal and the amended terms that may apply to overseas shareholders;
- a section referring to specified financial information on the offeror and the target company, which may now comprise only details of the website address where:
  - the relevant company's audited consolidated accounts for the last two financial years have been published; and
  - any interim statement and/or preliminary announcement made since the date of its last published audited accounts have been published,

and a statement that any such accounts, statement or announcement have been incorporated into the offer document by reference to that website in accordance with Rule 24.15;

- a section setting out the tax implications of the offer;
- a section containing general information on each of the offeror and the target to satisfy various Code requirements: this will contain, among other things, the following information (some of which – marked "O" – is required because the document is an offer document and some of which – marked "T" – is required because the document is also a target response document):
  - a summary of the principal contents of each material contract (not being entered into in the ordinary course of business) entered into in the two years prior to the commencement of the offer period by:
    - if securities are offered as consideration, the offeror's group (O); and
    - the target's group (T);

- details of any irrevocable commitment or letter of intent which the offeror (O) or the target (T) or any of their respective concert parties has procured in relation to relevant securities of the target (or, if appropriate, the offeror);
- details of any current ratings and outlooks publicly accorded to the offeror and target by rating agencies prior to the commencement of the offer period, any changes made to previous ratings or outlooks during the offer period and a summary of the reasons given, if any, for any such change (T/O);
- a description of any significant change in the financial or trading position which has occurred since the end of the last financial period for which either audited financial information or interim financial information has been published (or an appropriate negative statement) of:
  - if securities (other than loan notes) are offered as consideration, the offeror (O); and
  - the target (T);
- certain details about the consideration being offered (e.g. details of securities, details of financing arrangements etc.) (see paragraphs 4 and 5 of section 5 above) (O);
- a detailed section containing particulars of:
  - interests and dealings (over 12 months prior to the offer period and up to the latest practicable date prior to the publication of the document) in shares of the target and (where securities (other than loan notes) are offered as consideration) of the offeror, of each of its directors and concert parties, and any persons who have any arrangements with the offeror or any of its concert parties which may amount to an inducement to deal or refrain from dealing. Details of any short positions, stock borrowing or lending and financial collateral arrangements must also be included (O); and
  - interests and dealings (over the offer period and up to the latest practicable date prior to the publication of the document) in:
    - the offeror – of the target and its directors. Details of any short positions must also be disclosed (T); and
    - the target – of the target's directors, any pension fund or employee benefit trust or connected adviser of the target or any of the target's group companies or 20% associated companies; or any person controlling, controlled by or under the same control as any such connected adviser (except for an exempt principal or an exempt fund manager), and any persons who have any arrangement with the target or certain of its concert parties which may amount to an inducement to deal or refrain from dealing (T).

This section is often a difficult one to prepare, especially since it requires the disclosure of dealings by the parties' financial advisers and by other members of such advisers' groups. It is therefore important to start gathering the relevant information as early as possible;

- a section containing:
  - particulars of all service contracts of directors or proposed directors of the target and, if any contract has been entered into or amended within six months of the date of the document, details of the earlier contracts (if any) (T); and
  - where securities (other than loan notes) are offered as consideration, details of any change to the emoluments of the offeror directors as a result of the offer, or a negative statement (O);
- a section on the sources for material pieces of information in the document (e.g. if the target's performance is compared with its peers);
- a section containing an estimate of the aggregate fees and expenses expected to be incurred in connection with the offer, with separate estimates in relation to financial and corporate broking advice, legal advice, accounting advice, public relations advice, other professional services and other costs and expenses (T/O) as well as the financing arrangements (O). Where the fees and expenses payable within a particular category are likely to, or do, exceed the maximum previously disclosed by 10% or more, the offeror must promptly disclose to the Panel revised estimates/the final amount paid and the Panel may require public disclosure of such revised estimates/final amount where it considers it to be appropriate. Where any fee is variable between defined limits, a range must be given (setting out the expected maximum and minimum amounts payable) in respect of the aggregate fees and expenses and for each relevant category; however, where a fee arrangement provides for circumstances in which the fee will or may increase (e.g. where the offer is revised or a competitive situation arises), the higher amount will not be required to be disclosed unless and until such circumstances arise;
- a description of how the offer is being financed and the source(s) of the finance as well as details of the debt facilities or other instruments entered into in order to finance the offer and to refinance the existing debt or working capital facilities of the target company, including the amount of each facility or instrument, the repayment terms, interest rates (including any "step up" or other variation provided for), a summary of the key covenants, the names of the principal financing banks and, if applicable, details of the time by which the offeror will be required to refinance the acquisition facilities and the consequences of not doing so by that time (O);
- a summary of any agreement entered into with the target's employee representatives or pension scheme trustees in respect of any of the offeror's plans for the target (see above); and
- a list of the various documents that are required to be published on a website when the offer document is published (see the end of this paragraph for full details) (T/O).

There are also a number of other specific statements, or negative statements, that have to be included somewhere in the document. In particular, any financial adviser or other adviser who is quoted or whose reports are included in the document must give their consent to its issue.

If the offer document is actually a scheme document, there will be a number of additional "technical sections" required, including the terms of the scheme of arrangement itself and notices of shareholder meetings.

In addition, the target company must ensure that the scheme document sets out the expected timetable for the scheme, including the expected dates and times for the following: (i) the record date for any shareholder meeting; (ii) the latest date and time for the lodging of forms of proxy or elections for any alternative form of consideration; (iii) the date and time of any shareholder meetings; (iv) the date and time of any meetings of the shareholders of the offeror to be convened in connection with the offer; (v) the date of the court sanction hearing; (vi) the record date for the purposes of the scheme and/or any reduction of capital provided for by the scheme; (vii) the date and time of any proposed suspension in trading of shares or other securities of the target company; (viii) the date of any court hearing to confirm any reduction in capital provided for by the scheme; (ix) the effective date; (x) the date and time of the admission to trading of any offeror securities to be issued in connection with the scheme; and (xi) the long-stop date.

If the offeror is actually an unlisted subsidiary of another company, relevant information will generally have to be given in relation to the parent rather than (or as well as) the offeror. In addition, if the offeror is not itself a UK listed company, extra information may need to be given about any person(s) who have an interest in the offeror which would translate into an interest of 5% or more in the target if the offer is successful. The Panel must be consulted about the contents of this extra information.

If a separate opinion on the offer is received from the representatives of a target's employees and/or from its pension scheme trustees in good time before the target response is published, then it must be appended to the circular containing the target response (i.e. the offer document in a recommended offer). Where any such opinion is not received in good time the target company must promptly publish the opinion on a website and announce via a RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared wholly unconditional. The target must pay for the publication of any such opinion, and also for costs reasonably incurred by employee representatives (but not pension trustees) in obtaining advice required for the verification of information included in their opinion.

As set out above, the financial information required to be included in an offer document in relation to both the offeror and the target company may be incorporated by reference. Other information may also be incorporated in this manner if the Panel consents.

In addition, once the offer has been made, copies of the following documents must be published on a website from the time the offer document/offeree board circular is published until the end of the offer:

- memorandum and articles of association of the offeror or the target company or equivalent documents;
- any report, letter, valuation or other document any part of which is exhibited or referred to in any document published by or on behalf of the offeror or the target company (other than the service contracts of target company directors and any material contracts that are not entered into in connection with the offer);
- written consents of the financial advisers;
- any material contract entered into by an offeror or the target company, or any of their subsidiaries, in connection with the offer that is described in the offer document or offeree board circular;
- where a relevant profit forecast has been made: (i) the reports of the reporting accountants and of the financial advisers; and (ii) the letters giving the consent of the reporting accountants and of the financial advisers to the publication of the relevant document with the report in the form and context in which it is included or, if appropriate, to the continued use of the report in a subsequent document;
- where an asset valuation has been made: (i) the valuation certificate and associated report or schedule containing details of the aggregate valuation; and (ii) a letter stating that the valuer has given and not withdrawn his consent to the publication of his name in the relevant document;
- where the Panel has given consent to an aggregation of dealing disclosures in the offer documents, a full list of all dealings;
- all derivative contracts which in whole or in part have been disclosed in accordance with the requirements of the Code;
- any agreements or arrangements, or, if not reduced to writing, a memorandum of all the terms of such agreements or arrangements which relate to the circumstances in which the offeror may or may not invoke or seek to invoke a condition to its offer; and
- any agreement entered into between the offeror and the target company's employee representatives or the trustees of the target pension scheme(s) in relation to matters concerning the offeror's intentions regarding the impact on employment and the pension scheme(s).

4.2. Other documents

If an offeror also has to send a circular to its shareholders or publish a prospectus or an equivalent document, the content requirements for these are contained in the UKLA Rules. To a great extent, these are likely to overlap with the Code

requirements, or to extend Code requirements (e.g. details will also be required about offeror director service contracts). However, there are some separate content requirements which will need further work.

In particular, the documents will have to include a "working capital statement" which states that the combined offeror/target group will have sufficient working capital for its present requirements (i.e. for at least the next 12 months). If the offer is hostile, it may not be possible to make this statement due to lack of information. The UKLA will permit an offeror to state that it is not able to undertake appropriate procedures to support a working capital statement when taking the acquisition into account, provided that it explains why, it gives a 12-month working capital statement on an un-enlarged group basis and states that, if granted sufficient access before the close of the offer, it will produce a supplementary prospectus with an updated enlarged group working capital statement.

4.3. Prospectus or equivalent document?

If an offeror is issuing new securities as consideration and a prospectus is required, it will need to consider whether it would be better off electing to use an equivalent document. The advantage of a prospectus is that passport rights will definitely be available, enabling the document to be sent to the target's shareholders throughout the EU (provided the summary is translated where required); this is not so certain with an equivalent document.

However, the offeror would also be obliged under FSMA to issue a supplementary prospectus if a significant new factor, material mistake or inaccuracy came to light before the offer completes. If a supplementary prospectus were to be issued, then under FSMA a target shareholder who had agreed to subscribe for offeror shares on the basis of the prospectus would have the opportunity to withdraw. These withdrawal rights could theoretically go beyond those required by the Code, but the FCA's view is that they should not apply once the offeror shares have been unconditionally allotted.

The advantage of an equivalent document is that it would not be caught by the supplementary prospectus requirements and accompanying FSMA withdrawal rights; the disadvantage of using such a document is that, unlike a prospectus, it may not benefit from all passport rights.

However, given that the UKLA effectively regards an "equivalent document" as exactly akin to a prospectus, an offeror will in practice usually use a prospectus – and will almost invariably do so where it is using a scheme of arrangement, where the withdrawal rights issue is not relevant.

4.4. Material changes

Except with the consent of the Panel, following the publication of the initial offer document or offeree board circular and until the end of the offer period, the offeror or offeree company must promptly announce (i) any changes in information disclosed in any document or announcement published by it in connection with the offer which are material in the context of that document or announcement and (ii) any material new information which would have been required to have been disclosed in any previous document or announcement published during the offer period, had it been known at the time. If an announcement is required to be made, the Panel may require a document setting out this information to be sent to shareholders in the offeree company and persons with information rights and to be made available to the offeree company's employee representatives (or, if there are no representatives, the employees themselves) and to the trustees of the offeree company's pension scheme.

Any subsequent document published during the offer period, following the initial offer document or the offeree board circular, is required by the Code to give details of any material change in any information previously published by or on behalf of the relevant party during the offer period, or contain an appropriate negative statement. This will be particularly relevant in a hostile bid, where a number of documents are usually sent by both the offeror and the target during the offer period. Specific matters must be updated or an appropriate negative statement given (as appropriate), including:

- changes or additions to, or the replacement of, material contracts, irrevocable commitments, letters of intent or financing arrangements;
- interests and dealings;
- offeror directors' emoluments and changes to target directors' service contracts;
- all known significant changes in the financial or trading position of the offeror and/or target; and
- certain of the other specific statements required to be made in the offer document or target response document.

In any case, a supplementary prospectus is also required to be published in the case of a significant new factor, material mistake or inaccuracy relating to the information published in any original prospectus, and this requirement will not change.

5. Are any special reports required on particular types of information included in a document?

Special care must be taken over certain types of information which may be included in offer documentation; in particular, profit forecasts, quantified financial benefits statements and asset valuations.

The rules on profit forecasts and quantified financial benefits statements do not apply to a "cash offeror", in respect of which an announcement has been made that its offer is, or is likely to be, solely in cash (note that a non-convertible debt instrument – a loan note used to assist roll-over relief, for example – will normally be treated as cash).

In addition the Panel may grant a dispensation for an offeror if the Panel considers the requirements would be disproportionate or inappropriate.

5.1. Profit forecasts/estimates

A profit forecast is a form of words which expressly states, or by implication indicates, a figure, or a minimum or maximum figure, for the likely level of profits or losses for a particular period, or contains data from which a calculation of such a figure for profits or losses may be made, even if no particular figure is mentioned and the word "profit" is not used. A profit forecast which relates to part of a business only will also be treated as a profit forecast for these purposes (unless the Panel agrees otherwise), and a profit estimate is a profit forecast for a period which has expired and for which audited results have not yet been published. (A "profit ceiling" – which simply states a maximum figure for profits – may, however, be exempted from the relevant rules by the Panel, unless the offer is an MBO or made by a controlling shareholder of the target.)

Any profit forecast/estimate made is the responsibility of the relevant party and its directors, and must be "understandable", "reliable" and "comparable" on the basis set out in the Code.

The following table summarises the principal provisions of the Code in relation to profit forecasts:

<table>
<tr><td>Profit forecast published:</td><td>Non ordinary course profit forecast for a financial period ending 15 months or less from the date on which first published, except for MBOs</td><td>Ordinary course profit forecast for a financial period ending 15 months or less from the date on which first published, except for MBOs</td><td>Profit forecast (including ordinary course) for a financial period ending more than 15 months from date on which first published (including MBOs)</td></tr>
<tr><td rowspan="2">During the offer period</td><td>Rule 28.1(a)</td><td>Note 2(b) on Rule 28.1</td><td>Rule 28.2(a)</td></tr>
<tr><td>Document/announcement in which profit forecast is published must include:
(i) reports from reporting accountants; and
(ii) reports from financial adviser(s)</td><td>Document/announcement in which ordinary course profit forecast is published must:
(a) comply with Rule 28.1(a); or
(b) if all parties agree, include “directors’ confirmations”</td><td>Document/announcement in which profit forecast is published must include “directors’ confirmations”</td></tr>
<tr><td rowspan="2">Prior to the offer period but following approach</td><td>Rule 28.1(b)</td><td>Note 2(a) on Rule 28.1</td><td>Rule 28.2(a)/Rule 28.1(c)</td></tr>
<tr><td>Offer document/offeree board circular (or any earlier document announcement) must repeat profit forecast and include:
(i) reports from reporting accountants; and
(ii) reports from financial adviser(s)</td><td>Offer document/offeree board circular (or any earlier document announcement) must:
(a) repeat profit forecast and include “directors’ confirmations”; or
(b) explain why profit forecast not valid; or
(c) include a new profit forecast and comply with Rule 28.1(a)</td><td rowspan="3">Offer document/offeree board circular (or any earlier document announcement) must:
(a) repeat profit forecast and include “directors’ confirmations”; or
(b) explain why profit forecast not valid; or
(c) include a new profit forecast and include “directors’ confirmations”</td></tr>
<tr><td rowspan="2">Before an approach by the offeror</td><td colspan="2">Rule 28.1(c)</td></tr>
<tr><td colspan="2">Offer document/offeree board circular (or any earlier document announcement) must:
(a) repeat profit forecast and include “directors’ confirmations”; or
(b) explain why profit forecast not valid; or
(c) include a new profit forecast and comply with Rule 28.1(a)</td></tr>
</table>

Note: Profit forecasts for future periods - under Rule 28.2(b), if a profit forecast/ordinary course profit forecast is for a future year, the relevant document or announcement, or (as appropriate) the offer document or offeree board circular, must include a corresponding profit forecast for the current year and any intervening year, Rule 28 will apply to each such profit forecast.

There are also detailed rules about the use of analysts’ forecasts, and when these will or will not be treated as profit forecasts.

The UKLA Rules also contain similar rules relating to profit forecasts/estimates, which apply where the offeror is sending a prospectus, equivalent document or class 1 circular to its shareholders (although no accountants’ report will be required for a circular). These relate both to offeror and target company profit forecasts/estimates and may therefore mean that the offeror directors end up having to take responsibility for target company forecasts/estimates. However, where there is an outstanding profit forecast/estimate for either the offeror or the target that is no longer valid, it may be

possible for the offeror to instead add an explanation of why the forecast/estimate is no longer valid, and why reassessment of the forecast/estimate is not necessary. Again, the fact that the forecast/estimate was prepared for another purpose is not a valid reason.

Any subsequent documents published must confirm that the forecast/estimate remains valid and that the accountants/financial advisers have no objection to their reports continuing to apply.

5.2. Quantified financial benefits statement

A "quantified financial benefits statement" covers either (i) a statement by an offeror or target quantifying any expected financial benefits of a proposed offer; or (ii) a statement by the target quantifying any expected benefits from cost saving measures and/or any alternative transaction proposed to be implemented if the offer is withdrawn or lapses. Examples would include a statement that the offeror expects to make £X of savings per annum after the offer is completed, or a rival statement that the target could make £Y of savings per annum itself if the offer does not go through.

Where a quantified financial benefits statement is published by a party to an offer period (other than a cash offeror) during an offer period (or in the announcement that commences an offer period), that party must follow the same rules that apply to profit forecasts, and so must also publish the assumptions on which the statement is based, and reports from the reporting accountants and financial advisers.

In addition to this the statement must also:

- include the bases of the belief (including sources of information) supporting the statement;
- include an analysis, explanation and quantification of the constituent elements sufficient to enable the context and relative importance of those elements to be understood;
- include a base figure where any comparison is made with historical financial performance or with existing cost bases and structures;
- include details of all the material financial effects of the proposed transaction or other measures, and not only the financial benefits or other selected effects;
- include only the financial benefits which are expected to arise directly from the proposed transaction or other measures, and exclude any financial benefits which could be achieved independently;
- indicate when the financial benefits are expected to be realised;
- indicate whether the expected financial benefits will be recurring, clearly identifying any non-recurring benefit; and

– identify the non-recurring costs of realising the expected financial benefits, including an explanation if there is expected to be a material difference between the cash costs and the charge to the profit and loss account.

The Panel should be consulted if the target proposes to publish a statement with regard to future cost-saving measures after it has received an approach from a potential offeror with regard to a possible offer but prior to the commencement of an offer period, so that the Panel can consider whether the statement should also be treated as being subject to the above requirements.

Any subsequent documents published must confirm that the quantified financial benefits statement remains valid and that the accountants/financial advisers have no objection to their reports continuing to apply.

The UKLA Listing Rules also provide that an offeror with a premium listing that publishes a synergy statement in a class 1 circular must include various pieces of information, including a statement that the synergies are contingent on the proposed transaction and could not be achieved independently.

5.3. Asset valuations

An asset valuation includes not only a valuation of land or buildings but also other assets such as plant and equipment, stocks, contracts, intangible assets etc. In general a party to a hostile offer will not be able to make an asset valuation of the other party's assets, because it will not have sufficient information.

Where an asset valuation is given in connection with an offer, the basis of the valuation must be stated and it must be supported by the opinion of a named independent valuer. The opinion must, with the consent of the valuer, be included in the relevant document and the valuation certificate must be published on a website. Rules for the valuation of land, buildings, plant and equipment are included in the Code – if the valuation is of assets other than these, the Panel must be consulted. Any subsequent documents published must confirm that the asset valuation remains valid and that the independent valuer has confirmed that its opinion continues to apply.

SECTION ELEVEN: PUBLICITY

France

1. Are there any rules about publicity on bids?

All parties to an offer must comply with the general principles requiring a level playing field between competing bids, equal treatment and access to information for the shareholders of the companies involved, market transparency, integrity, fair trading and fair competition.

In addition, all information to be published during a pre-offer period (if any) and the offer period must be submitted to the AMF prior to publication. The AMF will then advise the relevant party if the form or content of the publicity is unacceptable.

Given the general principles, the parties and their advisers must be careful to limit public statements to information already published in press releases, AMF notices or the offer prospectus. Where new information is released that has not already been published in one of these forms, the AMF will require formal disclosure of the new information to all shareholders through a notice or press release.

2. How do these rules apply to: (a) advertisements; (b) telephone campaigns; (c) analysts; and (d) media interviews?

2.1. Advertisements

Parties to an offer in France may use advertisements as a tactic – especially in a hostile offer. However, any advertisement must first be submitted to the AMF, which may object to its publication if it is considered too aggressive.

Any advertisement must:

- state that an offer document has been or will be published and indicate how investors may obtain a copy of it;
- be clearly recognisable as an advertisement;

- not contain any indication likely to mislead the public or to discredit the offeror or the target;
- be consistent with the information contained in the press releases and the offer documents; and
- if required by the AMF, enclose a warning on certain exceptional characteristics of the offeror, the target or the target shares.

2.2. Telephone campaigns

Telephone campaigns have also been used in France by the parties to an offer. The script to be used for such a campaign must be pre-submitted to the AMF.

2.3. Analysts

Parties to an offer may speak to analysts – however, any slides used for presentation purposes should be submitted to the AMF before use. In addition, the parties must bear in mind the obligation to publish a subsequent press release if the presentation/Q&A session discloses "new" information.

2.4. Media interviews

The text of a media interview should also technically be submitted to the AMF before publication, although this may be difficult in practice. The parties must also bear in mind the obligation to publish a subsequent press release if the interview discloses "new" information.

Germany

1. Are there any rules about publicity on bids?

   There are no detailed rules about publicity in relation to an offer being made in Germany.

   However, price-sensitive inside information about the offeror, the target and/or the offer must not be provided on a limited basis to interested parties (e.g. the media/target shareholders) unless it is first, or simultaneously, published by way of a public announcement made through an electronic information system and over the internet.

2. How do these rules apply to: (a) advertisements; (b) telephone campaigns; (c) analysts; and (d) media interviews?

   See paragraph 1 above. The general principle also applies to media and the press. In addition, the FFSA has the power to prohibit advertising by the offeror/target during an offer in order to counter "abusive advertising". A prohibition could be made against specified methods of advertising (e.g. TV advertisements, telephone campaigns), or against the contents of particular advertising campaigns. There has, so far, been no experience of how the FFSA will apply this provision in practice.

Italy

1. Are there any rules about publicity on bids?

During the period from the making of the initial announcement to CONSOB to the payment of the offer consideration, there is a general “transparency rule” which applies to takeover offers in Italy. The rule provides that neither the offeror nor the target (nor other members of their groups, their directors, auditors or general managers, or any shareholders who are party to a shareholder agreement) may make any statement about the offer except in the form of an announcement to the market (sent to at least two press agencies or – if the target is listed – published by way of a market communication and sent to the Italian Stock Exchange) and to CONSOB. (All announcements must also be published on the offeror’s/target’s website.)

In addition, any announcement which is intended to promote or deter an offer must make its intention clear. Such announcements must be clear, fair and justified, consistent with information already disclosed and not misleading as to the details of the offer and the securities involved.

In addition, during such period, CONSOB also has the power to require such parties to publish additional information if it considers it necessary for the public to be properly informed.

2. How do these rules apply to: (a) advertisements; (b) telephone campaigns; (c) analysts; and (d) media interviews?

See paragraph 1 above. In addition, however, CONSOB has indicated that:

- marketing enquiries (e.g. calls to shareholders enquiring about their intentions) are allowed, provided the requirements in paragraph 1 are met and the enquiry (i) is worded in a neutral manner; and (ii) does not influence the decision-making process of the parties involved; and
- TV advertisements relating to the offer should be avoided, since the nature of such advertisements means that it is difficult to ensure their neutrality.

The Netherlands

1. Are there any rules about publicity on bids?

Pursuant to the Offer Rules, any public announcement by the offeror or the target company in relation to a public offer must be made promptly by press release. In the event of listings in other EEA states besides the Netherlands, the press release must be issued simultaneously in all the relevant states (see sections 8 and 9 for details).

Under the Offer Rules, neither the offeror nor the target company may furnish information to some target shareholders which is not also made available to all target shareholders. This means that any publicity in relation to an offer must not provide further information than has already been provided in any public document (including any public announcement relating to the offer). If new information in respect of the offer, the offeror or the target company is released that has not already been disclosed to the public, the AFM may require formal disclosure of the new information to all shareholders through a public announcement.

Regulated information must be communicated in a way which makes it clear that the information is regulated information and clearly identifies the issuer concerned, the subject of the information and the time and date of the press release. The information may not be accompanied by advertising if this could be misleading.

Press releases used to be pre-approved by the AFM under the previous offer rules, but under the Offer Rules they are no longer reviewed or pre-approved by the AFM. Any public announcement should be submitted to the AFM simultaneously with its publication. If the press release is made pursuant to the Offer Rules, then the press release should include a reference to the relevant provisions of those rules. Each public announcement regarding the offer should also refer to the approved offer document (if an offer document has already been approved and published).

The press release should also refer to the issuer's website where the announcement must be made available in full. Each company must keep such information available on its website for at least one year.

2. How do these rules apply to: (a) advertisements; (b) telephone campaigns; (c) analysts; and (d) media interviews?

See paragraph 1 above. Information released by a party to an offer may not be accompanied by advertising if this could be misleading. Telephone campaigns are not common practice in the Netherlands.

The disclosures made by the parties in their press releases, offer document and position paper should be the basis for all further communication to press/analysts and major institutional shareholders, in order to ensure equality of information in the market.

To the extent that securities are being offered as consideration, specific rules apply to the prospectus issued for such securities and any investments and analysts' meetings in connection with those securities. The offeror must ensure that communications made in connection with those securities do not include price-sensitive information and do not extend beyond the contents of the prospectus.

Spain

1. Are there any rules about publicity on bids?

   There are no detailed rules about publicity in relation to an offer being made in Spain, other than those relating to the announcement of the offer (see paragraph 1 of section 8 above).

   The only publicity contemplated by the takeover rules is the initial announcement of the offer and the publication of the official announcement once the offer has been authorised. The latter announcement must have been pre-reviewed by the CNMV. The CNMV has traditionally taken the view that no other publicity is allowed.

2. How do these rules apply to: (a) advertisements; (b) telephone campaigns; (c) analysts; and (d) media interviews?

   See paragraph 1 above. There is no restriction on talking to target shareholders – however, the principle of equal information for all target shareholders means that individual shareholders must not be given more information than has already been made generally available.

United Kingdom

1. Are there any rules about publicity on bids?

It is a requirement of the Code that neither the offeror nor the target may furnish information to some target shareholders (including persons with information rights) which is not also made available to all target shareholders, as nearly as possible at the same time and in the same manner. This means that publicity in relation to an offer must only repeat information which has already been published in a circular, or at least has been included in a general press announcement. (Release of information solely through a website will not count as making information available to all shareholders at the same time.)

The Code contains a number of detailed Rules designed to support this requirement. The Panel regards each party's financial advisers as being responsible for guiding their clients and any public relations advisers with respect to these Rules. It is therefore important that the financial advisers lay down ground rules for their clients at an early stage.

In particular, during an offer period, the offeror and/or the target may only meet with shareholders (of either company), other persons interested in securities of the target or the offeror, or with analysts, brokers or other investment managers or advisers, if:

– no material new information or significant new opinions are forthcoming; and
– a representative of the party's financial adviser/corporate broker attends the meeting and confirms to the Panel, in writing prior to 12 noon on the next business day, that the requirements of (a) were complied with.

If any material new information or significant new opinion does emerge at the meeting, it (or a retraction) must be immediately published to all target shareholders and persons with information rights.

If such a meeting is held prior to an offer period but relating to an offer, material information and significant opinions expressed at the meeting must be included in the subsequent Rule 2.7 announcement.

In addition, where information is being given to banks involved in the syndication of loans by the offeror in order to finance an offer, those banks must enter into a confidentiality agreement which confirms that an appropriate information barrier has been set up between the banking department and any equity department that might hold shares in the target (or alternatively must confirm that they and their groups do not, and will not, hold target shares during the offer).

The Code has been amended, however, so as to make it clear that there is no prohibition on the passing of information in confidence by the offeror or the target company to their employee representatives, employees or pension scheme trustees where they are acting in their capacity as such (rather than in their capacity as shareholders). The restrictions in relation to meetings (as outlined above) do not normally apply to meetings with employee representatives or employees in their capacity as such, but the Panel should be consulted if any employees are interested in a significant number of shares.

2. How do these rules apply to: (a) advertisements; (b) telephone campaigns; (c) analysts; and (d) media interviews?

2.1. Advertisements

The Code effectively prohibits all advertisements being made in connection with an offer, except for advertisements which fall within certain very narrow categories (such as reminders about closing dates). In addition, while product advertisements not relating to the offer can simply be assumed to be cleared for publication, "corporate image" advertisements (even if not relating to an offer) and advertisements comprising preliminary/interim results must (along with any other type of advertisement) be pre-cleared with the Panel. This can obviously cause difficult practical issues for the parties involved – advertisements include TV and radio advertisements, but are not generally taken to include press releases.

2.2. Telephone campaigns

Except with the consent of the Panel, campaigns in which shareholders or other persons interested in shares are contacted by telephone may be conducted only by staff of the relevant party's financial adviser. (If this is impossible, the Panel may consent to the use of other callers provided that the operation is supervised by the financial adviser and the callers stick solely to a script approved by the Panel.) Only previously published information which remains accurate and not misleading at the time it is quoted may be used in telephone campaigns. Shareholders and other persons interested in shares must not be put under pressure and must be encouraged to consult their professional advisers.

In relation to telephone campaigns, the restrictions on financial promotions contained in section 21 of FSMA must also be followed (which may further restrict the identity of those allowed to make the calls) and, where relevant, the provisions of the FCA's conduct of business rules.

2.3. Analysts

Meetings with analysts must be policed in the same way as meetings with shareholders – see paragraph 1 above.

2.4. Media interviews

The Code requires that parties involved in an offer must take particular care not to release new material information in interviews or discussions with the media. The Code points out that control of any possible abuse lies largely with the person being interviewed. In particular, the Code specifically states that parties should, if interviewed on radio, television or any other media, seek to ensure that the sequence of the interview is not broken by the insertion of comments or observations by others not made during the course of the interview. Joint interviews or public confrontation between representatives of the offeror and the target, or between competing offerors, should be avoided.

SECTION TWELVE: MINORITY SHAREHOLDERS/SQUEEZE-OUT PROCEDURES

France

1. How can an offeror buy out minority shareholdings?

   1.1. Compulsory Acquisition

   An offeror (whether French or not) has a statutory right to acquire minority shareholdings on a compulsory basis (the *retrait obligatoire*) if the offeror owns at least 95% of the share capital and voting rights of a listed target.

   The squeeze-out procedure can be implemented within three months following the end of the offer period of any type of bid which has resulted in the offeror holding at least 95% of the share capital or voting rights of the target, or in any case following a buy-out offer (*offre publique de retrait*).

   Squeeze-out after offer (other than buy-out offer)

   When an offer (other than a buy-out offer) is filed with the AMF, the offeror must specify whether the offeror reserves the right to elect to apply the procedure. If it does, it must notify the AMF of its decision to proceed on this basis, within three months of the closing of the offer, through the presenting bank, which will again confirm that it guarantees the irrevocable nature of the commitments of the offeror.

   No AMF clearance is required if the price offered is equal to the cash consideration offered in the previous offer and (i) the squeeze-out procedure follows a "standard" offer procedure; or (ii) the AMF has been provided with a valuation of the securities of the target, carried out by an independent expert and delivered to the target board in the context of the previous offer. The valuation must in this case be based on objective methods usually applied to asset disposals, taking into account the value of the target company's assets, its earnings, its subsidiaries (if any), its business prospects and the market price of its securities, each according to an

appropriate weighting. In practice, the result is effectively the same as would be achieved under the “multi-criteria approach” referred to in section 5 above.

Where no AMF clearance is required, it will simply publish its decision to implement the squeeze-out procedure and the timing of the process.

In all other cases, the offeror must file a squeeze-out prospectus with the AMF that the AMF will review and clear. The offeror is required to provide a valuation of the securities of the target company, carried out by an independent expert and delivered to the target board. Such valuation must also be carried out using the methods described above.

When the AMF is required to review the squeeze-out procedure, the price offered cannot be lower than the price offered in the previous offer – and where events have occurred since the previous offer so as to increase the value of the target securities, the price paid in the squeeze-out may have to be higher than the original offer price. The consideration must take the same form as the consideration offered in the previous bid or must be in cash. In any event, the offer must include a cash alternative.

The squeeze out procedure is then implemented by the AMF publishing its decision on the procedure, setting out the conditions for implementation and the date on which the compulsory acquisition will take effect. There must be a period of at least 10 trading days between the decision and the effective date.

Squeeze-out after buy-out offer

When a buy-out offer is filed with the AMF, the offeror must specify whether the squeeze-out procedure will be implemented automatically when the offer closes, or whether the offeror reserves the right to elect whether or not to apply the procedure. If the offeror reserves the right to elect, it must notify the AMF of its decision within 10 trading days of the closing of the buy-out offer, and the AMF will then publish the decision.

If the procedure is to be automatic, the notice announcing the offer will include the AMF decision and the effective date.

On the effective date, custodian and account-keeping institutions will transfer any target shares not tendered in the offer into the name of the offeror. The offeror pays the corresponding consideration into a reserved account opened for the purpose on behalf of the minority shareholders.

Minority shareholders may challenge the price offered in a buy-out/squeeze-out before the Paris Court of Appeal.

See also paragraph 2 of section 2 above for the circumstances triggering the filing of a buy-out offer.

1.2. Merger

A merger of the target company into the offeror is legally possible if both companies are French or the offeror is incorporated in another Member State in which the Cross-Border Merger Directive or the European Company Statute has been implemented (see paragraph 2 of section 2 above). The minority shareholders of the target would thereby become shareholders in the offeror.

However, French law prevents companies from financing the acquisition of their own shares. As a result, a merger completed within a very short timeframe after the closing of an offer could be challenged if the offeror has taken on debt leverage to make the acquisition.

2. Are there any other relevant issues relating to minority shareholders – e.g. restrictions on consideration payable, issues about de-listing etc.?

There is no restriction upon an offeror acquiring shares from minority shareholders at any price following the closing of a tender offer, and thereby seeking to reach the 95% mark. However, the price paid will have an effect on the required price for any subsequent buy-out offer/squeeze-out procedure.

The target shares that are the subject of a squeeze-out will automatically be de-listed either on the day on which the AMF publishes its decision on the squeeze-out procedure or, if the procedure is to follow the buy-out offer automatically, on the day after the buy-out offer closes.

Germany

1. How can an offeror buy out minority shareholdings?

1.1. Compulsory Acquisition – Takeovers

In order to implement the Takeover Directive, the Takeover Act now provides for a specific squeeze-out procedure which may be used following a successful takeover bid, in addition to the squeeze-out procedure available under the Stock Corporation Act (see paragraph 1.2 below).

The Takeover Act provides that, following a takeover bid or a mandatory bid, if the offeror holds at least 95% of the voting shares, it may apply for the transfer to it of the remaining voting shares by means of a court order, in return for the payment of "equitable compensation". This squeeze-out right only applies in the event of a preceding takeover bid or mandatory bid, but not in the case of a voluntary bid that is not a takeover bid. The squeeze-out right under the Takeover Act will therefore not apply if the 95% threshold has only been reached after a voluntary bid where the offeror already had 30% control before making the offer (e.g. because of a previous takeover bid).

For the squeeze-out procedure to apply, it is not necessary for the offeror to have reached the 95% threshold through acceptances of the takeover bid; shares that have been acquired by the offeror outside the offer (e.g. by individual purchases from shareholders) will also count towards the 95% threshold, subject to the following timing issues. The Federal Supreme Court has held that any individual purchases must have been made at the latest within the two weeks' additional acceptance period in order for the shares acquired to count towards the 95% threshold.

In determining the 95% majority, the holdings of entities that are controlled by the offeror or that are held by third parties for the account of the offeror (or for the account of a company controlled by the offeror) will also be included. Shares in the target held by the target itself will be ignored for the purposes of determining the 95% majority.

If the offeror holds 95% of all voting and non-voting shares of the company, it may also apply for the mandatory transfer of any remaining non-voting preference shares of the target.

The application for the transfer by court order has to be filed within three months after the end of the acceptance period with the regional court of Frankfurt am Main (which has exclusive jurisdiction to hear such applications).

The type of compensation must correspond to the consideration offered in the takeover offer or mandatory offer (i.e. if the consideration in the takeover bid consisted of shares, the compensation for the squeeze-out must also be offered in the form of the same shares); provided, however, that the offeror must always offer a cash alternative (the sufficiency of which must be calculated in accordance with the same provisions of the Regulation that apply in assessing the cash consideration offered in takeover bids).

If the offeror has acquired an amount of shares equal to at least 90% of the shares that were subject to the offer, in this case solely as a result of the offer, the consideration available in the offer is deemed "fair" for the purpose of the squeeze-out. It is not clear whether the deemed fairness of this consideration can be disproved by the minority shareholders (e.g. by producing expert opinions confirming a higher "fair" value of the shares). However, the Higher Regional Court of Frankfurt has confirmed that the consideration offered in a successful takeover bid will be regarded as "fair" unless it can be shown that the bidding process was subject to significant flaws, resulting in a distortion of the market. The court did not specify any criteria to be used to determine market distortion.

On the other hand, if the offeror acquires less than 90% of the shares subject to the takeover bid through acceptances of the offer, the Takeover Act does not provide for any rules to determine the adequacy of the squeeze-out compensation at all, and there is a dispute over whether the fairness of the compensation may, in these cases, be established by expert valuation. In the absence of a court decision on the question, the squeeze-out mechanism offered by the Takeover Act is not very useful in practice, as it is very unusual for there to be 90% acceptances of an offer (even if the offeror subsequently achieves a 95% level of ownership). For that reason, the specific squeeze-out procedure provided under the Takeover Act has so far only very rarely been used in practice.

The court order to effect the squeeze-out is implemented through registration of the order in the Commercial Register. The squeeze-out becomes effective upon registration.

If the conditions for the offeror to apply for a squeeze-out by court order are met (i.e. if the offeror holds 95% of the voting shares or of all voting/non-voting shares, as the case may be), the remaining minority shareholders also have a right to accept the offer even if the original acceptance period of the offer has already expired by that time (a "sell-out" right). The sell-out right can be exercised by each shareholder individually. Contrary to the squeeze-out rules, however, the offeror has no duty to offer cash consideration in such circumstances, if the original offer only provided for a share consideration.

1.2. Compulsory Acquisition – General

Under the Stock Corporation Act, any majority shareholder has a statutory right to acquire minority shareholdings on a compulsory basis if it holds not less than 95% of the share capital of a German stock corporation (whether listed or not). However, the minority shareholders do not have a right to be bought out by a 95% shareholder under the Stock Corporation Act, only under the sell-out procedure under the Takeover Act (described above).

This squeeze-out right applies regardless of the manner in which the 95% majority has been acquired. Therefore, exercise of the general squeeze-out right does not have to follow an offer and an offeror could get to the 95% mark by acquiring additional shares from target shareholders after its original offer has closed and after the three-month period following the closing of the offer has expired.

The shareholders of the target must approve the squeeze-out by a majority of the votes cast at a shareholder meeting. The offeror is allowed to vote on such a resolution. The notice of the shareholders' meeting must be published about six weeks in advance of the meeting.

Prior to calling the meeting, the offeror must prepare a detailed written report demonstrating that the pre-conditions for a squeeze-out have been met (i.e. that the offeror owns 95% of the target) and detailing the evaluation methods that have been used to determine the cash compensation to be paid to the minority shareholders. This report must include an auditor's fairness opinion on the appropriateness of the evaluation methods and the adequacy of the compensation. The auditor concerned is appointed by the court on the application of the offeror.

The compensation in a squeeze-out under the Stock Corporation Act bears no relation to the price paid in any preceding offer, and could be higher or lower than that price. It must always be in cash, and must be "adequate", although the Stock Corporation Act does not prescribe the rules for determining its "adequacy".

The traditional method for determining adequate compensation is the discounted future earnings analysis. However, the price should also not be below the "current market price" of the target's shares. The relevant current market price is calculated as the volume-weighted average price over the three months prior to announcing the squeeze-out.

Once the compensation is determined, and prior to the shareholder meeting, the offeror must produce to the management board of the target an unconditional guarantee of the payment of the minority compensation by the offeror, provided by an institution permitted to engage in the banking business in Germany.

After the holding of the shareholder meeting, the squeeze-out is implemented by providing a copy of the resolution to the Commercial Register for registration. The transfer of the shares becomes effective upon registration in the Commercial Register and the offeror must pay the consideration to the target shareholders. The consideration is credited directly to the target shareholders via their depository banks. The offeror must also pay interest at a rate of 5% above base rate on the consideration from the date of publication of the registration to the date of such payment.

A minority shareholder who has attended the shareholder meeting has a right to apply to the German courts, within one month from the date of the meeting, to set aside the resolution on the grounds of a violation of the law (e.g. failing to answer shareholder questions during the shareholder meeting) or the target's articles. Upon such a filing, the register judge is prohibited from registering the shareholders' resolution in the commercial register until the proceedings are resolved. This kind of filing therefore has significant blocking potential.

Such a prohibition can only be lifted upon an application of the offeror to the court. The court will then issue an injunctive order lifting the prohibition if the action to "set aside" the resolution is obviously without merits, or if the interest of the offeror in effecting the squeeze-out takes precedence in the opinion of the court over the interest of the plaintiff in seeking to set aside the resolution.

A minority shareholder arguing that the compensation is inadequate will not be heard in an action to "set aside", but he can commence a special court appraisal proceeding as to whether the compensation paid is "adequate". This is a more common action and, although it cannot delay the execution of the squeeze-out itself, it may cause uncertainty (and expense) for the offeror for some years – the average length of such proceedings is about seven years and the minority shareholders generally do not have to bear the cost.

While a compulsory acquisition under the Stock Corporation Act carries additional risks of court challenges, it has the advantage that it will be available for an unlimited period of time following a successful offer.

1.3. Merger

Both an upstream merger of the target company into the offeror and a downstream merger of the offeror into the target company are legally possible (see paragraph 2 of section 2 above). The minority shareholders of the transferring company would thereby become shareholders of the surviving company (i.e. in an upstream merger, the offeror). A merger is commonly effected as a last step in the corporate restructuring process following a takeover (after a squeeze-out); most frequently in leveraged buy-outs where the merger between the acquisition

company and the target results in a consolidation of acquisition debt and target assets.

An upstream merger of the target company can be combined with a squeeze-out. In this case the squeeze-out of the target company's minority shareholders and the merger become effective simultaneously. An advantage of this procedure vis-à-vis a "regular" squeeze-out under the German Stock Corporation Act is that such a merger-related squeeze-out only requires a holding of 90% (or more) of the share capital of a German stock corporation (instead of 95%). However, a prerequisite is that the offeror is also a German stock corporation.

2. Are there any other relevant issues relating to minority shareholders – e.g. restrictions on consideration payable, issues about de-listing etc.?

There are generally no restrictions on the price to be offered to minority shareholders in order to get up to the 95% mark if, following an offer, an offeror owns less than 95% of the target share capital. However, if the offeror acquires target shares off-market at a price above the offer price within the first year after the end of the offer period, the offeror is under an obligation to pay an amount equal to the excess to those target shareholders who accepted the offer.

Until an offeror has acquired 100% of the share capital, its influence over the target will continue to be limited unless it enters into a "domination agreement" (*Beherrschungsvertrag*) with the target. A domination agreement allows a shareholder to give direct instructions to the management board of a company. It must be approved by a 75% majority at a shareholder meeting of the target. The offeror may vote its shares at the meeting, although the outcome could be challenged by any minority shareholder.

Execution of a domination agreement then requires the dominating shareholder (i.e. the offeror) to make a purchase offer to the minority shareholders, and the compensation to be paid must again be "adequate". The methods for determining an adequate price are the same as in the case of the general squeeze-out procedure (see paragraph 1.2 above). In practice, the execution of a domination agreement is frequently used if the thresholds to initiate a squeeze-out procedure have not been reached, in order to give the offeror control of the management of the target.

After a squeeze-out has become effective upon registration in the Commercial Register, the stock exchange where the target shares are admitted to trading will, within a few days, automatically cancel their quotation. The stock exchange will then revoke the target's admission to the market, either upon application of the target company or ex officio.

Alternatively, if the offeror does not own 100% of the shares of the target company (i.e. has been unable to use the squeeze-out procedure), the target company/issuer can file an application for de-listing with the respective stock exchange. Shareholder approval is not required for a de-listing. However, the relevant provisions of the German Stock Exchange Act require that a tender offer is made to all minority shareholders. The offer may not be subject to any conditions. The offer document must make reference to the intended de-listing and must be published prior to submitting the application for de-listing. A de-listing without a tender offer is only possible if the shares are still expected to be listed on a domestic regulated market or organised market in the EU.

The consideration paid to the minority shareholders under the offer in connection with a de-listing must not be lower than the weighted average stock price over the six months prior to publication of the intent to launch the offer. However, the fair value of the issuer has to be used to determine the consideration to be offered if (i) the issuer did not properly inform the capital market about any inside information, (ii) the issuer or offeror violated rules on market manipulation or (iii) the stock price was not properly fixed in the relevant six-month period.

If these preconditions are met, the board of admission of the stock exchange may (but is under no obligation to) revoke the admission to trading. The stock exchange will take into account any overriding investor protection concerns on the delisting.

Italy

1. How can an offeror buy out minority shareholdings?

1.1. Squeeze-out

Under the CFA, an offeror has a statutory "squeeze-out" right to acquire minority shareholdings where, following an offer for 100% of the voting share capital of a target company, it comes to own a shareholding equal to at least 95% of the Voting Securities of the target. This right can only be exercised if the intention to do so was set out in the offer document. Where the target company has different classes of Voting Securities, the rights of the offeror can only be exercised for each class of securities in which the 95% threshold has been reached.

The squeeze-out right must be exercised within three months from the closing of the offer. The transfer of the outstanding target shares will become effective when the target receives a notice confirming that the purchase price has been deposited in a separate bank account set up for the purpose. Minority shareholders may access the account if they provide the relevant proof of ownership of their target shares – if the proceeds are not claimed within five years, the consideration will be returned to the offeror.

The price is determined according to the same criteria for the sell-out right (see below). In particular, where the 95% threshold has been reached as a consequence of an offer to purchase 100% of the Voting Securities, the price for the squeeze-out will be equal to the price of the previous offer. However, if the 95% threshold has been reached as a consequence of a voluntary offer, this pricing rule applies only if acceptances were received in respect of at least 90% of the Voting Securities which were subject to the offer. Otherwise, the price is fixed by CONSOB taking into account, inter alia: (i) the average weighted market price of the relevant Voting Securities over the six-month period preceding either the announcement of the previous offer to CONSOB or to the public, or – where the sell-out right has not been triggered by a prior offer – the purchase that has triggered the sell-out right; and/or (ii) the consideration offered under the terms of the offer by means of which the 95% threshold has been reached.

1.2. Sell-out

Under the CFA, minority shareholders in the target have the right to sell their Voting Securities to the majority shareholder in either of the following scenarios:

– where, following an offer for 100% of the target's Voting Securities, the offeror comes to own 95% or more of the Voting Securities in the target; or

– where any person comes to own more than 90% of the target's Voting Securities which are listed on a regulated market, unless within 90 days such person restores into public hands a sufficient proportion of the target's Voting Securities to ensure regular trading in the Voting Securities which that person does not own.

Where the target company has issued several classes of Voting Securities, the sell-out right arises only in respect of the class (or classes) of Voting Securities for which the 90% or 95% threshold has been reached.

Where the 95% or 90% thresholds have been reached as a consequence of an offer to purchase 100% of the Voting Securities, the price for the sell-out will be equal to the price of the previous offer. However, if the 95% or 90% threshold has been reached as a consequence of a voluntary offer (i.e. not a mandatory bid), this pricing rule applies only if acceptances were received in respect of at least 90% of the Voting Securities which were subject to the offer. Otherwise, the price is fixed by CONSOB taking into account, inter alia: (i) the average weighted market price of the relevant Voting Securities over the six-month period preceding either the announcement of the previous offer to CONSOB or to the public, or – where the sell – out right has not been triggered by a prior offer – the purchase that has triggered the sell-out right; and/or (ii) the consideration offered under the terms of the offer by means of which the 95% or 90% threshold has been reached.

Where the sell-out right is triggered by the offeror owning 95%+ of the target Voting Securities, or where the 90% threshold has been crossed as a consequence of an offer for 100% of the share capital, the consideration will have the same form (i.e. cash or shares) as in the previous offer, but target shareholders will also have the right to require a cash alternative established by CONSOB to be made available by the offeror.

2. Are there any other relevant issues relating to minority shareholders – e.g. restrictions on consideration payable, issues about de-listing etc.?

There are no restrictions on the price at which securities can be bought from minority shareholders after an offer is complete. However, the "best price rule" (see paragraph 2.1 of section 3 above) applies for six months following the settlement of an offer. If an offeror or its concert parties acquire Voting Securities (or derivative instruments granting a long position over Voting Securities) representing more than 0.1% of the class of securities for which the offer was made during that period, then target shareholders who accepted the previous offer will need to be paid "top up" consideration to match the higher price. The offeror will be required to publish a press release giving details of this process.

If sell-out rights arise, the target will be automatically de-listed with effect from the trading day following the end of the sell-out period.

The Netherlands

1. How can an offeror buy out minority shareholdings?

The offeror will generally state explicitly in its offer document that it reserves the right to use any of the methods described below if it has not obtained 100% of the shares as a result of a public offer. The most common route for an offeror holding 95% or more of the target shares is to initiate squeeze-out proceedings.

In order to ensure that the rights and interests of minority shareholders are properly observed, recent case law provides that the process must be transparent, that independent directors must be involved in the decision-making and that the process must occur on arm's length terms. If there is a potential conflict of interest, the non-independent members of the boards of the target company should abstain from any discussions and from the decision-making in respect of any proposed transaction which may affect the rights of the minority shareholders.

Recent Dutch market practice has seen the "pre-wired" ("pre-agreed") legal restructurings become increasingly common. Such post-closing restructurings are pre-agreed between offeror and target as part of their overall-contractual arrangements on the transaction (in a Merger Protocol). In those cases the offeror is willing to lower the acceptance level to typically 80%, thus increasing deal certainty. In return, the target company commits itself to a post-closing legal restructuring in case the 95% squeeze out threshold described below is not reached. These pre-wired restructurings for instance take the form of a legal merger, an asset sale followed by liquidation and payment of cash proceeds to the remaining minority or a (cross border) merger.

Although generally perceived as an acceptable transaction structure to increase deal certainty, these pre-wired structures have never fully been tested in court. Since they can be perceived as an aggressive structure in order to squeeze out minority shareholders below the statutory limit of 95%, pre-wired structures may carry the risk of shareholder litigation.

1.1. Squeeze-out proceedings

In general, a shareholder (or shareholders acting in concert) holding at least 95% of the share capital in a Dutch public company may at any time "squeeze-out" the minority shareholders, which means that they can require the minority shareholders to transfer their minority stake to the majority shareholder(s), by obtaining a court judgment of the Enterprise Chamber.

An alternative squeeze-out procedure applies to cases where the majority shareholder controls at least 95% of the voting rights and holds at least 95% of the share capital in the target company as a result of a public offer. The basic principle

in these alternative squeeze-out proceedings is that, if 90% of the shares have been acquired in a public offer, the consideration offered in such offer will be deemed an equitable price. However, the Enterprise Chamber still has the power to appoint between one and three experts in order to assess whether the offered consideration is indeed equitable.

The claim for a squeeze-out (whether the standard squeeze-out proceedings or the alternative squeeze-out proceedings) needs to be filed with the Enterprise Chamber within three months after the end of the offer period. The process is a court process, in which shareholder interest groups and other activist shareholders may become involved. The process will generally take between one to two years to complete.

1.2. Statutory merger

If the offeror has not acquired 95% or more of the share capital and the voting rights in a target company, or if it has decided not to initiate squeeze-out proceedings, it may effect a statutory merger of the target company (as disappearing company) and the offeror (as acquiring company).

Alternatively, in the event of a triangular merger, the target company is merged (as disappearing company) into a member of the offeror's group (as acquiring company) and the shareholders of the target company will become shareholders of another member of that group. If, as a result of a triangular merger, the majority shareholder of the acquiring entity (i.e. the offeror) will hold 95% or more of the shares of the group member in which the target shareholders receive shares, the majority shareholder may initiate squeeze-out proceedings in relation to that group entity.

Any merger requires, as a minimum, the approval of the shareholders of the target company and, if the offeror is a Dutch public company, the offeror. The necessary approval is either (i) if the shareholders at the relevant meeting hold or represent, in aggregate, 50% or more of the company's share capital, a majority vote at that meeting; or (ii) if the shareholders at the meeting hold or represent, in aggregate, less than 50% of the company's share capital, a two-thirds majority of the votes at that meeting. Furthermore, under the articles of association of many listed companies, a proposal for a legal merger may only be made to the target company shareholders by the boards of the target company (i.e. it cannot be proposed directly to the target company shareholders by the offeror or by any other shareholder of the target company).

1.3. Other possible measures

Other possible ways to obtain 100% of the shares in the target company or otherwise obtain full ownership of the target company's business include a liquidation of the target company, a demerger or a sale of all or substantially all of the assets of the target company which may be followed by a distribution of the proceeds to the shareholders of the target company.

2. Are there any other relevant issues relating to minority shareholders – e.g. restrictions on consideration payable, issues about de-listing etc.?

2.1. Buy-out right

The minority shareholders who did not tender their shares in the offer are entitled to have their shares bought by the offeror if, after a successful offer in which the offeror has acquired 95% or more of the share capital and at least 95% of the voting rights, the offeror does not initiate squeeze-out proceedings itself. The same principles apply to the price as for the alternative squeeze-out procedure, and the claim needs to be filed with the Enterprise Chamber within three months after the end of the offer period.

2.2. Consideration

For a period of one year after the offer becomes unconditional, the offeror is not permitted to make off-market purchases of shares in the target company at a price which exceeds the offer price. If the offeror makes off-market purchases at a price which exceeds the offer price, it will be required to pay this higher price to all shareholders who tendered their shares in the offer.

However, the offeror can continue to make on-market purchases, even at a price which exceeds the offer price. The offeror should refrain from any purchases if it has any inside information regarding the target company.

2.3. De listing

If an offer becomes unconditional, the offeror will usually want to de-list the target company. De-listing from Euronext Amsterdam requires termination of the listing agreement entered into between the company and Euronext Amsterdam. Unless a listing of the shares of the target is maintained on another stock exchange, Euronext Amsterdam will as a policy rule only permit de-listing if at least 95% of the listed shares are held by the offeror (or offerors, acting in concert), or if Euronext Amsterdam holds the view that the trading volumes are so low that the listing no longer serves any purpose. This requirement that 95% of the shares are held by the offeror(s) is the same as the shareholding threshold required for initiating the

squeeze-out proceedings applicable to Netherlands companies. Euronext Amsterdam will usually approve the de-listing request if the offeror provides the minority shareholders an exit route, preferably by way of squeeze-out proceedings.

Spain

1. How can an offeror buy out minority shareholdings?

1.1. Compulsory Acquisition

Following an offer for 100% of a target, an offeror has a right to acquire outstanding securities for which the offer was made (which may include convertible bonds, warrants etc.), and the minority holders of securities have the right to force the offeror to acquire such securities, provided that:

- after the takeover bid, the offeror holds at least 90% of the total voting rights of the target; and
- the offer has been accepted by persons holding shares which represent at least 90% of the voting rights covered by the bid.

In practice, the requirement for 90% acceptances may restrict offerors from buying shares outside the offer, since this would increase the effective squeeze-out and sell-out threshold. For example, if the offeror or a concert party purchases 5% of the target's voting share capital, the offeror will need acceptances in respect of 90% out of the remaining 95% of voting shares in order to satisfy threshold (ii) above.

Shares acquired by offeror group companies and concert parties count towards meeting threshold (i) above. If such shares are subsequently assented to the offer, they should arguably also be counted towards meeting threshold (ii) above, but this has not yet been confirmed by the CNMV.

The consideration for the squeeze-out and sell-out must simply be the same as the consideration offered in the takeover bid (e.g. cash, listed shares or a combination of both) and is not subject to any fairness opinion or authorisation. If minority shareholders are offered a choice of consideration and they fail to make a choice, then they are deemed to have chosen cash.

The offeror must, within three business days of the offer closing, inform the CNMV whether the squeeze-out thresholds have been satisfied. If squeeze-out is available, the right must be exercised by the offeror within three months of the end of the acceptance period for the bid, in relation to all securities which were subject to the takeover bid. The offeror must disclose its decision to squeeze out to the CNMV as soon as it is made, and announce it to shareholders within five business days. The offeror's decision is irrevocable.

Sell-out rights may be exercised by each minority shareholder individually within the same timeframe, although sell-out decisions are considered not to be irrevocable.

The other significant differences between squeeze-out and sell-out relate to settlement dates and transaction expenses.

Squeeze-out must be carried out simultaneously in respect of all minority shareholders on such date as the offeror elects within a period of 15 to 20 business days following the offeror's notice to the CNMV that squeeze-out will occur. Settlement takes place within the same period provided for in the offer document for accepting shareholders, counting from the date of the transaction. Any offeror electing to exercise its squeeze-out right must provide evidence to the CNMV that it has guarantees in place in respect of its payment obligations.

By contrast, if any minority shareholders exercise their sell-out right (even after the offeror has exercised its squeeze-out right), these sales must be carried out as and when sell-out notices are received from the minority shareholders, and they must be settled within the same period provided for in the offer document for accepting shareholders, counting from the date of receipt of each request. Guarantees are not required in respect of sell-out transactions.

On a squeeze-out, all expenses arising from the sale and purchase (or exchange) and settlement are borne by the offeror. On a sell-out, all such expenses are borne by the selling minority shareholders.

Following a squeeze-out (or sell-out) which leads to the offeror acquiring 100% of the share capital, the target will automatically be de-listed. This avoids a cumbersome de-listing offer, which would otherwise require fairness opinions, director reports, shareholder approvals and the authorisation of the CNMV (see paragraph 2 below).

1.2. Merger

A merger of the target company with the offeror is legally possible provided that the offeror is listed or, alternatively, the target is de-listed prior to the merger. (This includes cross-border mergers between Spanish companies and companies incorporated in a number of other European jurisdictions.) However, a merger will result in target shareholders receiving shares in the offeror. If the offeror and its existing shareholders want to have 100% control of the combined business, they would need to make a takeover offer for cash followed by a squeeze-out.

2. Are there any other relevant issues relating to minority shareholders – e.g. restrictions on consideration payable, issues about de-listing etc.?

   There are no restrictions on the price at which shares can be bought from minority shareholders after an offer is complete, but the price paid will be taken into account in assessing the value at which any subsequent de-listing offer must be made.

   In order to de-list the target from a Spanish Stock Exchange (other than as a consequence of a squeeze-out or sell-out), the target or the offeror must make a de-listing offer to all remaining shareholders, or follow a similar procedure approved by the CNMV. The price in the de-listing offer must be supported by a fairness opinion (based on the valuation criteria outlined in the Royal Decree) and a report of the directors of the target, and approved by the shareholders' meeting and by the CNMV (see paragraph 1 of section 5 above).

United Kingdom

1. How can an offeror buy out minority shareholdings?

1.1. Compulsory acquisition

Following a takeover offer for a UK company, an offeror (whether UK incorporated or not) generally has a statutory right to acquire minority shareholdings on a compulsory basis if it has acquired or unconditionally contracted to acquire:

– not less than 90% in value of the shares to which the takeover offer related; and
– not less than 90% of the voting rights carried by those shares.

(This right is referred to as a "squeeze-out" right elsewhere in this document.) Where a target company holds its own shares in treasury, such shares are disregarded for the purposes of this calculation.

The squeeze-out right applies only where there is a "takeover offer" – which is an offer to acquire the entire class of shares concerned, other than those already "owned" by the offeror (and its associates). ("Associates" of a corporate offeror are (A) other members of the offeror's group, (B) other parties to any "share acquisition agreement" with the offeror, (C) other companies in which the offeror has de facto control/one-third voting rights and (D) nominees of the offeror or persons referred to in (A) and (B).) A "share acquisition agreement" is an agreement for the acquisition of an interest in target shares which includes provisions imposing obligations or restrictions on one or more parties as to their use, retention or disposal of such target shares (but excluding underwriting agreements).

The offer must therefore be made to all target shareholders, even foreign shareholders. To avoid overseas regulatory issues, an offeror could, for statutory purposes, "make" the offer to foreign shareholders by publishing a notice in the London Gazette (which may be a notice specifying a website address where the offer document can be obtained), rather than by sending them an offer document. However, there are now Code restrictions on failing to send an offer document into overseas jurisdictions, referred to in paragraph 5 of section 5 above. The terms of an offer may alternatively provide that certain foreign shareholders may not accept the offer unless they do so from outside the relevant foreign jurisdiction.

The takeover offer must also make the same terms available to all shareholders. However, variations are permitted if a foreign law would preclude an offer of certain forms of consideration, or would allow it only after compliance with conditions the offeror regards as "unduly onerous" – for example, if the consideration for the offer is in shares, foreign shareholders could instead be given cash to a "substantially equivalent value".

The squeeze-out right also applies only where the offeror acquires 90% of the shares to which the offer relates. Therefore, if the offeror (or its associates) buys, or contracts to buy, a stake in the target before the offer is made (i.e. before the offer document is published on Day 0 of the timetable), it will need to acquire 90% of the remaining shares – which will be a larger overall percentage of the company when added to its existing stake. However, if the offeror (or its associates) buys shares after the offer document is sent out, those shares purchased will count towards reaching the 90% mark, as long as the purchases are made at or below the offer price (or above the offer price if the offer is then revised to the higher price).

Irrevocable undertakings to accept the offer (see paragraph 5 of section 4 above) will not count as a contract to buy shares for the above purposes, so long as the only consideration included from the offeror (if any) is negligible (e.g. £1 of symbolic consideration) or is an undertaking to make the offer. Irrevocable undertakings may also be made by deed, in which case no consideration is needed to make them binding. Accordingly entering into irrevocable undertakings prior to making the offer will not affect the inclusion of the relevant shares in the "shares to which the offer relates" and the 90% mark.

Once the offeror has reached the 90% mark, it may send out compulsory purchase notices immediately or at any time up to three months and a day after the last day on which the offer can be accepted. Where the target does not have securities admitted to trading on a regulated market, there is also a long-stop date for sending out such notices of six months from the date of the offer. If it fails to meet either deadline, the offeror can only take advantage of the statutory squeeze-out by making another takeover offer for the outstanding minority shareholding and acquiring 90% of those shares. Another option would be to implement a scheme of arrangement – see paragraph 1.2 below.

At the 90% mark, a minority shareholder also has a right to be bought out by the offeror. The offeror is therefore required to inform shareholders of these rights within one month of reaching the 90% mark. In practice, compulsory purchase notices are usually sent out within one month of reaching the 90% mark in order to comply with this extra information requirement as well.

The compulsory purchase notice must be given in the prescribed manner and the offeror must send a copy of the first notice to the target, together with a statutory declaration (in the prescribed form) by one of its directors confirming that the conditions for sending the notice have been satisfied.

A minority shareholder also has a right to apply to the UK courts within six weeks from the date of a compulsory acquisition notice, asking either that the offeror should be stopped from acquiring the minority shares or that the acquisition terms

should be varied. This is extremely rare in practice – the only grounds for making such an application would be if the offeror had not complied with any of the technicalities of the statute or had offered the wrong consideration (see paragraph 2 below).

Where the compulsory acquisition procedure is used, the minority shareholders must generally be offered the same consideration as was available in the original offer. In particular, if the original offer included any choice of consideration, the minority shareholders must be presented with the same choice – even if the choice was only available to accepting shareholders during part of the offer. In certain cases, therefore, a shareholder may benefit from not accepting an offer in its later stages, but instead waiting to be "squeezed out".

The only exception to the requirement to provide the same choices of consideration applies where the offeror has offered some form of non-cash consideration and is no longer able to provide that consideration (e.g. it has no more consideration shares to issue). In this case, the offeror may instead provide an amount of cash which is "equivalent" to the unavailable consideration as at the date of the notice.

Details of the choices available must be set out in the compulsory acquisition notice (including details of the "default consideration" which will be paid if no election is made), and the shareholder has six weeks to make his choice.

Complications arise where the offer has included a "mix-and-match" election. A common form of "mix-and-match" election is where target shareholders are offered cash and shares and can elect for more or less of one form of consideration to the extent that other shareholders make equivalent opposite elections (see paragraph 2 of section 5 above). In these circumstances, a shareholder could theoretically opt for anything between 0% and 100% cash, with the remainder in shares, so long as another shareholder opted for the opposite ratio.

However, it is generally considered that minority shareholders in the squeeze-out procedure should only be offered up to the maximum ratio that any shareholder has received by accepting the offer. For example, if the maximum proportion of cash received by any shareholder in the offer was 50% and the maximum proportion of shares received by any shareholder in the offer was 70%, the minority shareholders should be entitled to elect for cash or shares up to these respective maximum proportions.

1.2. Schemes of arrangement

As referred to in paragraph 2 of section 2 above, one alternative to making an offer is to propose a statutory scheme of arrangement. One of the advantages of a

scheme is that it can be approved by a shareholder vote of 75% by value (and 50% + 1 by number) of the shareholders actually attending a shareholder meeting (in person or by proxy). If it is so approved, it will then be binding on all shareholders, whether they voted or not. This means that shareholder apathy will generally work in favour of an offeror in a scheme of arrangement, but against an offeror making a takeover offer.

In a scheme of arrangement, all shareholders will generally receive the same consideration/choices of consideration. Shareholders who are offered anything different would have to vote as a separate class on the scheme.

If an offeror first makes a takeover offer, but does not manage to reach the 90% threshold for the squeeze-out, it could consider instituting a scheme of arrangement (with the same consideration) in order to acquire the outstanding minority (see paragraph 2.1 below).

2. Are there any other relevant issues relating to minority shareholders – e.g. restrictions on consideration payable, issues about de-listing etc.?

2.1. Consideration

If an offeror fails to reach the 90% mark with its offer and subsequently wishes to make a new offer, or propose a scheme, to the remaining minority shareholders, the offeror may wish to offer the minority a higher price as an inducement. However, under the Code, no acquisitions of any interests in target shares may be made on more favourable terms than the offer for a period of six months from the closure of the offer. In addition, the offeror may not agree any "special deal" with any of the minority shareholders during that period (see paragraph 7 of section 5 above). The offeror may therefore have to delay its tidying up of the minority until the six months has expired.

2.2. De-listing

De-listing of the target from the LSE/UKLA should be straightforward following an offer, provided that the offeror has stated its intention to de-list in the offer document (or a subsequent document sent to target shareholders). The document must state that a notice period of not less than 20 business days will automatically start to run on either (i) the offeror acquiring or agreeing to acquire shares carrying at least 75% of the voting rights in the target; or (ii) compulsory acquisition notices being sent to minority shareholders. The announcement that the offer is unconditional (or the explanatory letter sent to minority shareholders) must then remind people that the notice period has commenced and state the anticipated date of cancellation of the listing.

De listing following the implementation of a scheme is effectively automatic. The LSE/UKLA must be notified in advance of the date that the scheme is to become effective.

SECTION THIRTEEN: HOSTILE BIDS

France

1. What do the directors of a target company have to consider on receiving a hostile offer?

1.1. General Duties

The general duty of the directors of a target company is to act in the interests of the company, taking into account not just the shareholders' interests but also those of other relevant constituencies (for example, interests relating to the business or the employees of the company). The shareholders' interests do not take precedence over these other interests – for example, directors may take account of the likely adverse impact of a bid on the business of the target (e.g. because of disposals required by the competition authorities), even if the offer price may be attractive to shareholders.

The directors of a target company must also bear in mind the general principles embodied in the General Regulation, of shareholder equality, market transparency and integrity, fair trading and fair competition which translate into a principle of free competition between offers and counter-offers.

Following a recent reform, the principle adopted in 2006 by France and pursuant to which no action could be undertaken by the board of directors or general management of a listed company that would have the effect of denying target shareholders the opportunity to consider an offer, has been abandoned.

1.2. Rules

Pursuant to the new Takeover Law and revised provisions of the General Regulation, the directors will now have the right to take any measure they wish to frustrate an unsolicited offer, to the extent such actions do not have any material adverse effect on the "corporate interest" (*intérêt social*) of the target company.

As a consequence, the target's board is not under any obligation to obtain the prior authorisation of the shareholders in a general meeting before implementing a sale or acquisition of strategic assets, a sale of a block of treasury stock to a "white knight" or arranging a counter-offer.

The new Takeover Law has also abandoned the rule pursuant to which the financial authorizations granted to the board by shareholders were suspended as soon as an offer was announced, as well as the reciprocity exemption which is no longer necessary under the new rules.

However, the powers of the target's board can be limited. The directors must ensure that they comply, when they implement anti-takeover measures, with the general duties and the guiding principles governing takeover offers which impose, in particular, free competition between offers and counter-offers. By way of derogation to the new principle governing public takeovers, the company's articles of association may impose an obligation of neutrality on the management of the target during offer periods. The articles of association of the company may also provide that the neutrality obligation will not apply in the case of an offer made by a "non-virtuous" offeror – that is, an offeror incorporated in a country which does not apply "Article 9" rules prohibiting frustrating action (or "equivalent rules" if not incorporated in an EU Member State) or is controlled either directly or indirectly by a company which falls into one of these categories.

Shareholder activists and proxy advisors have already recommended voting for the adoption of these limitations to prevent the target's board from putting defensive measures in place in the case of an offer. These shareholders also seek to procure that financial authorisations granted by the annual shareholder meetings to the board are suspended if an offer is launched.

1.3. Suspension of provisions limiting voting rights or transfers of securities

Under AMF regulations implementing the Takeover Directive, any voting right limitations should be inoperative where an offeror acquires two-thirds or more of a target's outstanding share capital or voting rights through an offer, and any restrictions on the transfer of securities provided for in the articles of association of a target will not apply to an offeror during the offer period.

In relation to other relevant provisions, the Takeover Law provides only that French companies may "opt in" to such provisions by a shareholder vote. Accordingly, the articles of association of the target may provide that any restrictions on the transfer of securities in agreements entered into by the target after 21 April 2004 will not apply to an offeror during the offer period.

The target's articles of association may also expressly provide that (i) any restrictions on voting rights provided for in the articles of association of the target, (ii) any restrictions on voting rights provided for in contractual agreements entered into by the target after 21 April 2004, and/or (iii) any extraordinary rights of shareholders concerning the appointment or removal of members of the board or officers, will not apply at the first general meeting of shareholders following completion of a bid where the offeror holds more than half of the share capital or of the voting rights of the target.

2. What actions could a target take to protect itself against a hostile offer?

2.1. General preparation

If a company is aware that it might be the subject of an offer, it may decide to carry out various preparatory steps in advance of receiving any actual bid.

For example, directors could be made aware of their duties in a takeover situation and of the provisions of the General Regulation which are most likely to be relevant. All appropriate advisers (financial advisers, brokers, lawyers etc.) could be consulted and the company should also consider identifying external public relations advisers who are experienced in defence work.

In addition, a potential target may wish to monitor whether any party appears to be building up a stake in the company. A French company may provide in its articles of association for shareholders to disclose any interests of over 0.5% in the share capital of the company or any multiple thereof (see paragraph 4 of section 3) above. In addition, a listed company may also include in its articles a right to request certain information from Euroclear France as to the identity of its shareholders, the size of their shareholdings and any restrictions potentially affecting their shareholder rights. Such information must be provided within 10 business days of a request.

Companies are allowed to "look through" trusts or other entities, in order to determine the beneficial owner of the shares. If any intermediaries do not respond to the company's request, or respond with imprecise and insufficient information, the shares held on behalf of the beneficial owner may have their voting rights suspended.

2.2. Protective structures

Prior to an offer being made, a potential target can also, within limits, shape its corporate structure in a manner that would make the acquisition of control unattractive or more difficult for a potential offeror.

For example, a potential target's articles of association may include a provision limiting the number of votes exercisable by a single shareholder, regardless of the number of shares held. Such a limitation could also restrict voting where shares are held by shareholders acting in concert, or using proxy voting. Several large listed French companies have provisions of this nature in their articles.

However, under the AMF rules implementing the Takeover Directive, these voting right limitations will be inoperative where a party acquires two-thirds or more of a target's outstanding share capital or voting rights through an offer. In practice, such provisions will oblige a hostile offeror to provide for a two-third minimum acceptance condition (unless the articles of association provide for a lower threshold above which the limitation becomes inoperative).

Also, unless otherwise provided in the articles of association of the target, any share which has been held by the same shareholder in registered form for at least two years gives the holder two votes ("double voting"). An offeror may have to purchase a greater number of shares in order to acquire control of the target.

In addition, restrictions on the transfer of securities may be included in a shareholder agreement but not in a company's articles of association.

The Takeover Law requires that the board of directors of a listed company must include the following information in its annual report to the shareholders' meeting, if such information is likely to affect a future takeover bid for the company: (i) the structure of the company's capital; (ii) any restrictions on voting rights or on the transfer of securities provided for in the by-laws or any clause of any agreement providing for preferential conditions for the transfer of securities representing at least 0.5% of the share capital; (iii) any significant direct or indirect shareholders which are known to the board of directors; (iv) the holders of any securities with special control rights and a description of those rights; (v) the system of control of any employee share scheme where the control rights are not exercised directly by the employees; (vi) any agreements between shareholders which are known to the board of directors and which may result in restrictions on the transfer of securities and/or voting rights; (vii) the rules governing the appointment and replacement of board members and the amendment of the articles of association; (viii) the powers of board members, and in particular the power to issue or buy back shares; (ix) any agreements or arrangements to which the board of directors are a party and which take effect, alter or terminate upon a change of control of the company, except where the nature of the agreements or arrangements is such that their disclosure would be significantly prejudicial to the company (this exception does not apply where the company is specifically obliged to disclose such information on the basis of other legal requirements); and (x) any agreements or arrangements between the company and its board members or employees providing for

compensation if the board member/employee resigns or is made redundant without cause or if their employment ceases because of a takeover bid.

2.3. Rejecting the offer

On receipt of an offer, the target board will consider independent financial advice on the merits of the offer. An offer which becomes "hostile" will have been rejected, inter alia, on the basis of this advice, and the target board will then need to explain its reasons for this rejection.

The usual arguments are that the offer undervalues the target and its prospects and/or that the offer carries an insufficient premium for control – and that, by keeping their shares, the shareholders will benefit from the target's improved future prospects rather than allowing the offeror to obtain this benefit. However, the rejection could also be for "social reasons" relating to the interests of the company (as distinct from those of the shareholders); for example, where the company would have to divest parts of its business due to antitrust requirements. In order to support its arguments, the target board will seek to present the performance of the target in the most favourable light and may release new information about its future plans, or a profit forecast or asset valuation.

Where the offeror is offering its own securities as consideration, the target board may also seek to attack the value of that offer by focusing on the offeror's financial condition or operational performance. In making such statements, the target must bear in mind the standards of care required in relation to documentation (see paragraph 3 of section 10 above), and must also bear in mind the need to avoid any defamatory statements.

2.4. Regulatory hurdles

Where an offer is referred to either the Competition Authority or the European Commission, the relevant regulatory authorities will routinely request information from the target as to the competitive and other effects of the merger (and in some cases have legal power to require that such information be produced). The offeror and other interested parties should not therefore attempt to prevent the target from providing information in response to such requests which is unhelpful to the offeror's case so long as the target views the information as valid and correct, even where the information could result in the transaction being rejected. However, the target should be careful that the information provided is not misleading or intended to mislead, and that it forms part of a *bona fide* commentary on the relevant regulatory issues in response to the regulator's investigations.

2.5. Future developments

In addition to releasing favourable information about the current state of the target company, the target board may also consider formulating plans to put before its shareholders with respect to future strategies which could be carried out if the hostile offer is unsuccessful. Two possible routes are to propose a return of value to target shareholders and/or to propose an acquisition or disposal. However, these would generally be formulated as plans for the future, rather than as actions to be implemented immediately.

2.6. "Poison pills"/Frustrating actions

The target's board may take any action which may obstruct the offeror's attempt to acquire control of the target company provided such actions comply with the general principles applicable to any corporate action. In particular, the target's directors must ensure that their actions will not have a material adverse effect on the "corporate interest" (*intérêt social*) of the target company. The target's board may, *inter alia*, implement a share capital increase that has been expressly authorised by a general meeting of shareholders in the 18 months before the offer is filed.

In general, the target's board has wide powers to attempt to defeat an offeror.

Where the target's articles of association allow the board to take action only in the case of an offer made by a "non-virtuous" offeror, the AMF has exclusive jurisdiction to decide whether the offeror applies "equivalent rules". The AMF has not issued any decision in this respect but, as suggested in the debates in Parliament relating to the Takeover Law, the notion of a "non-virtuous" offeror may be widely interpreted.

Any person challenging the target's views on whether it may take a frustrating action or not must provide the grounds for its arguments and the documents that form the basis for its disagreement to the AMF and the target. The target must then communicate its response to the AMF within 10 trading days, with the AMF providing its conclusion within five days from the date of the target's response. The AMF may request supplementary information, during which period the time for the AMF to provide its conclusion is suspended. The AMF's decision is public and may be challenged before the Paris Court of Appeal.

Without prejudice to any other measures which may be taken by the target, the Takeover Law expressly permits equity warrants to be issued during an offer period (*bons de souscription d'actions*) provided the issue is authorised by shareholders during the offer period. This right is useful to a target defending a hostile bid because (i) the shareholders' authorisation, whenever given, requires only a simple

majority of votes cast at a shareholder meeting, whereas an authority to issue equity securities directly usually requires a two-thirds majority vote of the votes cast; and (ii) it requires only a quorum of 20% on first call and no minimum on second call (instead of 25% and 20% in a normal extraordinary general meeting).

The warrants may be issued free of charge to all shareholders of the target prior to closing of the offer and may entitle the holders to subscribe for new shares on preferential terms. The warrants must, however, expire immediately if the offer fails or is withdrawn. Even though this type of action is now permissible if approved by shareholders, issuing equity warrants during an offer period still effectively amounts to a "poison pill". More generally, target directors should be careful even prior to an offer when agreeing to certain measures, such as penalty clauses in contracts which would be triggered by a takeover. Where the underlying transaction is in the best interests of the company and the clause is a condition of the other party proceeding, such measures will generally be acceptable.

2.7. Third party involvement

There should be no legal objection to a target board seeking a third party (a "white knight") to make a competing offer for the target.

Theoretically, a target could alternatively issue new shares to a third party "friendly" shareholder. However, such an issue would require specific shareholder approval and therefore such a tactic would, in practice, be unusual.

2.8. "Offensive" actions

It is possible for the target to make a counter-offer to acquire the offeror if the board considers such a move to be in the best interests of the company (e.g. because the offeror could be acquired more "cheaply"). This is known as the "pac-man" defence, and while it has been accepted in principle by the CMF (the predecessor to the AMF) in the Total/Elf offer, it has not yet been reviewed as a tactic by the French courts.

2.9. Litigation

A particular feature of a French takeover offer is the use of litigation by the parties. This can delay an offer for a matter of several months. However, the target board does need to be mindful of its duties when considering whether to use litigation to block an offer.

The most usual litigation in a hostile offer involves an appeal of the AMF's clearance of the offer and approval of the offer prospectus. Challenges could, for example, be made regarding the adequacy of the information provided in the offer

documents or with respect to the contents of the offer prospectus. In certain (limited) specific cases (see section 5 above), the basis on which the offer price has been evaluated may also be challenged. Proceedings take place before the Paris Court of Appeal and must be resolved within five months. In certain cases however, these proceedings have lasted more than twelve months. During this time, the closing date of the offer was generally postponed with an obligation for the offeror to maintain its initial offer during any such suspension. The Paris Court of Appeal, in recent cases, has ruled that proceedings shall not entail an automatic postponement of the offer provided the bidder agrees to take the risk that the AMF decision is cancelled.

3. What should a hostile offeror bear in mind?

Hostile offers are not uncommon in France.

Making a hostile offer requires a lot more work and strategic planning than making a recommended offer. If the offeror is offering cash, it will need to justify the price to the target shareholders without suggesting to its own shareholders that it is "overpaying". If the offeror is offering its own shares, it will be exposing its own operational track record to criticism by the target and its own share price to possible downward pressure in the market.

In turn, the hostile offeror must remember that it must always comply with all relevant standards in making its "pitch" to the target shareholders. In addition to the standards of care required in relation to documentation (see paragraph 3 of section 10 above), the offeror should also bear in mind the need to avoid any defamatory statements.

The offeror's directors must also take into account the same general principles as the offeror (see paragraph 1 above). This means that, during the offer period, the offeror must ensure that none of its acts, decisions or announcements have any material adverse effect on the "corporate interest" (*intérêt social*) of the target company, and that target shareholders are treated equally and kept well informed.

In addition, the hostile offeror may also have to explain why its offer is superior than that of a competing offeror – which adds yet another dimension (and may further strain the offeror's share price).

4. What if there is more than one offeror?

A competing offeror may make a bid at any time up to five trading days prior to the closing date of the initial offer. Where the competing offer is a cash offer, it must be at least 2% higher than the previous offer. Where the competing offer is a securities exchange offer, the securities need to be worth substantially more to the target shareholders than the previous offer.

The principle is that a target shareholder should not be prevented from deciding on the merits of either of two competing offers by different timetable deadlines. If there is a competing offer, then the tender period for the first offer would be extended to match the tender period for the competing offer – see paragraph 2.2 of section 9 above.

The making of a competing offer automatically renders target shareholders' acceptances of the previous offer void.

The AMF can then set a deadline for receiving the "last bid" from each competing offeror if more than 10 weeks have passed since the start of the initial tender period, and a single closing date for all the competing offers. However, such deadlines cannot be set if any legal proceedings in connection with the offer(s) are still pending.

Germany

1. What do the directors of a target company have to consider on receiving a hostile offer?

1.1. General duties

German listed companies will generally have both a management board and a supervisory board. The general duty of the members of a management board is to manage the affairs of the company with the diligence of a prudent business person. Under the "business judgment" rule, the management board will be deemed to have complied with this standard of care if it acts in a manner which it reasonably considers to be in the best interests of the company, provided that this is based upon adequate information. The general duty of the members of the supervisory board is to supervise the management board with the same standard of diligence.

In considering the best interests of the target company, the boards must take into account the various stakeholder interests (primarily the interests of shareholders and employees, and the public interest). The shareholders' interests do not necessarily take precedence over the interests of the other stakeholders.

1.2. Frustrating actions

The Takeover Act

Once an offer has been announced for a target, the Takeover Act will control and limit the actions that can be taken by a target company. The basic principle is that, from the moment an offeror announces its intention to make an offer until the end of the offer period, the management board and the supervisory board must remain neutral in a takeover situation in order to let the shareholders decide on the merits of the offer and must, in particular, refrain from any actions that might frustrate the success of the tender offer.

However, the Takeover Act also contains important exceptions from this duty of neutrality. The general neutrality obligation does not prevent the management board or the supervisory board from taking actions that would also have been taken by a diligent manager of a company not subject to an offer. It also does not prevent the management board from taking actions authorised by the supervisory board, or from seeking to find an alternative offeror (see further details in paragraph 2 below).

Takeover Directive

Germany has opted out of implementing the stricter frustrating action provisions under the Takeover Directive.

However, under the Takeover Act, companies will be entitled to decide if the stricter provisions of the Takeover Directive should apply. This decision must be made at a general meeting of the shareholders.

If the articles of association of a company provide for the application of the European provisions in respect of "frustrating actions", the board of the target company must refrain from any action which could prevent the success of the offer. There are more limited exceptions which means that this does not apply to:

- actions with prior authorisation of the general meeting of shareholders;
- actions within the ordinary course of business;
- actions beyond the ordinary course of business, to the extent that they are an
- implementation of decisions that were made and partially realised prior to the offer; and
- a search for competing bids.

If a company has "opted in" to the stricter European prohibition of frustrating action, its shareholders may also authorise the management to disapply the stricter limitations in the event the company is targeted by an offeror that itself is not subject to comparably strict prohibitions on frustrating action (a "non-virtuous offeror"). The status of the offeror would be a matter for assessment by the target's management in the first instance or, in the case of dispute, by the courts.
In practice, no German listed company has so far "opted in" to the European prohibition against frustrating action, so there is no practical experience as to how the reciprocity exception will work.

It has even been argued that the potential for a management board to adopt frustrating actions has increased as a result of the implementation of the Takeover Directive. For example, prior to the implementation of the Takeover Directive, it was questionable as to whether actions beyond the regular course of business that had not been decided upon and partially realised prior to the offer could still be implemented following an offer. Following the implementation of the Takeover Directive, it has been argued that such actions, since they are only specifically prohibited if the stricter provisions are "opted in", will otherwise be available to the management board as long as the relevant target has not "opted in".

1.3. Shareholder attitude

In general, the attitude of German shareholders to the adoption of defensive measures by listed companies is sceptical or unfavourable. On the other hand, no German listed company has so far "opted in" to the stricter European prohibition on frustrating actions or the European breakthrough provisions.

1.4. "Breakthrough" provisions

Germany has opted out of implementing the "breakthrough" provisions of the Takeover Directive. From the statutory perspective, there is therefore nothing that would prevent a German company from including protective provisions in their articles of association (i.e. transfer restrictions, voting and other rights which could have an impact on a takeover – see paragraph 2.2 below). However, under the Stock Corporation Act, the scope of protection a company can implement in its articles of association and which would, if the breakthrough provisions applied, be set aside in a takeover scenario is very limited.

The Takeover Act again allows a shareholder meeting of a company to "opt in" to the breakthrough provisions through a change in its articles of association. In these circumstances, the shareholder meeting can also resolve that the breakthrough provisions do not apply if the rules applicable to an offeror do not provide for comparable breakthrough provisions (see paragraph 1.2 above).

2. What actions could a target take to protect itself against a hostile offer?

2.1. General preparation

If a company is aware that it might be the subject of an offer, it may decide to carry out various preparatory steps in advance of receiving any actual bid.

For example, directors could be made aware of their duties in a takeover situation and of the provisions of the Takeover Act which are most likely to be relevant. All appropriate advisers (financial advisers, brokers, lawyers etc.) could be spoken to and the company should also consider identifying external public relations advisers who are experienced in defence work.

The majority of listed German companies have unregistered shares, so there is no means of generally monitoring changes in shareholder identity. Some information on major changes in shareholdings may be obtained informally via brokers/investment bankers.

2.2. Protective structures

Prior to an offer, a potential target can also, within limits, shape its corporate structure in a manner that would make its acquisition unattractive to a potential offeror. This has not been affected by the implementation of the Takeover Directive, given the German decision to "opt out" (see paragraph 1.4 above).

For example, two independent German companies could acquire "blocking minorities" in each other as a protective measure. The stakes should be kept slightly below 25%, since there are restrictions on voting rights which apply to reciprocal holdings of 25% or more. Alternatively, three or more companies could set up a "ring" of cross-holdings, which could be larger than 25% holdings.

Another tactic may be to obtain a listing for one or more subsidiaries (with some shares being held by public shareholders). An offer for the parent company is then also likely to trigger the requirement to make a bid for each listed subsidiary.

The issue of non-voting preference shares may also create a deterrent, since the offeror would also have to bid for these shares.

It is also possible to include stricter majority requirements for certain votes in the articles of association of a potential target – for example, 75% approval for decisions that would otherwise only require a simple majority. This may deter an offeror that is not confident of reaching the relevant threshold, but it could also cause practical issues for the target in the ordinary course of its business.

The articles of a potential target may also establish an exclusive right for an identified shareholder to determine up to one-third of the shareholder representatives on the target's supervisory board. This right cannot be removed without the consent of the specific shareholder. Again, this may deter an offeror, but may not be ideal for the target in the ordinary course of its business.

Finally, it is possible to provide that registered shares cannot be transferred without the approval of the management board. However, even if the listed shares of the target were registered shares, the consent requirements for their transfer must not be significant, otherwise the shares could not be listed.

As a result of the implementation of the Takeover Directive, the German Commercial Code now includes an obligation for German listed companies to disclose in their financial statements a number of important facts and circumstances that could prevent or frustrate a takeover. These include (i) the composition of the share capital and a description of any different classes of shares; (ii) details of any agreements that may restrict the exercise of voting rights or the transferability of shares (to the extent known to the management); (iii) any

direct or indirect shareholding exceeding 10% of the voting rights; (iv) any shares conferring special control rights to their holders; (v) any indirect control over voting rights exercised by employees; (vi) a description of all statutory provisions and any provisions in the articles of association relating to the appointment and dismissal of members of the management board and changes to the articles of association; (vii) a description of the powers of the management board to issue or to repurchase shares of the company; (viii) a description of any agreements to which the company is a party and which contain a change of control clause in the event of a takeover offer; and (ix) any indemnities provided by the company in the event of a takeover offer to any members of the management board or employees.

To the extent that any of the protective structures referred to above can be, or are in fact, implemented by a target's management, the management will still be bound by the general duty of care that would prevent the management from taking any action that has the sole purpose of frustrating a potential takeover offer.

2.3. Rejecting the offer

Upon receipt of an offer, the target board will seek independent financial advice on its merits. An offer which becomes "hostile" will have been rejected, inter alia, on the basis of this advice, and the target board will then need to explain its reasons for this rejection.

The usual arguments are that the offer undervalues the target and its prospects and/or that the offer carries an insufficient premium for control – and that, by keeping their shares, the shareholders will reap the rewards of improved future prospects rather than letting the offeror take them. In order to back these arguments up, the target board will seek to present the performance of the target in the most favourable light and may release new information about its future plans, a profit forecast or an asset valuation.

Where the offeror is offering its own securities as consideration, the target board may also seek to attack the value of that offer by focusing on the offeror's financial condition or operational performance. In making such statements, the target must bear in mind the standards of care required in relation to documentation (see paragraph 3 of section 10 above) and must also bear in mind the need to avoid any defamatory statements.

In getting its message across, the target company will require considerable assistance in strategic planning from its financial adviser. It is likely to despatch a number of documents to its shareholders and must make decisions about the optimal time for releasing information about itself and/or the offeror (bearing in mind the timing constraints of the timetable – see section 9 above).

2.4. Regulatory hurdles

Where an offer is referred to either the German competition authorities or the European Commission, the relevant regulatory authorities will routinely request evidence from the target as to the competitive and other effects of the merger (and in some cases have legal power to require evidence). The target should therefore not be prevented from producing information in response to such requests which is unhelpful to the offeror's case and which may, accordingly, result in the offer being frustrated, if it views the information as valid and correct. However, the target should be very careful that the information provided is not misleading or intended to mislead, and that it forms part of a bona fide commentary on the relevant regulatory issues in response to the regulator's investigations.

2.5. "Poison pills"/Frustrating actions

As referred to in paragraph 1 above, the Takeover Act controls and limits what actions can be taken by a target following the announcement of an offer.

Even before these provisions come into play, the directors of a German company must be careful about actions intended to stop potential offers – for example, building provisions into the company's contracts which would effectively prevent or severely hinder the making of an offer. Large penalty clauses in contracts triggered by a change of control would not be appropriate if they were agreed solely in order to impede a potential bid.

However, it is possible for a potential target to ask for shareholder authorisation for certain "frustrating actions" prior to the announcement of an offer. Such authorisation may, in particular, provide for (i) the issuance of shares increasing the target's share capital by up to 50%; or (ii) certain dealings in the target company's own shares. However, the authorisation (a) must be specific as to the actions it is authorising; (b) cannot be for longer than 18 months; and (c) needs a 75% shareholder majority in favour. Actions taken under such an authority also need the approval of the supervisory board. Such a resolution would also signal that a company views itself as a target – it is therefore an extremely rare course of action.

In a takeover situation, the management board may also take certain steps (such as disposing of or acquiring material assets) which may "frustrate" the offer, so long as it has the approval of the supervisory board.

The Takeover Act does not explicitly provide for any limits on the ability of the supervisory board to authorise defensive measures. However, it is generally considered that the supervisory board must only authorise defensive measures if the interests of the target company in taking such actions clearly outweigh the

interests of the target shareholders in having the opportunity to consider the offer. In considering defensive actions, the supervisory board may have different views from the management, since it will include a number of employee representatives. A disposal/acquisition may also require shareholder approval if it is of "outstanding importance" to the target.

Finally, the management board may take actions which have the effect of frustrating an offer if such action would in any case have been taken by a prudent and diligent manager of a company which was not subject to the offer; for example, acquisitions or disposals (subject to any required shareholder approval), agreements with third parties etc. However, the general view is that the management board can take measures which would have a defensive effect only if these actions are consistent with the pre-existing business strategy of the target company, and that it would not be sufficient if the actions were only theoretically permissible in the absence of a takeover bid.

2.6. Third party involvement

There is no legal objection to a target board seeking a third party (a "white knight") to make an alternative offer for the target. An additional offer for a target should always be in the interests of the target shareholders.

The target's management board may also issue shares pursuant to an existing authorisation if it is in the interests of the target company regardless of the offer. The board may do so even if the shareholders to whom the shares are issued are against the offer and therefore, as a "side effect", the issue may frustrate the offer. However, the management board would usually seek to obtain the approval of the supervisory board for such an issue.

3. What should a hostile offeror bear in mind?

Even though a small number of hostile offers have taken place in recent years, they are still quite uncommon in Germany, and this in itself is something that should be borne in mind by a potential hostile offeror.

Making a hostile offer requires a lot more work and strategic planning than making a recommended offer. If the offeror is offering cash, it will need to justify the price to the target shareholders without suggesting to its own shareholders that it is "overpaying". If the offeror is offering its own shares, it will be exposing its own operational track record to criticism by the target and its own share price to possible downward pressure in the market.

In addition, the hostile offeror may also have to explain why its offer is better than that of a competing offeror – which adds yet another dimension (and possible extra strains on the offeror's share price).

As a result of the above, the hostile offeror is likely to despatch a greater number of documents to the target company's shareholders and it must make decisions about the optimal time for releasing information helpful to its offer and/or for increasing its offer or declaring its offer final (bearing in mind the timing constraints of the timetable – see section 9 above). This means that the role of the financial adviser to the offeror will be particularly important.

If the offeror is already a shareholder in the target, it may challenge the target's actions in certain circumstances.

If it holds over 5% of the share capital, it could call an extraordinary general meeting. If a shareholder authority for defensive measures has been put in place prior to the offer, a shareholders' meeting could be held to revoke the delegation of the relevant powers or to pass a vote of no confidence in relation to members of the management board. A vote of no confidence would constitute a cause for the supervisory board to revoke the nomination of the relevant management board member(s).

Shareholder resolutions passed during the offer to approve defensive measures may also be challenged in the courts by any target shareholder – either the offeror itself or another "friendly" shareholder.

Finally, if the management and supervisory boards exceed their authorisation, a target shareholder (which could include the offeror) may seek injunctive relief from the courts against the measures taken.

4. What if there is more than one offeror?

A competing offer can be made at any time during the acceptance period of the initial offer. The principle is that a target shareholder should not be prevented from deciding on the merits of either of two competing offers by different timetable deadlines. If there is a competing offer, then the acceptance period for the first offer would be extended to end at the same time as the acceptance period for the competing offer – see paragraph 2.2 of section 9 above.

The launch of a competing offer allows target shareholders who have already tendered their shares in the initial offer to withdraw their acceptances. The first offeror, however, is not allowed to withdraw the offer unilaterally in the event of a competing offer being made.

Italy

1. What do the directors of a target company have to consider on receiving a hostile offer?

1.1. General duties

The board of a target company must act in the interests of the target when considering an offer, which requires directors to act in the interests of the company's shareholders, but also to take into consideration the impact of the offer on the business of the company as a whole. In general, no action should be taken by target directors which would have the effect of denying target shareholders the opportunity to consider an offer.

The board must also ensure that it complies with the general fair dealing and transparency rules imposed by the Regulation during an offer.

1.2. Frustrating action

Italian listed target companies are subject to the so-called "passivity rule", i.e. they are prevented from taking any actions, other than seeking alternative bids, which may, inter alia, interfere with the completion of an offer, unless such actions are approved by target shareholders at a shareholders' meeting by a majority representing the relevant percentage of the target's Voting Securities set out in the Italian Civil Code, depending on what the decision is to be adopted. Company directors and general managers are personally liable for actions undertaken in breach of the "passivity rule". The "passivity rule" applies between the announcement of the offer by the offeror and settlement of the consideration (or earlier termination of the offer).

However, a company may elect in its articles of association not to be subject to the "passivity rule". It must notify any such decision both to CONSOB (and the supervisory authority of any regulated market in any other Member State on which its securities are – or are being – admitted to trading) and to the public.

The "frustrating actions" which are prevented are those which may hinder the offeror from achieving its goals in respect of an offer, including:

- actions which increase the potential costs for the offeror (e.g. increases of share capital, conversion of bonds into shares, buy-backs of shares);
- actions aimed at changing the business and/or the financial situation of the target (e.g. sales of subsidiaries or businesses, mergers or demergers); and
- actions which may make implementation of the offer more difficult (e.g. launching an offer for the offeror, acquiring businesses which may cause antitrust problems).

Shareholder approval will be needed for the implementation of any decision which is taken before the announcement of the offer to CONSOB but (a) is not yet partly or fully implemented; (b) does not form part of the normal course of the company's business; and (c) may result in frustration of the bid.

Where the offeror already holds shares in the target, it is free to vote against any "frustrating action" proposed for approval by target shareholders.

1.3. Shareholder attitude

If there is an offer pending, Italian shareholders are unlikely to approve "frustrating actions" by the necessary majority and so such actions are unusual in practice.

1.4. Breakthrough rule

The "breakthrough" rule introduced by the Takeover Directive only applies if the by-laws of the Italian listed company specifically provide that it should apply. In particular, the by-laws may provide that, if an offer is launched for the Voting Securities of the company, the following limits or rules, included in the by-laws or any shareholders' agreements, do not apply to the offeror during the relevant offer period: (i) limits on the transfer of Voting Securities; (ii) limits on the exercise of voting rights at shareholders' meetings convened to approve any defensive measures; and (iii) multiple or enhanced voting rights at shareholders' meetings convened to approve any defensive measures (i.e. each multiple voting security grants only one vote one vote during the offer period).

In the event that the company has opted-in for the breakthrough rule, following an offer for a Listed Italian Company's Voting Securities, where the offeror comes to own securities equal to at least 75% of the Voting Securities carrying voting rights to appoint or remove the directors or the supervisory board, at the first shareholders' meeting following the closing of the offer, which has been convened to amend the by-laws or appoint a new managing body: (i) any restrictions on the voting rights of the target's Voting Securities provided for in its by-laws or in any shareholders' agreement do not apply; (ii) any special rights concerning the appointment or the removal of directors or supervisory board members do not apply; and (iii) each Voting Security confers one vote regardless of any enhancement of voting rights or the fact that multiple voting shares have been issued, pursuant to the target's by-laws.

The offeror must pay equitable compensation for any loss suffered by the holders of rights which cannot be exercised as a result of the breakthrough provisions, provided that the contractual provisions giving rise to such rights came into effect before the announcement of the offer to CONSOB.

There is a "reciprocity exception" to restrict the effect of the passivity rule mentioned in paragraph 1.2 above and, if adopted in the relevant target's by-laws, the breakthrough rule mentioned in this paragraph 1.4. This means that the "breakthrough" rule and the passivity rule will not apply to an Italian target if an offer is made by a "non-virtuous" offeror – that is, an offeror which is not subject to the passivity rule or (as appropriate) the breakthrough rule (or "equivalent rules" if not incorporated in an EU Member State), or that is controlled either directly or indirectly by such a company. In these circumstances the target's board of directors may take any action that has been expressly authorised by a shareholders' meeting in the period of 18 months preceding the date on which the offer is made public.

CONSOB must determine if the rules applicable to the offeror are "equivalent" to those applicable to the target company within 20 days from the day on which the target company files a formal request on the matter with CONSOB.

2. What actions could a target take to protect itself against a hostile offer?

2.1. General preparation

If a company is aware that it might be the subject of an offer, it may decide to carry out various preparatory steps in advance of receiving an actual bid.

For example, directors could be made aware of their duties in a takeover situation and of the provisions of the applicable regulations which are most likely to be relevant. All appropriate advisers (financial advisers, brokers, lawyers etc.) could be spoken to and the company should also consider identifying external public relations advisers who are experienced in defence work.

However, there is no means of generally monitoring changes in shareholder identity, except through the public notification of major shareholdings (over 2%) to CONSOB.

2.2. Protective structures

Prior to an offer being made, a potential target can also, within limits, shape its corporate structure in ways that would make the acquisition of control unattractive to a potential offeror.

For example, cross-shareholdings between listed companies are permitted up to 2%, although such holdings in listed companies must be disclosed to both CONSOB and the public.

In addition, a potential target's by-laws may provide for special quorum requirements for the valid constitution of a shareholders' meeting, or stricter majority requirements for certain shareholder resolutions (although not unanimity). This may deter an offeror which is not confident of overcoming the relevant hurdle, but it could also cause practical issues for the target in the ordinary course of its business.

A company could therefore provide that voting rights relating to specific matters only come into force if there is a takeover offer. However, the CFA provides that shares carrying voting rights which are conditional on the launch of an offer may only be issued if the voting rights require confirmation by the other target shareholders (under the "passivity rule") in order to become effective.

Under the CFA, the annual accounts of listed companies must contain detailed information regarding, inter alia, (i) the share capital structure, including securities which are not traded on a Member State regulated market, showing the different classes of shares and the percentage of the share capital that they represent; (ii) any restriction on the transfer of securities; (iii) major holdings, owned directly or indirectly; (iv) if known, the owners of securities with special rights of control and a description of such rights; (v) the procedure for exercising the voting rights of securities owned by employee share schemes, where such rights are not exercised directly by the employees; (vi) any restrictions on voting rights; and (vii) any significant agreements to which the company is a party which take effect, alter or terminate upon a change of control of the company following a takeover bid, and the effects of any such agreements.

2.3. Rejecting the offer

On receipt of an offer, the target board will take independent financial advice on its merits. An offer which becomes "hostile" will have been rejected, inter alia, on the basis of this advice, and the target board will then need to explain its reasons for this rejection. In particular, the board must disclose the advice received, describe the methodologies used in such advice and attach a copy of the opinion to the target's statement.

The usual arguments are that the offer undervalues the target and its prospects and/or that the offer carries an insufficient premium for control – and that, by keeping their shares, the shareholders will reap the rewards of improved future prospects rather than letting the offeror take them. In order to back these arguments up, the target board will seek to present the performance of the target in the most favourable light and may release new information about its future plans, a profit forecast or an asset valuation.

Where the offeror is offering its own securities as consideration, the target board may also seek to attack the value of that offer by focusing on the offeror's financial condition or operational performance. In making such statements, the target must bear in mind the standards of care required in relation to documentation (see paragraph 3 of section 10 above), and must also bear in mind the need to avoid any defamatory statements.

The target board's response must be communicated to the market within a short period after the launch of the offer (see section 9 above), so the target will need to be in a position to marshal its arguments quickly.

2.4. Regulatory hurdles

Where an offer is referred to either the Italian competition authorities or the European Commission, the relevant regulatory authorities will routinely request evidence from the target as to the competitive and other effects of the merger (and in some cases have legal power to require evidence). The target should not therefore be prevented from producing information in response to such requests which is unhelpful to the offeror's case and which may, accordingly, result in the offer being frustrated, if it views the information as valid and correct. However, the target should be very careful that the information provided is not misleading or intended to mislead, and that it forms part of a bona fide commentary on the relevant regulatory issues in response to the regulator's investigations.

2.5. Poison pills/Frustrating actions

As referred to in paragraph 1 above, once the 'passivity rule' is triggered, it controls and limits the actions which may be taken by a target.

Prior to such time, there are no specific limitations on the adoption of 'anticipatory' anti-takeover devices. However, the implementation during an offer of any decision taken before the "passivity rule" is triggered requires a shareholder vote if (i) the decision does not fall within the normal course of the target's business; and (ii) its implementation constitutes a "frustrating action" (see paragraph 1 above).

2.6. Third party involvement

CONSOB has ruled that there is no legal objection to a target board seeking a third party (a 'white knight') to make an alternative offer for the target.

It is theoretically possible for the directors to issue new target shares, or sell existing treasury stocks, to 'friendly' shareholders. However, this would require

shareholder approval under the 'passivity rule' and is therefore in practice not used.

2.7. "Offensive" actions

The operation of the 'passivity rule' means that it is not possible for an Italian target to use the 'pac-man defence', and launch a counter-bid for the offeror, without prior shareholder approval.

3. What should a hostile offeror bear in mind?

Hostile offers are fairly uncommon in Italy, and this in itself is something that should be borne in mind by a potential hostile offeror.

Making a hostile offer requires a lot more work and strategic planning than making a recommended offer. If the offeror is offering cash, it will need to justify the price to the target shareholders without suggesting to its own shareholders that it is "over-paying". If the offeror is offering its own shares, it will be exposing its own operational track record to criticism by the target and its own share price to possible downward pressure in the market.

In turn, the hostile offeror must remember that it must always comply with all relevant standards in making its 'pitch' to the target shareholders. As well as the standards of care required in relation to documentation (see paragraph 3 of section 10 above), the offeror should also bear in mind the need to avoid any defamatory statements.

In addition, the hostile offeror may also have to explain why its offer is better than that of a competing offeror – which adds yet another dimension (and possible extra strains on the offeror's share price).

In general, the effort required from a hostile offeror is greater than that required for a recommended offer, since the offeror's decision-making process and documentation are subject to more stringent analysis by the market, the target company and its shareholders. In addition, the number of people involved and the greater effort required in launching a hostile offer may bring a greater likelihood of leaks before the formal announcement is made to CONSOB – and therefore before the 'passivity rule' begins to operate – which may give an advantage to the target.

Where a target has adopted defensive measures, the offeror is entitled to challenge such measures before the courts, or request CONSOB to review such measures.

4. What if there is more than one offeror?

A competing offeror may make a bid at any time up to five trading days before the closing of the original offer.

The principle is that a target shareholder should not be prevented from deciding on the merits of either of two competing offers by different timetable deadlines. If there is a competing offer, then the acceptance period for the first offer would be extended to match the acceptance period for the competing offer, unless the first offeror decides otherwise – see paragraph 2.2 of section 9 above.

Target shareholders who have already accepted the original offer automatically become able to withdraw their acceptances from the date of publication of the competing offer.

Where a competing offer has been announced, an offeror cannot buy target shares at a price higher than its offer price. In order for an offeror to buy at a higher price, it must therefore first raise its bid to that higher price.

The Netherlands

1. What do the directors of a target company have to consider on receiving a hostile offer?

When faced with any approach or takeover proposal (whether recommended or hostile), the members of the managing board and the supervisory board have to consider the interests of all stakeholders (including all the company's shareholders (including minority shareholders), employees, customers, creditors and banks), and not only the interests of shareholders. The boards should act in accordance with the requirements of reasonableness and fairness towards all stakeholders involved in the target company.

There are three main issues that need to be addressed when considering an offer:

- How serious is the offer and how serious is the offeror?
- Is the offer in the best interests of the target company and all of its stakeholders?
- Does the offer create more shareholder value now than the target company can create in the near future as a stand-alone company which continues its long-term strategy?

If the boards assess the interests of all stakeholders and all other aspects of the offer, and conclude that they should not recommend the offer, the boards should also investigate alternatives (including, in certain circumstances, the temporary use of anti-takeover measures).

If, following announcement of a contemplated hostile offer, the boards of the target company (i) decide to use certain anti-takeover measures; or (ii) refuse to cooperate with the offeror, the shareholders of the target company could request the Enterprise Chamber to order an inquiry into the affairs of the company and order interim measures (see paragraph 2.9 below).

2. What actions could a target company take to protect itself against a hostile offer?

2.1. General preparation

It is advisable for any company to be aware of the market and it should monitor stock exchange trades and investor feedback on a regular basis. It should be aware of likely offerors and "white knights" (whether strategic or financial), the likely role of shareholder activists in a takeover and the legal and regulatory requirements of a takeover. It is advisable to maintain an up-to-date response manual with general response considerations, rules for effective responses and actions to be taken in the event of an offer or an imminent offer (including a clear communication plan), and an overview of the role and functions of the boards in a takeover.

2.2. Rejecting the offer

On receipt of an offer, the target boards will seek independent financial advice on its merits. An offer which becomes "hostile" will have been rejected on the basis of, among other things, financial advice and the target boards will then need to explain the reason for this rejection. At the same time, the target boards will have to review available alternative transactions.

The usual reasons given for rejecting an offer are that the offer undervalues the target company and its prospects and/or that the offer carries an insufficient premium for control and that, by keeping their securities, the holders of those securities will reap the rewards of improved future prospects rather than letting the offeror take them. In order to support these arguments, the target boards will seek to present the performance of the target company in a more favourable light and may release new information about its future plans, or a profit forecast or asset valuation (see paragraph 2.3 below for details).

In addition, the boards of the target company could also state that the offer would not be in the interests of the target company or would not succeed for the following reasons: (i) that there is a low likelihood of obtaining merger clearance; (ii) that customers would be disadvantaged by facing a dominant supplier; (iii) that a takeover would not be in the interest of employees and/or would be opposed by the works council and the relevant trade unions; or (iv) that cultural differences would cause problems for a combined business.

Where the offeror is offering its own securities as consideration, the target boards may also seek to attack the value of that offer by focusing on the offeror's financial condition or operational performance. In making such statements, the target company must bear in mind the standards of care in relation to any public documents (see section 10 for details).

A target company may also wish to make statements regarding the level of support it is receiving from shareholders who have indicated that they do not intend to accept the offer. In getting its message across, the target company will require considerable assistance in strategic planning from its financial and legal advisers.

2.3. Regulatory hurdles

Where an offer is referred to either the Dutch competition authorities or the European Commission, the relevant regulatory authorities will routinely request evidence from the target as to the competitive and other effects of the merger (and in some cases have legal power to require evidence). The target is not prevented from producing information in response to such requests which could be unhelpful

to the offeror's case. However, the target should not provide information that is misleading or intended to mislead in response to the regulator's investigations.

2.4. Future developments

In addition to releasing favourable information about the current state of the target company, the target boards may also consider formulating plans for the on-going development of the target company which could be carried out if the hostile offer is unsuccessful. Two possible routes are to propose a return to value to target shareholders and/or to propose an acceleration of the company's business plan, an acquisition or a disposal.

Target companies have in the past proposed various measures by which value would be returned to shareholders in the event of an unsuccessful offer (e.g. share buy-backs or large special dividends etc.). In essence, such proposals give target shareholders a choice between the consideration available under the terms of the offer and the value that can be released by the target company itself. However, shareholders have to believe that the target company would still have good prospects as a "stand-alone" business after the proposed return of value if this tactic is to have a chance of success.

Alternatively, the target company might accelerate its business plan and possibly adopt the proposed business plan of the offeror, or propose a major acquisition/disposal as an alternative to the offer. This will probably only be effective if a seller or a buyer is in fact lined up. An alternative might be, for example, to propose a demerger of a part of the target's business. Making such a proposal would require a lot of work to be carried out by the target company.

2.5. Defensive measures

In addition to the possible responses as set out above, a Dutch target company that wants to oppose a takeover may choose to use certain defensive measures to reduce the likelihood of a hostile offer being made or being successful. In using such defensive measures, the boards of the target company should bear in mind their duties as set out in paragraph 1 of this section 13. Dutch case law suggests that the use of ad hoc defensive measures in the event of a hostile takeover is permitted, provided that the defensive measure is proportional, reasonable and temporary. A defensive measure may not permanently deny a shareholder the ability to take control of the company.

The general meeting of shareholders of a listed company has the right to decide whether, and to what extent, the articles of association of the target company should facilitate any defensive measures. Most Dutch listed companies have one or two permanent defensive measures in place, as described below.

Protective shares

The most common defensive measure is an option agreement between the company and an independent foundation incorporated for this purpose. An option agreement allows a company to issue protective shares (preference shares or otherwise) to a foundation acting as a special purpose trust if there is a threatened hostile takeover attempt. Such issue would dilute the shareholding and voting rights of a potential hostile bidder, as protective preference shares provide high levels of voting rights at low cost. The issue of shares generally gives the company room to negotiate a better deal or seek alternatives.

The use of an issue of protective shares as a defensive measure is subject to certain limitations. An issue allowing the independent foundation to exercise 30% or more of the target's voting rights is permitted only after a public bid has been announced by a third party, as crossing the 30% threshold in other circumstances would result in an obligation on the foundation to make a mandatory offer. In addition, a stake in excess of 30% of the voting rights in the target company may not be held for longer than two years. As a consequence, the size of such protective stake must be decreased below 30% before the two-year period lapses. The Enterprise Chamber may scrutinise any defensive measures and could further restrict the use of such measures in particular instances.

Depository receipts for shares

Several Dutch companies have chosen to separate the economic ownership from the legal ownership of their shares by listing bearer depository receipts for shares, and providing that a foundation will hold the legal title to the shares. The result is that the foundation, and not the holder of the listed depository receipts, will exercise voting rights over the shares. The foundation has the statutory right to grant or revoke a power of attorney to holders of the depository receipts to allow them to vote at a general meeting of the target company. This makes it difficult, if not impossible, for a hostile bidder to obtain control over the target, as the foundation may just refuse to grant, or may revoke, any power of attorney.

2.6. Optional restriction of defensive measures

The purpose of the Takeover Directive, as well as the draft Dutch rules implementing the Takeover Directive, was significantly to restrict the use of defensive measures. However, the outcome of the political debate both at EC level and at the Dutch national level is that the use of defensive measures is restricted only to a limited extent. The key principle of the Dutch rules is that listed companies have discretionary power in deciding whether and to what extent their articles of association facilitate defensive measures. This means that the

implementation of the Takeover Directive in October 2007 has not fundamentally changed the Dutch practice on defensive measures. The Netherlands has "opted out" of the provisions of the Takeover Directive restricting defensive measures, but permits listed companies to "opt in" to the passivity and break through rules set out in the Takeover Directive.

The passivity rule

A company may "opt in" to the passivity rule in the Takeover Directive by setting out in its articles of association that shareholders' approval is required before the company can take any frustrating actions after the initial public announcement of a bid (the "passivity rule").

In addition, the articles may stipulate that any restrictions on the transfer of securities or the exercise of voting rights as set out in the articles of association or in contractual arrangements will not apply after a bid has been announced. However, this does not apply to contractual rights which originated prior to 30 May 2004 (the date on which the Takeover Directive came into force).

If, and to the extent that, a shareholder suffers damages as a result of such a restriction (for instance, due to the fact that he will only be able to sell his shares at a lower value or because he loses certain benefits or powers), the shareholder will be entitled to equitable compensation. It is, however, not clear who should pay such compensation. To date, this rule has not been applied in practice.

It is not clear at present whether and to what extent the passivity rule, if applied to a company, would affect its ability to issue protective shares. This defensive measure is typically structured so that a call option is granted to an independent foundation, which decides at its sole discretion if and when it will exercise its option right; therefore, the boards of the target company could be viewed as passive and the company might be able to issue protective shares notwithstanding that it has "opted in" to the passivity rule.

The breakthrough rule

A company may "opt in" to the breakthrough rule in the Takeover Directive by stipulating in its articles of association that an offeror who has acquired at least 75% of the share capital following a public bid may convene a general meeting of shareholders at which it can put the dismissal and appointment of members of the management and supervisory board on the agenda. In this meeting, any special rights of shareholders included in the articles of association regarding the appointment or dismissal of members of the management or supervisory board (e.g. the right to make a binding nomination) would then be set aside (the "breakthrough rule"). At such a meeting, each share would also entitle the holder

to one vote and other contractual restrictions or restrictions deriving from the articles of association would not apply. To date, this rule has also not been applied in practice.

The breakthrough rule cannot be included in the articles of association of companies to which the "large company regime" (*structuurregime*) applies. A key feature of the large company regime is that the right to appoint and dismiss members of the management board is vested in the supervisory board and not in the general meeting of shareholders. Shareholders do, however, have the right to dismiss the supervisory board collectively. They also have the right to veto the appointment of members of the supervisory board, although such members can only be appointed upon nomination of the supervisory board.

The reciprocity rule

A company that has voluntarily relinquished its protection by "opting in" to the passivity rule and/or the breakthrough rule (an "unprotected company") is entitled to revive its defensive measures if a protected company launches a hostile offer for its shares (the "reciprocity rule"). Imposing such measures would, however, require the approval of the general meeting of the target shareholders. Such decision could be taken before the announcement of the bid, but not more than 18 months prior to such announcement.

2.7. Third party involvement

It is possible for the target company to search for a third party (a "white knight") to make an alternative offer for the target company, which should be in the target company's interests. It would also be possible for the target company to issue protective shares to a third party (see paragraph 2.3 above for details).

2.8. "Offensive" actions

It is possible for the target company to make a counter-offer for the offeror, if the boards consider that such a move is in fact in the best interests of the target company. This is known as the "pac-man" defence, and may, depending on the circumstances, require approval by the target's shareholders.

2.9. Litigation

While litigation is not commonly used by target companies in the Netherlands as a weapon against hostile offers, there are many instances of the Enterprise Chamber becoming involved in takeovers as a result of shareholder action, which may be relevant where a bid is contentious.

Any shareholder of a public company who holds (alone or jointly) (i) 10% or more of the issued share capital of that company; or (ii) shares with an aggregate par value of €225,000, may initiate inquiry proceedings before the Enterprise Chamber and request that the Enterprise Chamber orders an inquiry into the policy of such public company by independent court-appointed investigators.

The Enterprise Chamber may order an inquiry into the policy of a company if it is demonstrated that there are reasonable grounds to believe that there is mismanagement of that company. The Enterprise Chamber has developed substantial case law on what constitutes mismanagement of a company. This may, for instance, consist of abuse of minority shareholders, insufficient disclosure to shareholders, conflicts of interest of board members or the unjustified use of takeover defences.

The Enterprise Chamber may at any time during the proceedings order interim measures. In the context of takeovers, the interim measures ordered by the Enterprise Chamber may play an important role in takeover situations. Such interim measures may include the suspension of management board members, the appointment of interim management board members and the suspension of shareholders' voting rights.

The Enterprise Chamber has repeatedly demonstrated its willingness to act promptly and take rigorous action in takeover situations. In the context of takeovers of public companies, shareholder interest groups and other activist shareholders often use inquiry proceedings to protect the interests of minority shareholders against the boards of the target company (the members of which may no longer be independent) or a majority shareholder.

3. What should a hostile offeror bear in mind?

Hostile offers are becoming more common in the Netherlands (although they are still very much the exception to the rule). Except in the context of the initial public announcement and the contents of the offer document, the Offer Rules do not contain provisions which distinguish a hostile offer from a recommended offer. A potential offeror is allowed to announce that it is contemplating an offer without first having contacted the target company. If an offeror has publicly announced that it is contemplating a hostile offer and states the name of the target company, the offer price or exchange ratio and an indicative timeline, such announcement will qualify as an "initial public announcement" under the Offer Rules. Consequently, the offer and the offeror will become subject to the Offer Rules and the supervision of the AFM (see sections 8, 9 and 10 for details).

A target company is not under an obligation to provide the offeror with an opportunity to conduct a due diligence investigation. If the target company does not cooperate with

the offeror's due diligence requests, any due diligence investigation will be limited to available public information (annual reports, interim financials, press releases etc.).

Making a hostile offer may require more strategic planning than making a recommended offer. If the offeror offers cash, it must justify the price to the target shareholders without suggesting to its own shareholders that it is "overpaying". If the offeror offers its own shares, it exposes its own operational track-record to criticism by the target and also exposes its own share price to possible downward pressure in the market.

In addition, the offeror may also have to explain why its offer is better than that of a competing offeror – which adds yet another dimension.

A hostile offeror should also bear in mind that there may be defensive measures in the articles of association of the target company which may be invoked to prevent the offeror from obtaining control of the company (see paragraph 2 of section 13 for details).

In a hostile offer, the requirement to obtain advice from the works council does not generally apply to the target company. Pursuant to the Merger Rules, the managing board of the target company must be informed of a contemplated hostile offer at least 15 days prior to making such offer (which can be after the initial public announcement). Consequently, the offeror will not be in a position to make a hostile offer by publishing the offer document without the prior knowledge of the target company. See paragraph 2 of section 14 for further details.

4. What if there is more than one offeror?

A competing offeror may make a competing offer at any time. There is no requirement that it should be at a higher price, but it is obviously unlikely to be successful if not.

The Offer Rules contain only limited rules on competing offers. In particular, the Offer Rules do not contain a specific obligation for a target company to provide a competing offeror with the same information as the information which has been provided to the initial offeror.

The initial offeror may extend the offer period until the end of the offer period of a competing offer (whether or not that competing offer period has itself been extended). During the offer period, the offeror may now also raise its offer consideration any number of times.

Target shareholders who have already accepted the initial offer are not automatically able to withdraw their acceptance as a result of a competing offer. Such withdrawal is only allowed if the offer period is extended by the offeror. However, the acceptance of

the initial offer will be cancelled automatically if the initial offer fails. As a result, in order to be successful, a competing offer should in practice be made prior to the expiry of the initial offer period.

Offers are often subject to the condition that no competing offer is publicly announced. This implies that the first offer may be terminated by the offeror if a competing offeror announces or makes a public bid.

The obligation for the target company to convene a general meeting of shareholders to discuss the offer only applies to the initial offer and not to any subsequent offer. Consequently, this could mean that the target shareholders will not be provided the opportunity to discuss any competing offer. The boards of the target company will, however, be obliged to issue a position paper for each offer, in which their position in respect of such offer is set out (see paragraph 4 of section 10 above for details).

Spain

1. What do the directors of a target company have to consider on receiving a hostile offer?

1.1. General Duties

The board of a target company must act in the interests of the company (which means the interests of the target's shareholders) when considering an offer. The directors would therefore be in breach of their duties if they took action for the sole purpose of impeding a potential bid.

1.2. Regulations

Once an offer has been announced, the Royal Decree provides that the target board and any executive body (or committee) of such boards (including individual members), as well as other companies belonging to the target's group and any other company that might act in concert with the target, must obtain the prior approval of the target's shareholders, at a general meeting where the quorum required to amend the target's by-laws is present, before taking any action that may prevent the bid being successful. This restriction lasts until publication of the offer results.

In particular, the regulations specifically state that the board must refrain from carrying out, inter alia, the following "frustrating actions":

– approving or implementing any issue of securities that may prevent the bid being successful;
– carrying out or promoting, directly or indirectly, transactions involving securities subject to the bid (or any other securities) that may prevent the bid being successful (e.g. purchasing shares in the open market in order to increase the share price above the offer price and reduce the number of shares available for the offeror);
– disposing of, encumbering or leasing real property or other corporate assets where such transactions may prevent the bid being successful (e.g. sale of "crown jewel" assets); and
– paying extraordinary dividends or making any other distribution to shareholders that is not consistent with the customary policy for payment of dividends, unless the distributions were approved by the competent corporate decision-making body, and made public, before the offer was announced.

The target's directors are required to issue a report setting out the rationale for any "frustrating actions" that are submitted to the shareholders at a general meeting for approval. Such report must include details about how each director intends to vote on such proposals. An offeror which already holds shares in the target will be free to vote against any such frustrating action if it is put to shareholders.

1.3. Shareholder resistance

In addition to the directors' duties and the provisions of the Royal Decree described above, Spanish shareholders are also resistant to actions which could prevent an offer being made for companies in which they have an interest. It is therefore unusual to put any actions which count as "frustrating actions" to a shareholder vote.

1.4. "Breakthrough" Provisions

Spain has "opted out" of implementing the "breakthrough" provisions of the Takeover Directive. From this statutory perspective, there is therefore nothing to prevent a Spanish company including breakthrough provisions in their by-laws (i.e. transfer restrictions, voting and other rights which could have an impact on a takeover).

Under the Royal Decree, target companies may, however, "opt in" to these "breakthrough" provisions at a general meeting held in accordance with the quorum requirements for amending the by-laws. The effect of such a resolution would be to render invalid any such agreements or by-law provisions (e.g. an agreement restricting the transfer of shares or an agreement which restricts rights to vote at a general meeting of the target company convened to approve a "frustrating action"), although in some cases not until the offeror holds not less than 70% in value of all voting shares.

In any case, a provision in a company's by-laws that limits the number of votes that a shareholder may hold, will have no effect if the tender offer is accepted by shares representing at least 70% of the share capital with voting rights.

Spain has also adopted the "reciprocity" principle in the Takeover Directive. As a result, if a company "opts in" to the "breakthrough" provisions, then any restrictive agreements or by-law provisions will continue to apply in respect of an offeror which is not also subject to the "breakthrough" provisions (i.e. a "non-virtuous" offeror).

2. What actions could a target take to protect itself against a hostile offer?

2.1. Preparation

If a company is aware that it might be the subject of an offer, it may decide to carry out various preparatory steps in advance of receiving any actual bid.

For example, directors could be made aware of their duties in a takeover situation and of the provisions of the applicable regulations which are most likely to be relevant. All appropriate advisers (financial advisers, brokers, lawyers etc.) could be spoken to and the company should also consider identifying external public relations advisers who are experienced in defence work.

Spanish listed companies have book entry shares registered through Iberclear – save for the limited exception of companies required by law to have registered shares (e.g. banks, television companies, airline companies), only depository entities registered with Iberclear know the identity of the shareholders. There is therefore no means of generally monitoring changes in shareholder identity, except through the public notification of major shareholdings to the CNMV (see paragraph 4 of section 3 above). It is possible for listed companies to request Iberclear to provide a shareholders' certificate for a given date if they have called a shareholders' general meeting by liaising with the depositories – however, this is unusual, expensive and time consuming.

2.2. Protective Structures

Prior to an offer being made, a potential target can also, within limits, shape its corporate structure in ways that would make the acquisition of control unattractive to a potential offeror.

For example, the by-laws of a company may provide that no shareholder may cast more than 10% of the total votes available, regardless of the ownership percentage actually held by the shareholder.

It is also possible to include special quorum requirements for the valid constitution of a shareholders' meeting, or stricter majority requirements for certain shareholder resolutions, in the articles of association of a potential target. For example, the by-laws could specify a 75% approval for decisions that would otherwise only require an outright majority, although the by-laws cannot go so far as to require unanimity. This may deter an offeror which is not confident of overcoming the relevant hurdle, but it could also cause practical issues for the target in the ordinary course of its business.

It is also very common to establish certain conditions for eligibility of directors of Spanish companies. Such conditions could include:

– a requirement to have been a shareholder for a specified minimum period;
– a requirement to be an employee of the company or its subsidiaries; or
– a requirement to have certain professional skills or experience.

It is also possible for two companies to have cross-shareholdings of up to 10%, which would protect each other to a certain extent against hostile offerors.

Target companies having protective measures in place may "opt in" to the "breakthrough" provisions under the Takeover Directive at a general meeting held in accordance with the quorum requirements for amending the target's by-laws. The effect of such a resolution would be to disapply any protective provisions of the target's by-laws (such as the ones described above) if, after a takeover bid, the offeror acquires a percentage of target securities equal to or greater than 75% of the capital carrying voting rights.

In order to implement the Takeover Directive, additional disclosure requirements for annual reports were introduced in the Securities Act. Under this Act, the annual management reports of companies listed on a regulated market must set out information on protective structures and other arrangements that may be relevant to a potential offeror, including (i) the total number of shares of each class issued by the company, including the rights attaching to each class of shares; (ii) share transfer restrictions, whether statutory or in the articles of association; (iii) direct or indirect significant shareholdings in the relevant company; (iv) capped voting rights; (v) share transfer restrictions in shareholders' agreements that are known to the company; (vi) rules in the articles of association governing the appointment and replacement of board members and the amendment of the articles of association; (vii) authorisations that entitle the board to issue or buy back shares; (viii) any significant agreements to which the company is a party and which take effect or may be terminated or altered on a change of control of the company as well as, except where their disclosure would be seriously prejudicial to the company, the effects of such agreements; and (ix) any agreements between the company and its board members or employees that provide for compensation for loss of office or employment due to a takeover bid.

2.3. Rejecting the offer

On receipt of an offer, the target board will normally take independent financial advice on its merits. An offer which becomes "hostile" will have been rejected, inter alia, on the basis of this advice, and the target board will then need to explain its reasons for this rejection.

The usual arguments are that the offer undervalues the target and its prospects and/or that the offer carries an insufficient premium for control, and that, by keeping their shares, the shareholders will reap the rewards of improved future prospects rather than letting the offeror take them. In order to back these arguments up, the target board will seek to present the performance of the target in the most favourable light and may release new information about its future plans, a profit forecast or an asset valuation.

Where the offeror is offering its own securities as consideration, the target board may also seek to attack the value of that offer by focusing on the offeror's financial condition or operational performance. In making such statements, the target must bear in mind the standards of care required in relation to documentation (see paragraph 3 of section 10 above), and must also bear in mind the need to avoid any defamatory statements.

The target board is only able to send out one document to its shareholders – the target board response – so it will need to be in a position to marshal its arguments quickly.

2.4. Regulatory hurdles

If applicable thresholds are met, offers must be referred to either the Spanish or the European competition authorities. In addition, the offer may be subject to other regulatory approvals in Spain (e.g. Bank of Spain, National Energy Commission etc.), in which case the offer will generally not be authorised until the outcome of the regulatory process is known. During these regulatory processes, the relevant competition and regulatory authorities will routinely request evidence from the target as to the competitive and other effects of the merger (and in some cases have legal power to require evidence). The target should not therefore be prevented from producing information in response to such requests which is unhelpful to the offeror's case and which may, accordingly, result in the offer being frustrated, if it views the information as valid and correct. However, the target should be very careful that the information provided is not misleading or intended to mislead, and that it forms part of a bona fide commentary on the relevant regulatory issues in response to the regulator's investigations.

2.5. "Poison pills"/Frustrating actions

As referred to in paragraph 1 above, once an offer has been filed, there are restrictions on what actions can be taken by a target.

In addition, the ability of a target to put in place "poison pills" before a formal offer is filed is limited by the restrictions on the implementation of frustrating actions. The Royal Decree provides that any decisions adopted prior to the announcement of a bid which have not yet been carried out in whole or in part must be submitted to a vote of the target's shareholders at a general meeting, if they do not fall within the scope of the company's ordinary course of business and their completion may prevent the bid being successful.

2.6. Third party involvement

The Royal Decree provides specifically that target directors do not need to seek shareholder consent to search for a third party (a "white knight") to make an alternative offer for the target. It would also be possible for the target to issue shares to a friendly third party, but subject to the requirement for shareholder approval referred to in paragraph 2.5 above.

2.7. "Offensive" actions

Under Spanish law, two companies cannot have cross-ownership of more than 10% in each other's share capital. Therefore, if the target is aware of the offeror's identity and has sufficient finance available, it is possible for it to prevent an offer being made by acquiring 10% in the offeror. However, this restriction would cease to apply if the offeror acquired more than 50% of the target's share capital.

3. What should a hostile offeror bear in mind?

Hostile offers are very uncommon in Spain, and most of the few hostile bids launched have not been successful. This in itself is something that should be borne in mind by a potential hostile offeror.

Making a hostile offer requires a lot more work and strategic planning than making a recommended offer. If the offeror is offering cash, it will need to justify the price to the target shareholders without suggesting to its own shareholders that it is "overpaying". If the offeror is offering its own shares, it will be exposing its own operational track record to criticism by the target and its own share price to possible downward pressure in the market.

In turn, the hostile offeror must remember that it must always comply with all relevant standards in making its "pitch" to the target shareholders. As well as the standards of care required in relation to documentation (see paragraph 3 of section 10 above), the offeror should also bear in mind the need to avoid any defamatory statements.

In addition, the hostile offeror may also have to explain why its offer is better than that of a competing offeror – which adds yet another dimension (and possible extra strains on the offeror's share price).

If an offeror wishes to challenge any defensive actions taken by the target, it may appeal either to the CNMV or to the courts.

4. What if there is more than one offeror?

Competing offers must comply with certain statutory restrictions:

- they can be filed at any time after the submission of the original bid, up until the fifth calendar day prior to the expiration of the acceptance period for that bid (although this deadline does not apply for mandatory offers, which must be filed immediately upon the occurrence of the event that gives rise to the obligation to submit the offer, if it occurs before the expiry of the acceptance period of the original bid);
- they must cover an amount of target securities that is not less than that in the last preceding offer;
- they must improve the conditions of the most recent offer filed – either by increasing the price, or (in the context of partial bids) by extending the offer to additional target securities. If securities are offered as consideration with no cash alternative, a report from an independent expert certifying that the price is higher must be provided;
- if the competing offer is a mandatory offer, it must also comply with the applicable provisions for mandatory offers; and
- subject to any adjustments, as described below, the acceptance period must be one month from publication of the first announcement of the competing bid (although, if the consideration includes new securities, the period will be extended if necessary to 15 days after the shareholders' meeting issuing the new securities).

The principle is that a target shareholder should not be prevented from deciding on the merits of any competing offers by different timetable deadlines. If there is a competing offer, the acceptance period for each previous offer would be automatically extended to match the acceptance period of the new offer – unless the acceptance period of the previous bid(s) would actually expire after the acceptance period of the new bid, in which case the new bid will instead automatically extend.

In a competitive situation, offerors are authorised to either withdraw their offers or improve the terms of their offers at any time after approval of the last competing offer up until the fifth day after the expiry of the deadline for filing new competing offers. In addition, on the fifth day after the expiry of the deadline for filing new competing offers all competing offerors which have not withdrawn their offers must file a sealed envelope with the CNMV with its decision as to whether to improve its offer for the last time.

On receipt of the new offers, the CNMV will suspend trading of the affected securities. It will then open the sealed envelopes and announce the new offers on the next business day. The shares will resume trading and each offeror will have three business days to provide an additional guarantee for the increased consideration.

The Royal Decree also provides for a "first mover advantage" – if the original offeror has not withdrawn its offer, it may make a last and final improvement to the offer consideration provided that:

- in the "sealed bid" procedure the consideration offered by such offeror was less than 2% lower than the highest consideration offered by any competing offeror; and
- the original offeror must then outbid the terms of the highest competing offer either by raising the price or value of the consideration offered by not less than 1% or (in the context of partial bids) by extending the original bid to a number of securities that is at least 5% greater.

The CNMV will then authorise any offer which has complied with this requirement and the offeror(s) must publish the revised conditions within five business days of authorisation. If several improved offers are to be authorised by the CNMV, they must all be authorised and published on the same date. The acceptance period for each offer will then automatically be extended to the date falling 15 calendar days after publication.

Target shareholders may submit multiple acceptances stating their order of preference of any offers that are on the table.

United Kingdom

1. What do the directors of a target company have to consider on receiving a hostile offer?

1.1. General duties

The duties of the directors of a UK company have now largely been codified by CA06. Directors generally owe these duties solely to the company, and generally only the company is able to enforce them.

CA06 expressly provides that directors must act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its shareholders as a whole. Directors must have regard to the following matters (among others) when discharging this duty:

- the likely consequences of any decision in the long term;
- the interests of the company's employees (see also paragraph 2 of section 13 below);
- the need to foster the company's business relationships with suppliers, customers and others;
- the impact of the company's operations on the community and the environment;
- the desirability of the company maintaining a reputation for high standards of business conduct; and
- the need to act fairly as between members of the company.

Directors are only obliged to have regard to the factors listed above and are not required actively to promote the interests of these interest groups. However, target directors need to ensure that they are able if necessary to demonstrate that they had regard to the relevant factors when making decisions affecting the company.

If the target is insolvent, the interests of the creditors will instead become paramount (although this situation is obviously unusual in a takeover context).

As a result of the changes brought in by CA06, there may be some (limited) circumstances where the directors of a target could take the view that ownership of the target by the offeror is likely to damage the target's business and would not therefore promote the success of the company, even though the price being offered to shareholders might be of interest to them.

Notwithstanding the above, the directors must not act in their own self-interest to preserve their management control, and must not exercise powers vested in them by the company for an improper purpose (e.g. issuing shares solely to defeat a bid).

It used to be an interesting question in this regard as to whether a target company could enter into arrangements with an initial offeror which gave it a "competitive

advantage" over later offerors (e.g. a very sizeable break fee or "right to match" proposals from later offerors). These types of arrangements with the initial offeror are no longer permitted in most situations; a target company may, however, be permitted to enter into break fee arrangements with "white knight" second bidders (see paragraphs 1 and 2 of section 4 above).

1.2. Code

The target board is not limited in the factors that may be taken into account when deciding on the merits of a bid. In particular, the Code specifies that the target board is not required to consider the offer price as the determining factor and is not precluded from taking into account any other factors which it considers relevant. A board whose shareholdings confer control over a target company must carefully examine the reasons behind its opinion on the offer and must be prepared to explain its decisions publicly. The Code states that shareholders in companies which are effectively controlled by the directors must accept that, in respect of any offer, the attitude of their board will be decisive.

The main focus of the Code in this regard, however, is in relation to frustrating actions and it is a requirement of the Code that, once an offer has been communicated to the target company board, or after the board of the target company has reason to believe that a bona fide offer might be imminent, no action should be taken by the target board which could result in any offer or bona fide possible offer being frustrated or in the target shareholders being denied an opportunity to decide on its merits.

The Rule will not, however, apply where (i) the target shareholders have given their approval to the action in a general meeting; or (ii) the offeror agrees that the target may take the relevant action, and the Panel therefore waives the application of the Rule. An offeror which already holds shares in the target will be free to vote against any such frustrating action if it is put to shareholders.

In addition to this general requirement, the Code sets out a non-exhaustive list of actions which will be regarded as "frustrating actions" unless approved by target shareholders. These actions are:

- issuing any shares, or transferring or selling (or agreeing to transfer or sell) any treasury shares;
- issuing or granting any options over unissued shares (although grants of employee share options in accordance with "normal practice" under an established share option scheme will usually be cleared by the Panel);
- creating or issuing any convertible securities over shares;
- selling or acquiring (or agreeing to sell or acquire) assets of a "material amount"; in determining "materiality", three tests will be applied – comparing consideration with

market capitalisation, assets to assets and operating profits to operating profits – and a relative size of 10%+ under the tests will generally be considered material; and

- entering into contracts otherwise than in the ordinary course of business (and amending or entering into service contracts with a target director will generally be outside the "ordinary course" if it constitutes an abnormal increase in emoluments or a significant improvement in terms).

A company may (with the Panel's consent) proceed with a course of action that would otherwise contravene this provision if it is in pursuance of a pre-existing contract or arrangement, or a decision to take the actions has already been taken and either was in the ordinary course of business or has been at least partly implemented.

This list is not exhaustive, because the general requirement outlined above is the overriding guide. For example, abnormal interim dividends declared by the target board, or proposals in relation to the target company pension scheme, or litigation undertaken by the target for reasons associated with the offer, could all be frustrating actions.

The Code also prohibits "inducement fees" subject to certain limited exceptions (see paragraph 2 of section 4 above).

1.3. Shareholder resistance

In addition to the above, UK shareholders are also extremely resistant to anything which could prevent an offer being made for the companies in which they have an interest. They are unlikely to vote for anything (e.g. any changes to a company's articles of association) which might have this effect. It is therefore extremely unusual to put any actions which count as "frustrating actions" to a shareholder vote.

1.4. "Breakthrough" provisions

The UK has "opted out" of implementing the "breakthrough" provisions of the Takeover Directive. From a statutory perspective, there is therefore nothing to prevent a UK company including breakthrough provisions in its articles of association (i.e. transfer restrictions, voting and other rights which could have an impact on a takeover). However, these would in any case not generally be permitted under the Listing Rules.

In addition, under CA06, target companies may by special resolution "opt in" to these provisions. The effect of such a resolution would be to render invalid any agreements which restrict transfers of shares to the offeror during an offer period, or which restrict rights to vote at a general meeting of the company that decides

whether to take any action which might result in the frustration of a bid. Companies rarely, if ever, pass such "opt in" resolutions, as such restrictive agreements are in any case very rare in the UK.

The UK has not adopted "reciprocity" provisions, so a company that "opts in" to these breakthrough provisions would not be able to distinguish between an offeror that is subject to equivalent provisions and one that is not.

2. What actions could a target take to protect itself against a hostile offer?

2.1. General preparation

If a company is aware that it might be the subject of an offer, it may decide to carry out various preparatory steps in advance of receiving an actual bid.

For example, directors should be made aware of their duties in a takeover situation and of the provisions of the Code which are most likely to be relevant. All appropriate advisers (financial advisers, brokers, lawyers etc.) should be spoken to and the company should also consider identifying external public relations advisers who are experienced in takeover defence work.

In addition, the target's registrars could be instructed to monitor changes in shareholdings in the target and report any substantial changes. Section 793 notices could be issued to establish the identity of underlying owners of any significant new holdings in nominee names (see paragraph 4 of section 3 above).

The target's brokers could also be instructed to keep a watch on the market and inform the target of any unexplained movements or unusual activity in shares. If there is an unexplained movement in the target's share price, an approach to the Panel may be considered in order to ask them to make enquiries of specified potential offerors as to whether they have a duty to make an announcement under the Code.

When faced with a hostile bid, it is also essential that a target be able to present its financial position effectively and as quickly as possible. Therefore, preparation in this regard might also be undertaken in advance of a bid. For example, the target could check whether it would be able to produce a profit forecast and asset valuation within the necessary timetable.

2.2. Protective structures

It should be noted that structural protection would not usually be something that UK companies would be able to put in place. This is because of the nature of the directors' duties, combined with the fact that the Panel and the UKLA are likely to

object, and the fact that shareholders are very unlikely to approve any such structure. The only exception to this is the small minority of companies that have to remain majority UK-owned/European-owned for regulatory purposes and are therefore permitted to include provisions in their articles to that effect.

Regulations made under CA06 require that a company which has voting securities admitted to trading on a regulated market at the end of a financial year must include the following information in the directors' report for that year: (i) the structure of the company's capital; (ii) any restrictions on voting rights or on the transfer of securities; (iii) any significant direct or indirect holdings of securities which are known to the company; (iv) the holders of any securities with special control rights and a description of those rights; (v) how control rights over any shares which are the subject of an employee share scheme are exercised, if such control rights are not exercisable directly by the employees; (vi) any agreements between holders of securities which are known to the company and which may result in restrictions on the transfer of securities and/or voting rights; (vii) any rules governing the appointment and replacement of directors and the amendment of the articles of association; (viii) any rules governing the powers of board members, and in particular the power to issue or buy back shares; (ix) any significant agreements to which the company is a party that take effect, alter or terminate upon a change of control of the company following a takeover bid, except where the nature of the agreements is such that their disclosure would be significantly prejudicial to the company (this exception does not apply where the company is obliged to disclose such information on the basis of other legal requirements); and (x) any agreements between the company and its directors or employees providing for compensation if the director/employee resigns or is made redundant or if their office/employment ceases because of a takeover bid. This is intended to ensure transparency of information which may be of use to a potential offeror.

2.3. Rejecting the offer

On receipt of an offer, the target board will take independent financial advice on its merits. An offer which becomes "hostile" will have been rejected, inter alia, on the basis of this advice, and the target board will then need to explain its reasons for this rejection.

The usual arguments are that the offer undervalues the target and its prospects and/or that the offer carries an insufficient premium for control – and that, by keeping their shares, the shareholders will reap the rewards of improved future prospects rather than letting the offeror take them. In order to support these arguments, the target board will seek to present the performance of the target in the most favourable light and may release new information about its future plans, a profit forecast or an asset valuation.

Where the offeror is offering its own securities as consideration, the target board may also seek to attack the value of that offer by focusing on the offeror's financial condition or operational performance. In making such statements, the target must bear in mind the standards of care required in relation to documentation (see paragraph 3 of section 10 above) and the restrictions on "marketing" (see paragraph 2 of section 11 above), and must also bear in mind the need to avoid any defamatory statements.

A target may also wish to make statements regarding the level of support it is receiving from shareholders who have indicated that they do not intend to accept the offer, in order to create a groundswell of support. The Code provides that the target should not make such statements unless the relevant shareholders' up-to-date intentions have been clearly stated to the target or its advisers. In practice this will normally require written confirmation from its shareholder, which will have to be disclosed to the market as a "letter of intent" in accordance with the Code (see paragraph 5 of section 4 above).

In getting its message across, the target company will require considerable assistance in strategic planning from its financial adviser. It is likely to send a number of documents to its shareholders and must make decisions about the optimal time for releasing information about itself and/or the offeror (bearing in mind the timing constraints of the Code – see section 9 above). However, the target must ensure that its financial adviser is not inappropriately incentivised – for example, it should not get a larger fee if the hostile offer fails.

2.4. Regulatory hurdles

Where an offer or possible offer is referred for investigation to either the CMA or the European Commission, the relevant regulatory authorities will routinely request evidence from the target as to the competitive and other effects of the merger (and in some cases have legal power to require evidence). The target should not be prevented from producing information in response to such requests which is unhelpful to the offeror's case and which may, accordingly, result in the offer being frustrated, if it views the information as valid and correct. However, the target should be very careful that the information provided is not misleading or intended to mislead, and that it forms part of a bona fide commentary on the relevant regulatory issues in response to the regulator's investigations.

2.5. Future developments

In addition to releasing favourable information about the current state of the target company, the target board may also consider formulating plans to put in front of its shareholders for future developments which could be carried out if the

hostile offer is unsuccessful. Two possible routes are to propose a return of value to target shareholders and/or to propose an acquisition or disposal.

Target companies have in the past proposed various measures by which value would be returned to shareholders in the event of an unsuccessful offer – e.g. share buy-backs or redemptions/large special dividends etc. In essence, such proposals give target shareholders a choice between the consideration available under the terms of the offer and the value that can be released by the target itself. However, shareholders have to believe that the target would still have good prospects as a stand-alone business after the proposed return of value, if this tactic is to have a chance of success.

Alternatively, the target might propose a major acquisition/disposal as an alternative to the offer. This is probably only effective if a seller or buyer is in fact lined up – but an alternative might be, for example, to propose a demerger of a part of the target's business instead. Making such a proposal would, however, require a lot of work by the target to make it appear cogent and viable.

2.6. "Poison pills"/Frustrating actions

Having considered the various actions which a target may validly take in respect of a hostile offer, it is worth confirming that it may not take any of the steps referred to as "frustrating actions" in paragraph 1.2 above. This obviously restricts the target board to a great extent as to what immediate steps can be taken to make life difficult for an offeror. For example, it is not possible simply to issue shares to a "friendly" shareholder in order to prevent an offeror gaining control.

Even before the "frustrating actions" provisions of the Code come into play, given their duties, the directors of a company must be extremely careful about building provisions into the company's constitution or contracts which would effectively prevent or severely hinder the making of an offer. For example, large penalty clauses in joint venture arrangements giving the joint venture partner rights to acquire material assets at a very favourable price in the event of an offer should be scrutinised very carefully by a company's directors (see paragraph 1.1 above).

As discussed in paragraph 1.3 above, this will generally be reinforced by the attitude of the company's shareholders, especially where the particular contract/amendment to the constitution needs to be voted on by shareholders.

2.7. Third party involvement

There should generally be no legal objection to a target board seeking a third party (a "white knight") to make an alternative offer for the target. Indeed, where there are two or more potential offerors, the target directors may have a positive duty to

seek the best price for the target shareholders' shares. In addition, a target company may now be permitted to enter into a break fee arrangements with white knight second bidders (see paragraph 2 of section 4 above). The Panel will require a potential white knight to clarify whether it intends to make a bid by Day 53 in the original offer timetable, so that shareholders have time to make up their minds on the original offer.

There may, however, be more difficulty in a target seeking a "white squire" to build up a protective stake in the target company. The allotment of shares to such a person will generally not be appropriate, given the directors' duties and the restrictions on frustrating actions referred to in paragraph 1 above. However, there may also be difficulties if the third party wishes to purchase shares in the market. The target will not be able to fund a third party to make such purchases, nor provide such party with any indemnity protection against potential losses. In addition, any exempt principal trader connected with the target – which might otherwise be prepared simply to take shares on to its books – is prohibited from dealing in shares with the purpose of assisting the target. Finally, if shareholders band together (in support of the target board) to acquire interests in voting shares and frustrate the offer, then they and the directors may all be deemed by the Panel to be acting in concert and will therefore need to be careful about not triggering an obligation to make a mandatory offer (see paragraph 3 of section 2 above).

2.8. "Offensive" actions

It is possible for the target to make a counter-offer to acquire the offeror, if the board considers such a move is in fact in the best interests of the company (e.g. because the offeror could be acquired more cheaply). This is known as the "pac-man" defence.

2.9. Litigation

Litigation is not commonly used as a weapon in UK takeovers. In fact, the Panel has in some circumstances found that the use of litigation may amount to a frustrating action.

3. What should a hostile offeror bear in mind?

Hostile offers are relatively common in the UK (although obviously not as common as recommended offers).

Making a hostile offer requires a lot more work and strategic planning than making a recommended offer. If the offeror is offering cash, it will need to justify the price to the target shareholders without suggesting to its own shareholders that it is "overpaying". If the offeror is offering its own shares, it will be exposing its own operational track record

to criticism by the target and its own share price to possible downward pressure in the market.

In turn, the hostile offeror must remember that it must always comply with all relevant standards in making its "pitch" to the target shareholders. As well as the standards of care required in relation to documentation (see paragraph 3 of section 10 above) and the restrictions on "marketing" (see paragraph 2 of section 11 above), the offeror should also bear in mind the need to avoid any defamatory statements.

In addition, the hostile offeror may also have to explain why its offer is better than that of a competing offeror – which adds yet another dimension (and possible extra strains on the offeror's share price).

As a result of the above, the hostile offeror is likely to send a greater number of documents to the target company's shareholders and it must make decisions about the optimal time for releasing information helpful to its offer and/or for increasing its offer or declaring its offer final (bearing in mind the timing constraints of the Code – see section 9 above). This means that the role of the financial adviser to the offeror will be particularly important.

An offeror should also remember that, if its offer is unsuccessful, it may not thereafter simply buy shares in the market at any price in order to thwart any competing bid. The Code prohibits a "failed" offeror (and its concert parties) from buying shares on terms which are better than those made available under its lapsed offer until all other competing offers have either succeeded or lapsed. In addition, any exempt principal trader connected with an offeror is prohibited from dealing in shares to assist that offeror (e.g. to thwart the other offeror).

Finally, if the offeror considers that the target has exceeded the limits on the frustrating action that it may legitimately take, it would generally complain to the Panel (see section 1 above). It would be hard for the offeror to take action through the courts against the target or the target board – even if it was already a target shareholder.

4. What if there is more than one offeror?

If a potential competing offeror has been publicly identified then the potential competing offeror must either announce a firm intention to make an offer under Rule 2.7 or announce that it does not intend to make an offer under Rule 2.8 by Day 53 in a contractual offer or by Day 14 in a scheme of arrangement. If an offeror has not been publicly identified they would, in theory, have until the offer is declared unconditional as to acceptances to make a bid.

The principle is that a target shareholder should not be prevented from deciding on the merits of either of two competing offers by different timetable deadlines. If there is a

competing offer, then the first offeror would effectively move on to the timetable of the second offeror – see paragraph 2.2 of section 9 above.

Target shareholders who have already accepted the original offer are not automatically able to withdraw their acceptance as a result of the competing offer – although if the first offer fails, they will then have an opportunity to accept the second. An accepting shareholder is, however, entitled to withdraw their acceptance from the date which is 21 days after the first closing date of the initial offer, if the offer has not by such date become or has been declared unconditional as to acceptances. This entitlement to withdraw must be exercisable until the earlier of the time that the offer becomes or is declared unconditional as to acceptances and the final time for lodgement of acceptances which can be taken into account in accordance with Rule 31.6 (the final day rule).

Target shareholders who have already voted on a scheme are not prevented from accepting another offer; however, the original vote would technically remain valid and binding on the target's shareholders from time to time unless and until the court declines to accept it on the basis that circumstances have changed (e.g. a better offer has been made).

The Panel will normally implement an auction procedure if a hostile bid situation continues to exist in the later stages of an offer period. This is sometimes necessary because the last day for revision of an offer is Day 46 in the timetable. In a hostile situation, Day 46 will be the same day for all competing offerors – therefore, if one offeror releases a higher offer very late in the day, there may not be sufficient time for the other offeror(s) to respond. The auction will normally require final revisions to be announced by Day 46 of the latest competing offer.

If a competitive situation continues to exist at 5.00 p.m. on Day 46, and no other procedure has been agreed between the competing offerors, the board of the offeree company and the Panel, the Panel will impose an auction procedure on the competing offerors, requiring final revisions to their offers to be announced by Day 46 of the latest competing offer. After Day 46, the competing offerors will be able to revise their offer a maximum of five times within a period of five business days. If no revised bid is made by either of the competing offerors on any day, the auction will end.

Where one or more of the competing offers is being implemented by way of a scheme of arrangement, the parties must consult the Panel in relation to the applicable timetable. The Panel will then determine the date or dates on which final revisions to the competing offers must be announced and on which any auction procedure will commence, taking into account all of the relevant circumstances.

SECTION FOURTEEN: OTHER

France

1. Are any taxes or duties usually payable?

1.1. Offeror

There is generally no stamp duty payable in relation to an offer for a listed target, provided that no deed is drawn up for the acquisition of the shares, except for a nominal stamp duty if the offeror is a French company and issues new shares in consideration for the target's securities.

Subject to various exemptions, the acquisition of shares in a listed corporation headquartered in France with a market capitalisation of at least €1 billion is subject to a 0.2% financial transaction tax which is economically borne by the acquiror of the shares and is assessed in principle on the purchase price of such shares.

1.2. Target shareholders

The transfer of listed target securities to the offeror results, in principle, in the taxation of the capital gain, if any, realised upon such transfer. This applies even in the event that the squeeze-out procedure is triggered. However, its effect will depend on the consideration offered by the offeror.

– General

As regards French resident individual holders (not acting as professionals), social contributions are levied on capital gains at the fixed proportional rate of 15.5%. In addition to such contributions, capital gains are subject to income tax at a maximum rate of up to 45% (after deduction of an allowance that generally does not exceed 65%, as the case may be), and such gains may further be taxed under a 3% or 4% exceptional income tax contribution applicable to such portion of the tax payers' overall annual taxable income

(including capital gains derived during the relevant fiscal year) that exceeds certain specified thresholds.

If the transfer leads to a capital loss, the loss can be set off against capital gains resulting from other sales of securities realised by the household as a tax unit during the same tax year or the following 10 years.

As regards French resident companies subject to French corporate income tax, the capital gain or loss realised upon transfer of their securities is in principle included in their taxable profit, which is subject to standard corporate income tax (currently at a maximum rate of 33.1/3% or 34.43%, in the majority of cases).

However, such capital gain may benefit from the participation exemption regime and thus be taxed at a zero corporate income tax rate (subject to a 12% recapture which will remain subject to standard corporate income tax), provided that the securities sold are shares which qualify, for the purpose of the participation exemption regime, as long-term investments (*titres de participation*) in non-predominantly real estate companies which have been held for at least two years at the date of the sale. Capital losses incurred upon the sale of such shares cannot be set off against long-term capital gains of the same nature realised by the company during the same fiscal year. Shares which qualify as long-term investments in listed predominantly real estate companies (as defined for the purposes of such participation exemption regime) and that have been held for at least two years also benefit from a long-term capital gains regime, with a reduced corporate income tax rate of currently circa 19%. Specific rules apply to the offsetting of capital losses incurred upon the sale of such shares.

Subject to the provisions of applicable tax treaties, capital gains realised upon the sale of securities in listed companies (that are not predominantly real estate companies) by persons who do not have their tax residence in France in accordance with article 4 B of the French Tax Code, or companies whose registered office is located outside France (and which do not have a permanent establishment or a fixed base in France, the assets of which include the securities being sold) and, in each case, who are not domiciled, established or incorporated in a Non-Cooperative Jurisdiction, are not taxable in France, provided that the seller and (where applicable) his family group have not directly or indirectly held more than 25% of the rights to earnings of the company at any time during the five years preceding the sale. As far as listed predominantly real estate companies (as defined for the purposes of this non-resident capital gains tax regime) are concerned, capital gains realised upon the sale of shares of such companies by persons who do not have their tax residence in France pursuant to article 4 B of the French Tax

Code, or companies whose registered office is located outside France (and which do not have a permanent establishment or a fixed base in France, the assets of which include the securities being sold), are not taxable in France, provided that the seller has not directly or indirectly held at least 10% of the company's share capital.

Notwithstanding the above, and subject to various conditions and exceptions, persons who cease to be tax resident in France may still be subject to taxation in France on all or part of the capital gains realised upon the subsequent disposal of any shares that they held on the date they ceased to be tax resident in France within the meaning of the relevant provision of the French Tax Code.

– Exchange offer

To avoid immediate taxation of the holders upon disposal of their securities, exchange offers are often provided as an alternative to cash offers: such offers are treated as non-taxable events and no taxation is incurred until the further disposal, cancellation, buy-back or redemption of the securities received as consideration. This is subject to the following conditions being met:

- as regards French tax resident individuals (not acting as professionals):
  - the offer must comply with relevant legal and regulatory requirements. If the exchange offer is made in France, it is subject to the control of the AMF; if such offer is made in a foreign state pursuant to that state's relevant regulations, either of the following conditions must be met:
    - the foreign state is an EU Member State or a state which has entered into a tax treaty with France providing for reciprocal administrative assistance for the prevention of tax fraud or tax evasion; or
    - the financial institution with which the securities are deposited is established in France or in a state mentioned in the previous paragraph; and
  - where part of the consideration consists of cash, such part must not exceed 10% of the nominal value of the securities received as consideration by the holders of the target's securities;
- as regards French tax resident companies subject to French corporate income tax:
  - the exchange must consist exclusively of a share for share exchange (thus generally excluding exchanges of other types of securities, such as bonds or loan notes, although there are some exceptions);
  - the public offer must comply with relevant legal and regulatory requirements, i.e. must be subject to the control of the AMF in France or, if made in an EU Member State, to regulations comparable with the French ones, notably with regard to the requirements relating to the protection of small investors;

- where part of the consideration consists of cash or cash equivalents (bonds, warrants etc.), such part must not exceed (1) 10% of the nominal value of the shares received as consideration by the shareholders of the target; and (2) the amount of the capital gain realised by the company on accepting the offer; and
- certain anti-abuse provisions apply on the exchange of shares which were issued in a capital increase carried out less than three years before the exchange offer.

If these conditions are met, no taxation is incurred upon the disposal of the target's shares (or securities in the case of individuals); the profit or loss realised upon further disposal of the offeror's shares (or securities in the case of individuals) received as consideration is then computed by reference to the tax value of the target's shares (or securities in the case of individuals) disposed of in the offer, and subject to taxation or deduction pursuant to the standard tax regimes.

It should be noted that the above analysis does not cover any taxation issues relating to options or option holders, nor to shares held within an employees' saving plan, nor to free shares granted to employees. These issues are complex and should be considered early on in any proposed offer, since they can have a significant impact on taxation matters for both the option holders or employees and the target company.

2. Are there any particular issues relating to employees?

A company employing 50 employees or more must form a Works' Council (*comité d'entreprise*), a body elected by, and representing the interests of, the employees of the company. The Works' Council has the right to be informed (and sometimes consulted) on the employment-related aspects of the economic activities and situation of the company.

With regard to tender offers, the target's chairman must inform the target's Works' Council (or the employees directly, in any case where there is no Works' Council) as soon as he or she is aware of the filing of an offer prospectus with the AMF.

The offeror is required to send the offer prospectus to the target's Works' Council (or in any case where there is no Works' Council, to the target itself, which must provide such prospectus directly to its employees without delay) within three days following publication of such offer prospectus.

In the event of a takeover bid, the target is required to implement a works council information-consultation procedure. These measures will not apply to takeover bids

filed by offerors holding alone or in concert more than 50% of the share capital or voting rights when the draft offer is filed.

To enable employees of the target to protect their interests, the board of directors of the target cannot issue an opinion on the offer, and the approval of the AMF cannot be issued, until, in each case, the target's Works' Council has given its opinion on the takeover bid.

An initial meeting of the Works' Council must take place very shortly after the draft offer is filed with the AMF. At this meeting, the Works' Council will decide whether it wants to meet with the offeror and whether it wants to seek the assistance of a financial expert, such appointment being not subject to any specific criteria. The meeting with the offeror must take place within one week of the filing of the draft offer and the financial expert must deliver his report on the offeror's industrial and financial policy and strategic plans as regards the target within three weeks of such filing. The report must also assess "the repercussions of implementing the offeror's industrial and financial policy and strategic plans on all interests and on the employees, business sites and the localisation of decision-making centres".

In order to carry out his task, the financial expert shall have access to all information, whether in the possession of the target or the offeror, deemed necessary to assess the scope of the transaction. If this information is not made available to the financial expert, the Works' Council may apply to the President of the *Tribunal de Grande instance* (Regional Civil Court), deliberating in summary proceedings and without the possibility of appeal, for an order stipulating that the relevant information or documents be provided by, accordingly, the offeror or the target. The fact that the financial expert has the right to obtain information from the offeror may not be appreciated by offerors as, due to the public nature of the financial expert's report, it could conflict with trade secrecy, particularly if the offer is unsuccessful.

Following the meeting with the offeror and the delivery of the financial expert's report, the Works' Council must give an opinion on the offer within one month of the draft offer being filed. If not, the Works' Council will be deemed to have been duly consulted. This one-month period may, however, be extended by an express Court order, if an application is made to the Court to settle a dispute regarding the availability of information required for the financial expert's report. The Works' Council's opinion and the financial expert's report are made public in the offeree document (*note en réponse*) issued by the target in response to the offer prospectus.

In no case does the law grant the target's Works' Council a right of veto. The success or the failure of a takeover bid remains in the hands of the shareholders.

If the target company is the dominant company of a group, the requirements described above are applicable to the Group Works' Council (*comité de groupe*) rather than to the target's Works' Council.

As an exception to the general rule of prior consultation of the Works' Council, the offeror is not required to consult its Works' Council before a bid is launched. In such a case, the offeror is only required to hold a meeting of its Works' Council within two business days after the publication of the filing and to provide the Works' Council with precise written information in relation to the offer, and the consequences that such offer may have on employment.

However, the general view is that both the offeror and the target would be required to consult their respective Works' Councils prior to the announcement and filing of the offer in the event of a friendly takeover where an agreement has been entered into between the two companies in respect of the envisaged offer or involves their management. In practice, this means that implementation agreements are less usual in French domestic deals. Typically, the main terms and conditions of the agreement would be set forth in a joint press release and not in a formal agreement.

3. How are options and convertible securities dealt with?

When structuring an offer, outstanding warrants and convertible debt instruments should be taken into account. Many listed companies have implemented share-based incentive schemes covering all or certain categories of employees and executives.

An offer must be made for all securities in a target which give access to share capital or voting rights (including convertible securities). The offer price for such securities must be determined separately by the application of the multi-criteria approach.

Options (*options de souscription et d'achat d'actions*) are not tradeable because of their personal nature under French law, and therefore do not qualify as securities.

It is not common for the terms of options in France to provide that they will lapse upon a successful takeover offer. Furthermore, it is not possible for the target's articles of association to be changed to provide for an automatic exchange into offeror shares if any options are exercised following completion of the offer. In practice, however, a liquidity facility would be offered to all remaining holders of options whereby, as they exercise their options (or, as the case may be, as the holding periods on the underlying shares required for social security and/or tax purposes lapse), their target shares would be acquired by the offeror on the same terms as in the offer.

Offers to employee option holders to "roll over" their rights into options over the offeror's shares are not commonly made in France.

In the case of options granted under an employee option scheme, the use of a liquidity facility may be a solution but should be considered on a case–by-case basis and with specialist tax advice.

4. What are the consequences of an unsuccessful bid?

The offeror is not prevented from making another offer/acquiring target shares at any time after an unsuccessful offer.

5. What regulates a "partial" offer?

A partial offer is generally not possible under French law. However, an offeror may be authorised to launch a partial offer for no more than 10% of the voting equity securities and voting rights that the offeror already holds, either directly or indirectly, alone or in concert (including securities that the offeror is entitled to a acquire at its own initiative). A partial offer could be made by using the simplified offer procedure (see paragraph 1 of section 2 above). The 10% threshold would probably need to be calculated for each category of financial instruments.

Partial offers are very uncommon and, to our knowledge, have never been used in France. They may however by used by an offeror wanting to acquire a stake in a public company quickly without affecting the share price.

As with a voluntary bid, partial offers are not subject to the AMF's prior approval of the offer price and the offeror is free to offer whatever price it wishes. The AMF will however assess whether the information given in the offer document (*note d'information*) is comprehensible, complete and consistent.

The AMF will also review the mechanism proposed by the offeror to restrict the number of shares acquired in its offer.

Germany

1. Are any taxes or duties usually payable?

1.1. Offeror

No stamp duty will be payable on the value of the consideration paid for the target's shares in an offer.

However, if the target owns real estate in Germany, real estate transfer tax (RETT) will be payable on the fair market value of the real estate. This is a fixed cost of carrying out any offer where the acquisition is of 95% or more of the target shares, or results in 95% or more of the target shares being held by one party, directly or indirectly, including through dependent subsidiaries. Depending on where the real estate is located within Germany, the range of applicable RETT rates currently varies in the range between 3.5% and 6.5%. RETT will also be payable on real estate in Germany that is owned by any subsidiaries of the target that are organised as corporations, provided that the target holds (directly or indirectly) at least 95% of the shares in the subsidiary. If real estate is owned by subsidiaries organised as partnerships, RETT can become payable as well (at the aforementioned rates on the fair market value of the real estate). Such RETT, however, would be payable by the partnership itself.

1.2. Target shareholders

The main tax payable by target shareholders in relation to takeover offers is corporate income tax or ITT (as defined) and/or trade tax on a potential capital gain. The tax treatment fundamentally depends on whether the consideration offered in exchange for the target shares consists of cash or shares.

Cash offer

Under current German law, any gain derived from the sale of shares (including as part of an offer) by a German company is generally 95% exempt from corporate income tax and trade tax. The remaining 5% are subject to corporate income tax (plus a solidarity surcharge thereon) at a rate of 15.8% and trade tax at a rate of 7 to 17% (depending on the municipality where the business is located). On the other hand, losses suffered from the sale of shares would not be deductible for tax purposes. Special rules apply to banks, financial institutions and insurers meaning that, subject to certain requirements, capital gains can be fully taxable and losses fully deductible.

For target shares acquired on or before 31 December 2008, an individual selling shares in an offer will generally only be subject to income tax and a solidarity surcharge (levied on 60% of the capital gain), if:

– the individual shareholder holds the target shares as a business asset; or

– the individual shareholder holds the target shares as a private asset but has, directly or indirectly, held 1% or more of the share capital of the target at any time during the last five years.

In both cases, only 60% of the capital gain will be taxable and only 60% of any loss suffered will be deductible for tax purposes. If neither of the criteria under paragraphs (i) and (ii) above is fulfilled, any capital gain will be tax free and any capital loss will be non-deductible.

For target shares acquired after 31 December 2008, the full amount of capital gains from a sale of the target shares held by an individual as private assets will generally be subject to a flat tax of 26.4% (including a solidarity surcharge and plus, if applicable, church tax thereon), irrespective of how long the shares have been held. However, if any of the cases (i) or (ii) above are present, income tax at the applicable personal income tax rate (plus a solidarity surcharge and any applicable church tax) will be levied on 60% of the capital gain.

Share offer

If the consideration offered consists of shares in the offeror (and if the offeror qualifies as an EU corporation under the EU directive 90/434 of 23 July 1990, and owns or acquires directly shares representing at least a majority of voting rights in the target), target shareholders which or who are either companies or individuals holding the shares as business assets or having held a shareholding of at least 1% at any point in time during the last five years, can, subject to certain requirements, avoid taxation of capital gains if they opt for a tax-neutral "roll-over" of book values. In order to be eligible for such treatment, two specific requirements must be met:

– (A) the offeror must maintain the tax book value at which the target shares have been accounted for in the target shareholder's balance sheet (if the target shareholder has held the target shares as a business asset), or the target shares' acquisition costs (if the target shareholder has held the target shares as a private asset) – the tax book value and the acquisition costs are together referred to as the "tax basis" in this section; and (B) the offeror must hold the target shares over a period of seven years. If the target shares are sold within such period, a capital gain realised by the target shareholder upon exchange of the target shares for consideration shares will retroactively be taxed,

but one seventh of such capital gain will be tax-exempt for each full year that has expired from the time of the exchange; and

– the target shareholder must (A) apply its former tax basis in the target shares to the consideration shares received in the offer, and (B) hold the consideration shares over a period of seven years. If the consideration shares are sold within such period, a capital gain realised upon the exchange of the target shares for consideration shares will retroactively be taxed, but one seventh of such capital gain will be tax-exempt for each full year that has expired from the time of the exchange.

In addition, where part of the consideration is in cash (or assets other than shares), such part must not exceed (i) 25% of the book value of the target shareholder's target shares or (ii) 500,000 EUR or, if lower, the tax book value of the target shareholder's target shares.

Individuals holding their shares as a private asset generally do not realise any capital gain to the extent they acquire as consideration shares in the offeror. However, any capital gain arising from a future disposal of the shares in the offeror will be calculated based on the historical cost for their shares in the target. Any cash that is paid as an additional part of the consideration will be taxed as dividend income.

Foreign target shareholders

Foreign shareholders are subject to German taxation with a capital gain only if they have held 1% or more of the share capital of the German target at any time during the last five years. However, even in this case, most double taxation treaties exempt foreign shareholders from German taxation.

Where the consideration consists primarily of shares, but in addition a cash component is offered, foreign shareholders should not be subject to German taxation either. However, this is not absolutely clear even though the tax authorities have issued a decree to that effect in respect of two cases recently,

2. Are there any particular issues relating to employees?

Under German stock corporation law, the management board has to act in the interests of the company; this means that the management has to take into consideration the various stakeholder interests in the company and its operations. The relevant stakeholder groups are primarily the shareholders, the employees and the public. There is no legal hierarchy between these interests: the management board has to balance all the stakeholder interests equally in the event of conflicting interests.

The management board of the target has a duty to report the offeror's notification of its decision to make an offer to the target works council. If there is no works council, the management board must instead report directly to the target employees.

The offer document must elaborate on the prospects for the target's employees and their representatives, as well as any expected material changes in their conditions of employment, and any measures planned in that respect.

In their reasoned opinion on the offer, the management board and supervisory board of the target must also address the expected consequences of a successful offer for the target's employees and their representatives.

The competent target works council or, if there is no works council, the employees of the target, may also submit to the management board their own opinion on the offer. If so, the management board must publish the employees' opinion together with its own opinion.

However, target employees do not have any direct right to challenge an offer in their capacity as employees.

3. How are options and convertible securities dealt with?

When structuring an offer, outstanding warrants and convertible debt instruments should be taken into account. Many listed companies have implemented share-based incentive schemes covering all or certain categories of employees and executives.

The Takeover Act generally applies to any securities issued by a target company and traded on an organised market; the Takeover Act would therefore also apply (subject to exceptions – see below) to an offer for listed convertible securities in a target (which could include options, convertible bonds, warrants or other subscription rights).

However, the Takeover Act does not require an offeror to launch a takeover offer for convertible securities in a target. Instead, the Takeover Act provides that takeover offers and mandatory takeover bids only have to extend to all classes of shares of the target company.

If the offeror does choose to make an offer for the convertible securities, the provisions of the Takeover Act requiring the consideration to be "adequate" do not apply, and the consideration offered will depend on the nature and function of the convertible securities concerned. However, the rules on the squeeze-out also do not apply to convertible securities. Holders of convertible securities therefore have a certain amount of leverage over an offeror.

It is also not usual for the terms and conditions of convertible securities to include provisions for takeover or squeeze-out procedures; thus, the rights of the holders of the securities are usually unaffected by those procedures. Therefore, if the convertible holders do not choose to sell their securities to the offeror, they may continue to convert their securities into shares in the target even after the offer has closed and the offeror has taken control of the target. The practice on terms and conditions may, however, change in future.

The offeror has no ability to compel any person to sell shares issued after completion of the offer.

4. What are the consequences of an unsuccessful bid?

If an offer fails because it does not reach the required level of acceptances, the offeror (and its related concert parties) cannot within one year from the date on which the offer fails announce an offer for the target, or acquire any shares in the target if it would thereby be required to make a mandatory offer. This restriction does not apply if the offeror is unsuccessful for another reason – for example, because a required merger clearance cannot be obtained. The FFSA may grant an exemption from this rule if the target company gives its consent.

5. What regulates a "partial" offer?

Partial offers are only permissible if they do not result in the offeror holding shares carrying more than 30% of the voting rights of the target, and they are, in practice, very rare. If target shareholders tender more shares in a partial offer than the required percentage, acceptances should be allocated between such shareholders on a pro rata basis. They are not governed by the most important provisions of the Takeover Act (e.g. adequacy of price, timelines etc.).

Italy

1. Are any taxes or duties usually payable?

1.1. Offeror

In general, no taxes or duties will be payable by the offeror on the value of the offer consideration for the target's shares.

However, starting from 1 March 2013, an Italian Financial Transaction tax ("FTT") applies on the transfer of property rights in shares or similar participating instruments issued by Italian resident companies, regardless of the tax residence of the purchaser or seller and/or the place where the transaction is entered into. The FTT applies at a rate of 0.2%, reduced to 0.1% if the transaction is executed on a regulated market or a multilateral trading system, as defined by the relevant law. As a general principle, the taxable base is the consideration paid for the transfer.

The FTT is payable by the party that acquires the shares or similar participating instruments, and should be levied by any financial intermediary (or other person) that is involved, in any way, in the execution of the transaction. Specific exclusions and exemptions are set out by the law.

From 1 July 2013, specific rules under the FTT apply to any transactions in derivative instruments linked to shares issued by Italian resident companies.

1.2. Target shareholders

The main tax payable by target shareholders in relation to a takeover offer is capital gains tax.
The tax rates will depend on whether the shares being sold, as a whole, fall within the definition of a "qualified shareholding", and on whether the seller is a commercial company.

If the target is listed on a regulated market, a shareholding will be a "qualified shareholding" where more than 2% of voting rights or more than 5% of the share capital is sold by the shareholder in a 12-month period.

Capital gains realised by Italian individuals on a qualified shareholding are subject to personal income tax at progressive rates up to 43%, and the taxable base is an amount equal to 49.72% of the gain realised. Capital gains realised on a non-qualified shareholding are subject to a fixed rate substitute tax of 26%.

If the seller is a company or another commercial entity, the capital gain is treated as corporate income and taxed accordingly (corporate income tax is currently at

27.5%). However, gains realised by companies on the disposal of shares are 95% exempt from corporate income tax if certain conditions are met.

In particular, capital gains on shares are exempt if:

- the shares in the target company have been held for at least 12 months;
- the shares are reported as a fixed asset in the balance sheet of the corporate shareholder for the taxable year in which the acquisition takes place;
- the target company is engaged in genuine business activities; and
- the target company is resident in Italy or in a foreign country that is not considered a tax haven jurisdiction under Italian law.

If the seller is a non-resident without a permanent establishment in Italy, and is resident in a country which allows an adequate exchange of information with Italy, the proceeds of the sale of a non-qualified shareholding in a listed company will not incur any capital gains tax liability. However, where the sale is of a qualified shareholding, tax at a 27.5% rate is payable on 49.72% of the capital gain realised, unless any international tax treaties provide relief.

In principle, the above rules on capital gains tax apply irrespective of the consideration received by a selling shareholder. However, if certain conditions apply, special rules provide that an exchange of target shares for shares in the offeror is not treated as a taxable event.

In particular, pursuant to the EU Merger Directive (Dir. 90/434/CE) as implemented in Italy, if the target is an EU resident corporation and, through the exchange of shares, the offeror achieves control of the target (i.e. owns the majority of the target voting rights), then the exchange of shares will be tax neutral.

Under the tax neutrality regime, the Italian resident shareholder of the target will not realise any gains or losses on the target shares exchanged, but the tax basis in the target shares carries over to the offeror shares received in exchange.

2. Are there any particular issues relating to employees?

   There are no particular issues relating to employees.

3. How are options and convertible securities dealt with?

   When structuring an offer, outstanding warrants and convertible debt instruments should be taken into account. Many listed companies have implemented share-based incentive schemes covering all or certain categories of employees and executives.

There is no obligation to make an offer to the holders of options and convertible securities in the target. However, the offeror may voluntarily decide to offer to purchase such securities.

There are no specific rules on the value of such an option or convertible security offer, although it would usually be made on the basis of the offer price for the shares, less the conversion or subscription price per share. The offeror may provide a "roll-over" into securities which are convertible into its own shares, provided that the rules relating to exchange offers are complied with.

The exercise of conversion rights during a takeover offer is allowed provided the terms and conditions of the securities permit such conversion. Any action by the target to accelerate such conversion rights would count as a defensive measure and be subject to the "passivity rule" (see paragraph 1.2 of section 13 above).

It is not usual for the terms and conditions of convertible securities to provide that they lapse on completion of a takeover offer, or for the target to make changes to its constitutional documents to seek to deal with the situation post-offer.

If any holders of convertible securities continue to hold their securities after an offer, they may continue to convert their securities into shares in the target even after the offeror has taken control of the target, in accordance with the applicable terms and conditions.

The existence of securities which may be converted into target shares after closing of an offer may require prior consultation between the offeror and CONSOB if the offeror intends to delist the target as a result of the offer.

4. What are the consequences of an unsuccessful bid?

The offeror is not prevented from making another offer/acquiring target shares at any time after an unsuccessful offer.

5. What regulates a "partial" offer?

Partial offers are regulated under the general provisions set forth in the CFA. Where the offeror crosses either of the thresholds for a mandatory offer (see paragraph 3 of section 2 above) as a result of a partial offer, it will be required to make a mandatory offer for the remaining shares in the target. Partial offers are rare in Italy.

The Netherlands

1. Are any taxes or duties usually payable?

1.1. Offeror

The offeror does not have to pay any Dutch taxes of a documentary nature on the offer, such as capital tax, stamp or registration tax or duty with respect to the purchase of the shares in the target company.

If the offeror is a Dutch tax resident company, then it is subject to corporate income tax on its worldwide taxable profits at a rate of 25% (the first €200,000 of taxable income is taxed at a rate of 20%). There is no distinction between the taxation of capital gains and ordinary income. Generally, losses derived during a taxable year can be set off against taxable profits of the preceding year and nine subsequent years. Various rules may limit the actual carry-over of losses.

If the offeror is a Dutch tax resident company, then after the offer it may benefit from the Dutch participation exemption regime. Pursuant to the participation exemption, a Dutch company is exempt from Dutch corporate income tax with respect to all benefits derived from a qualifying participation, including dividends received and capital gains (including currency exchange gains) realised. The participation exemption will generally apply if the Dutch company owns at least 5% of the nominal paid-up share capital of the subsidiary, except if (i) the Dutch company holds it with a view to obtaining a return that does not exceed what can be expected from regular asset management, (ii) the subsidiary is primarily (> 50%) engaged in holding small (< 5%) equity investments, or (iii) the subsidiary is primarily (> 50%) engaged in group financing, leasing and licensing activities. Even if one or more of these exceptions apply, the parent company can nevertheless benefit from the participation exemption if (i) the subsidiary's regular tax rate is 10% or higher and the applicable foreign tax regime does not contain substantial tax base deviations, or its profits recalculated on the basis of Dutch standards are effectively taxed at a rate of 10% or more, or (ii) 50% or more of its assets are "good assets".

While interest related to the financing of participations is generally deductible, since 1 January 2013 certain restrictions may apply.

Following the offer, a Dutch tax resident offeror may consolidate for corporate income tax purposes any subsidiaries that are tax resident in the Netherlands in which it holds 95% or more of the share capital. Consequently, corporate income tax is levied as if there is only one taxpayer, in that the activities and the net worth of the subsidiaries form part of the activities and the net worth of the parent company. This may be helpful in carrying out a debt push-down of the acquisition

finance, although since 1 January 2012 certain additional restrictions on the deductibility of related interest expenses apply.

1.2. Target shareholders

This paragraph only addresses the Dutch tax consequences for individuals and companies.

Individual shareholders

Generally, a Dutch tax resident individual will be subject to an annual income tax imposed on a fictitious yield on its shares under the regime for income from savings and investments (*inkomen uit sparen en beleggen*). Irrespective of the actual income or capital gains realised as a result of the public offer, the annual taxable benefit of all the assets and liabilities of a Dutch individual that are taxed under this regime, including the target shares, is set at a fixed amount. The fixed amount equals 4% of the fair market value of the assets, reduced by the liabilities, measured, in general, at the beginning of every calendar year. The tax rate under the regime for savings and investments is a flat rate of 30%.

For the avoidance of doubt, any actual capital gain realised by such individual on the disposal of its shares pursuant to the offer will therefore, by itself, not be subject to income tax.

Corporate shareholders

As a general rule, Dutch tax resident corporate shareholders will be taxed for the capital gain realised as a result of a public offer, irrespective of whether the purchase price is paid in cash or in shares. However, the sale will not give rise to such Dutch corporate income tax if the participation exemption regime (described above) is applicable with respect to the shareholding in the target.

Where the offeror offers to issue shares to the target's shareholders in consideration for their target shares (which offer may be combined with a cash payment, provided such cash payment represents 10% or less of the par value of the shares issued by the offeror), a roll-over facility may be available to the selling shareholder. This would mean that a Dutch corporate shareholder whose shareholding in the target does not qualify for the participation exemption could qualify for such roll-over facility, as a result of which capital gains would not have to be recognised and may be deferred.

1.3. Target company

As a general rule, distributions of profits by a Dutch company are subject to dividend withholding tax levied at the statutory rate of 15%. After the offer, the offeror will generally be able to claim a reduced rate or exemption from this withholding tax under tax treaties or the Parent-Subsidiary Directive (90/435/EEC).

If the target company has losses that can be carried forward, then various rules may limit the actual carry-over of losses, e.g. if the activities of the company have been significantly decreased in connection with a substantial change of ownership.

2. Are there any particular issues relating to employees?

If any of the companies involved in the offer has instituted a works council, the advice of the works council should be obtained before the boards of the companies involved unconditionally decide to support the offer.

The Merger Rules require that the relevant trade unions (if any) are consulted before the offer is made. The Merger Rules are aimed at initiating discussions between the board of the target company and the relevant trade unions.

Both the request for advice from the works council and the consultation with the trade unions must be carried out in such a way that the views of the works council and trade unions can substantially influence the boards' decision whether or not to support the contemplated offer and under what conditions. It is current market practice that initial contact with the works council is established immediately before the initial public announcement on the public offer. A formal request for advice is then submitted to the works council and consultation with trade unions is initiated as soon as possible after the initial public announcement of the contemplated offer.

If the boards' decision deviates from the advice rendered by the works council, the works council has the right to have the decision of the boards reviewed by the Enterprise Chamber.
In a hostile offer – the requirement to obtain advice from the works council does not apply. However, pursuant to the Merger Rules the board(s) of the target company must be informed of a contemplated hostile offer at least 15 days prior to making such offer.

3. How are options and convertible securities dealt with?

When structuring an offer, outstanding warrants and convertible debt instruments should be taken into account. Many listed companies have implemented share-based incentive schemes covering all or certain categories of employees and executives.

A mandatory bid is not required to extend to options or convertible securities under the Offer Rules, but only to all shares and depository receipts for shares in the target company. Other types of public offers also do not have to extend to options or convertible securities.

However, when structuring an offer, outstanding options and convertible securities should be taken into account. Many listed companies have implemented share-based incentive schemes covering all or certain categories of employees and executives. These schemes may sometimes result in a significant dilution when the options are exercised. Where any such dilution causes the offeror's shareholding in the target company to fall below 95%, the offeror may lose its right to squeeze out minority shareholders.

Where such dilution would not cause the offeror's shareholding to fall below 95%, the offeror could always squeeze out shares issued on an exercise of options sometime after completion of the offer.

In practice, convertible securities and options are often dealt with in private arrangements with the holders of such securities or options relating to, for instance: (i) redemption of convertible securities or (ii) conversion of the convertible securities and subsequent inclusion of the converted shares in the public offer.

For disclosure obligations, an option and a right to purchase shares also qualify as shares.

4. What are the consequences of an unsuccessful bid?

In the event a bid is terminated, the offeror will be barred from announcing or launching a public offer for the target company involved during the six months following termination. An exception to this rule applies where a third party subsequently makes a public offer for the target company. The AFM would have to pre-approve a new offer document for such subsequent offer, which takes up to 10 days (and possibly longer) (see section 10 for details), so this represents the theoretical minimum time that may elapse between the original offer and a subsequent offer.

Mandatory offers are not subject to conditions and therefore will never be "unsuccessful" in the sense of not completing.

5. What regulates a "partial" offer?

A public offer is not required to have a minimum-ownership percentage as a condition, so any offer may end up with the offeror holding less than 100% of the target. However, a voluntary offer that ends with a holding of between 30% and 50% will now have to be followed by a mandatory offer.

Partial offers are only allowed under the Offer Rules if they do not result in the offeror holding shares which represent 30% or more of the voting rights of the target company. The offeror should also take into account any shares it holds in the target company prior to making the partial offer. If target shareholders tender more shares in a partial offer than the required percentage, acceptances should be allocated between the tendering shareholders on a pro rata basis.

In addition, the Offer Rules recognise a "tender" offer, which is defined as a public offer in which the offeror invites the holders of securities in the target company to offer their securities to the offeror for a consideration to be determined by the holders of the securities, and that is intended for the acquisition of less than 30% of the voting rights in the target company. If target shareholders tender more shares in a tender offer than the required percentage, acceptances should be allocated between the tendering shareholders on a pro rata basis taking into account the consideration at which the securities have been tendered, starting at the lowest consideration.

Partial offers and tender offers are very rare in the Netherlands.

Spain

1. Are any taxes or duties usually payable?

1.1. Offeror

In a tender offer where cash consideration is offered to the target shareholders, no stamp duty or other indirect taxes will generally be payable upon acquisition of the target shares by the offeror.

Where the offeror is a Spanish company and the takeover involves a share for share exchange by the offeror of its own shares, no capital or stamp duty will be applicable, as the transaction will qualify as a "restructuring operation" for the purposes of Article 4 of the Council Directive 2008/7/EC of 12 February 2008, relating to indirect taxes on the raising of capital. For more details, see paragraph 1.2 on Exchange tender offers below.

1.2. Target shareholders

It should be noted that Navarre and the three historical territories of the Basque Country have their own Individual Income Tax and Corporate Income Tax laws that may apply to shareholders resident in those territories. These laws are generally in line with the law enacted for the rest of Spain (set out below), but some differences exist.

The tax position for target shareholders differs depending on whether the offer is a cash tender offer or an exchange tender offer.

- Cash tender offer
  - Shareholders resident in Spain

    The transfer of target shares by individual shareholders resident in Spain is subject to Individual Income Tax. A taxable capital gain or loss is generated on the transfer; such gain or loss is equal to the positive or negative difference between the transfer value of the securities and their tax basis. Gains, if any, are included in the "savings income" basket for Individual Income Tax purposes and, together with any other "savings income" earned in the calendar year, will be subject to the following tax brackets:

    - 19% rate on the first €6,000 of "savings income" for the year;
    - 21% rate on any "savings income" for the year that amounts to between €6,000.01 and €50,000; and

- 23% rate on any "savings income" for the year that exceeds €50,000.

Corporate shareholders resident in Spain will also generate a taxable income or loss on the sale of the target shares. The gain or loss is equal to the difference between the price received and the tax basis of the shares (taking into account rules on portfolio depreciation). The income or loss is subject to the relevant corporate income tax rate (which is generally 25%, although special rates may apply to specific taxpayers).

If the shareholder has held at least 5% of the target (or shares with acquisition value exceeding €20 million) during 12 months prior to the transfer, a tax exemption for the avoidance of double taxation may be generally available for the shareholder, so the capital gain would be exempt.

- Shareholders not resident in Spain

Non-resident shareholders without a permanent establishment in Spain are subject to Spanish NRIT on any capital gain resulting from the transfer of the target shares. Spanish NRIT is currently levied at a 19% flat tax rate on capital gains received by non-resident shareholders who are not entitled to the application of a CDT.

However, capital gains derived from a transfer of target shares, where the relevant shareholder does not act through a permanent establishment in Spain nor through countries or territories which are statutorily defined as 'tax havens', are exempt from taxation in Spain in the following cases:

- (a) if the non-resident shareholder is an individual or entity resident in a Member State other than Spain, provided that during the preceding 12 months such shareholder has not held a direct or indirect interest of at least 25% of the capital or net worth of the target and provided further that the majority of the assets of the target do not comprise, directly or indirectly, real estate located in Spain; or
- (b) if the non-resident shareholder is an entity resident in a Member State other than Spain, provided that (i) such shareholder has held at least 5% of the target (or shares with acquisition value exceeding €20 million) during 12 months prior to the transfer, and (iii) the majority of the assets of the target do not consist, directly or indirectly, of real estate located in Spain ; or
- (c) if the non-resident benefits from an applicable CDT, providing for taxation on capital gains only in the tax payer's country of residence as regards this particular capital gain; or
- if the non-resident shareholder benefits from a CDT that contains an exchange of information clause and the transfer of the shares is made on a Spanish official stock market. Currently, all CDTs entered into by Spain include such a clause.

In order to benefit from the exemptions referred to in bullet points (a) to (c) above, a certificate of residence for tax purposes duly issued by the tax authorities of the country of residence of the non-resident shareholder will be required which, in the case of (ii) above, must evidence that the non-resident shareholder is resident for tax purposes in the relevant country within the meaning of the relevant CDT entered into with Spain. Under Spanish law, the certificate is valid for one year after it is issued (unless the non-resident tax payer is a State, or a political, administrative or local sub-division of a State, in which case it will not expire).

Finally, no withholding tax will apply on capital gains derived from the transfer of shares by a non-resident shareholder without a permanent establishment in Spain, even if such capital gain is subject to tax in Spain.

– Exchange tender offer

Where the consideration being offered consists of shares in the offeror, capital gains triggered by the target shareholders arising upon transfer of the target shares will be treated in the same manner as that described in paragraph (1) above, unless the transaction qualifies as a "share for share exchange" under the special tax reorganisation regime.

An exchange tender offer may benefit from this special tax regime provided that:

- as a result of the transaction, the offeror holds a participation in the target share capital representing more than 50% of the target voting rights or, if a 50% participation was already held by the offeror, as a result of the transaction the offeror increases its participation;
- as consideration for the target shares, the target shareholders receive shares representing a participation in the capital of the offeror and a cash payment (if any) not exceeding 10% of the face value of the offeror share consideration;
- target shareholders are resident in (A) Spain; (B) other Member States; or (C) any other country, provided that in this case the offeror is resident in Spain; and
- the offeror is resident in Spain or falls within the scope of EU Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions etc.

Should the offer qualify as a "share for share exchange" under Spanish tax law, a "roll-over" relief may be applied to capital gains arising, except in

respect of those target shareholders resident or operating through countries or territories which are statutorily defined as “tax havens”.

Shares received as consideration by the target shareholders will retain the tax basis that the target shares transferred to the offeror had, as well as their date of acquisition. Likewise, target shares received by the offeror are valued for tax purposes at the value attributed to them when held by the former shareholders of the target.

This special tax reorganisation regime applies at the option of the offeror. An election that it should apply must be notified to the Ministry of Finance within three months following the date of registration of the deed of increase of share capital.

The benefits under the special tax reorganisation regime do not apply if the main purpose of the transaction is tax fraud or evasion, and, in particular, when the relevant transaction is carried out with the sole purpose of obtaining a tax benefit, and not for valid business reasons.

2. Are there any particular issues relating to employees?

As soon as a tender offer is announced, the boards of directors or managers of the target company and of the offeror must inform their respective workers’ representatives. In the absence of workers’ representatives, information must be addressed directly to the employees.

In addition, upon publication of the offer document, both the offeror and the target company must distribute a copy to their workers’ representatives or, in the absence of workers’ representatives, directly to their employees. Furthermore, employees must be able to obtain the offer document and related documentation in a quick and easy manner.

Finally, the report issued by the board of directors of the target company must explain the consequences of the offer for the company’s interests, employment and location of its centres of activity. The workers’ representatives may also address a report on these issues to the board of directors. If the report of the workers’ representatives differs from the directors’ report (and is delivered in time), the workers’ report must be attached to the target statement for disclosure purposes.

3. How are options and convertible securities dealt with?

When structuring an offer, outstanding warrants and convertible debt instruments should be taken into account. Many listed companies have implemented share-based incentive schemes covering all or certain categories of employees and executives.

If the target company has granted share subscription rights under a rights issue or has issued convertible bonds, the offeror which is subject to the takeover rules is also required to address the offer to the holders of these securities, to ensure that their interests are safeguarded. The offeror may also choose to extend the offer to warrants and options, but is not required to do so. If it does extend the offer to warrants and options, the offer must be addressed to all the holders of warrants or options, or at least to all those of the same class.

There are no specific rules on the value of such a convertible offer, although it would usually be made on the basis of the offer price for the shares, less the conversion or subscription price per share. The offeror is not able to offer the option of a "roll-over" into securities which are convertible into its own shares.

The offer to convertible holders will be made as part of the overall offer for the target. If the offer is not accepted by all the convertible holders, the convertible holders may continue to convert their securities into shares in the target even after the offer has closed and the offeror has taken control of the target. It is not usual for the terms and conditions of convertible securities to provide that they lapse on completion of a takeover offer, or for the target to make changes to its constitutional documents to seek to deal with the situation post-offer.

4. What are the consequences of an unsuccessful bid?

If a voluntary tender offer is unsuccessful, the offeror (and its related concert parties) cannot, within six months from the date on which the result of the bid is published, announce an offer for the target (except where a third party subsequently makes an offer, when the previous offeror can decide to make a competing tender offer), or acquire any shares in the target if the offeror (and its concert parties) would thereby be required to make a mandatory offer.

This does not apply if the offeror has withdrawn its tender offer, in the events where withdrawal is permitted.

Mandatory offers are not subject to conditions and therefore will never be "unsuccessful" in the sense of not completing.

5. What regulates a "partial" offer?

Partial offers are permitted if (i) the offeror, as a result of the offer, is not acquiring a controlling stake (30% of voting shares); or (ii) the offeror already holds a controlling stake and is increasing its holding in the company.

Where "partial" offers are permitted, they are dealt with in the same way as voluntary offers – see paragraph 6 of section 2 above.

United Kingdom

1. Are any taxes or duties usually payable?

1.1. Offeror

Stamp duty will be payable where the takeover is effected by way of a transfer of shares in the target at a rate of 0.5% on the value of the consideration paid for the target's shares, rounded up to the nearest £5. This is a fixed cost of carrying out any acquisition pursuant to any offer. It is no longer permissible to acquire shares via a reduction or cancellation scheme of arrangement. This means that the stamp duty saving that was open on a reduction or cancellation scheme of arrangement is no longer available.

1.2. Target shareholders

The main tax for which target shareholders who are resident or, in the case of individuals, ordinarily resident in the UK for tax purposes may be liable in relation to a sale of their shares pursuant to a takeover offer is CGT or, for shareholders who are within the charge to UK corporation tax, corporation tax on chargeable gains.

However, this tax treatment would only apply to a shareholder who held the target shares as an investment rather than as a trading asset, and the rest of this paragraph applies only to those shares being held on an investment basis. Shareholders who hold their shares as a trading asset or in connection with their employment may be subject to corporation tax or income tax on income arising on the sale of their shares.

Whether any tax will be payable, as a result of a takeover, by a shareholder who holds his shares as an investment will depend to a large extent on the type of consideration that is received by the shareholder concerned.

– Cash

Where the offeror pays cash for the shares in the target company, the sale of those shares pursuant to the offer will constitute a disposal by the target shareholders who held those shares as an investment for the purposes of CGT or, where relevant, corporation tax on chargeable gains. Such a disposal may, depending on the shareholder's circumstances (including the availability of exemptions, reliefs and allowable losses), give rise to a charge to CGT or, where relevant, corporation tax on chargeable gains. (Note that certain approved institutional shareholders such as pension funds, authorised investment funds and investment trusts can be exempt from paying CGT or corporation tax on chargeable gains on their investments.)

– Shares and/or Loan Notes

The offeror often offers to issue shares and/or loan notes to selling shareholders in consideration for their shares in the target as an alternative to cash. The issue of shares or loan notes instead of the payment of cash reduces the amount of cash which the offeror needs to raise for the acquisition and also usually enables target shareholders, who would otherwise be liable to tax in respect of the disposal of their shares, to defer their tax liability until the shares or loan notes are disposed of (including by way of redemption).

Careful drafting will be required to ensure that the loan notes are not Qualifying Corporate Bonds, so that the gain on the sale of the loan notes is rolled over into the loan notes, rather than simply being deferred. The principal benefit of this is that, if the offeror subsequently defaults on the loan note, the selling shareholder is not left with a taxable gain in the earlier sale of the shares.

– Conditions for Tax Deferral – Transfers

In order for deferral to apply, in a case where the takeover is effected by way of a transfer of the shares in the target company, the consideration must take the form of shares or loan notes which are issued by the offeror itself and one of the following conditions must also apply:

- the offeror holds, or in consequence of the exchange will hold, more than 25% of the "ordinary share capital" of the target; or
- the offeror issues its shares or loan notes in exchange for target shares as the result of a general offer made to the target's shareholders (or any class of them) and made in the first instance on the condition that the offeror would have control of the target; or
- the offeror holds, or in consequence of the exchange will hold, more than 50% of the voting power in the target.

– Annual Exemption

Individuals who are resident or ordinarily resident for tax purposes in the UK are also entitled to an annual exemption for CGT purposes, which cannot be carried forward or back to be used against gains arising in other tax years. By deferring part of the capital gain on their shares so that it arises in a later tax year, the individual shareholder may be able to take advantage of more than one year's annual exemption in order to shelter any gain arising on the disposal of the target shares.

– Rates of Tax

The main rate of corporation tax is currently 20%, reducing to 19% from 1 April 2017 and by a further 2% to a rate of 17% for the financial year commencing 1 April 2020.
There are two rates of CGT. The rate of 10% applies to basic rate taxpayers, and the rate of 20% applies to higher and additional rate taxpayers.

The above is, however, subject to the potential availability of "entrepreneurs' relief". In summary, this allows individual shareholders to enjoy an effective CGT rate of 10% on the first £10 million of lifetime gains arising from the disposal of business assets (including certain shareholdings in trading companies). In order to qualify, shareholders in public companies must generally have been, for a one-year period ending with the disposal, officer holders or employees of the company whose shares are being disposed of and must hold a minimum of 5% of the shares voting rights. In practice, therefore, this relief will be of little help to minor shareholders in major public companies which are subject to a takeover, as it will generally only be available for management shareholders with a significant, long-term stake in the company.

2. Are there any particular issues relating to employees?

In an offer, the main interests to be considered by the directors of each party are those of their shareholders (see paragraph 1 of section 13 above). However, the interests of employees are given some protection both by statute and by the Code. CA06 provides that directors must have regard to, inter alia, the interests of a company's employees in discharging their duty to promote the success of the company for the benefit of its shareholders as a whole (see paragraph 1 of section 13 above).

More particularly, the Code requires the offeror to include in its offer document a statement of its strategic plans for the target and their likely repercussions on employment, including, inter alia, its intentions concerning the continued employment of the employees and management of the target group (including any material change in the conditions of employment) (see paragraph 4.1 of section 10 above). If no changes are intended to be implemented, a negative statement must be made to that effect.
The target directors are also specifically required to provide their views on the effects of the offer on employment and the repercussions of the offeror's strategic plans on employment and the locations of the target company's places of business, and give reasons for their opinions, in their own circular (i.e. in the offer document in a recommended offer).
Employees or their representatives and trustees of the offeree's pension scheme now have a specific right to receive documents (see paragraph 1 of section 9 above) as well

as a specific right to give an opinion on the offer and, if the opinion is received in good time, to have that opinion attached to the offer document/target board response (see paragraph 4.1 of section 10 above). Where the opinion is not received in good time, the target company must promptly publish the opinion on a website and announce via a RIS that it has been so published, provided that it is received no later than 14 days after the date on which the offer becomes or is declared wholly unconditional. In addition, the target company must pay for any costs reasonably incurred by the employee representatives in obtaining advice required for the verification of the information contained in that opinion

In practice, the rights accorded to the employees can cause a number of difficulties for the target company, as it is often difficult to identify a representative body of the employees with whom the target company can deal. In addition, if a separate opinion is produced, it is important to ensure that the content is accurate (and not libellous); as a result of this, the opinion is in practice usually published on a website rather than appended to the offer document/target board response.

3. How are options and convertible securities dealt with?

When structuring an offer, outstanding warrants and convertible debt instruments should be taken into account. Many listed companies have implemented share-based incentive schemes covering all or certain categories of employees and executives.

If the target company has convertible securities (which for these purposes include options and subscription rights such as warrants), the offeror is required to make an "appropriate" offer or proposal to the holders of each type of convertible security to ensure that their interests are safeguarded. Such offer or proposal must be open for at least 21 days.

Where conversion of the security requires payment of an exercise or subscription price by the holder, an "appropriate" offer is usually taken to be one that reflects the "see through" value of the convertible in question – i.e. the value of the main offer, less the exercise or subscription price payable by the holder. If the convertible is "under water" (i.e. the result of the above calculation would be zero or a negative result), the Panel will normally waive the requirement for an offer.

In the case of convertible debt, where no separate exercise price is payable, an offer will always be required, which should reflect the conversion ratio of the debt. It should be noted that an offer is not required to match the market price of any listed convertible securities, as the market price may (for example) reflect the interest rate payable on convertible debt.

The "appropriate" offer does not have to be made in the same form of consideration as the main offer. However, the "see through" value of the convertible securities should be

calculated by reference to the voting equity offer with the highest value as at the latest practicable date before despatch of the convertible offer, even if that alternative has ceased to be available to shareholders by that point.

The offer to holders of convertible securities may be made at a price that exceeds the "see-through" value of the convertibles, but the Panel will be keen to ensure that this is not simply a means to provide target shareholders who also hold convertible securities with favourable treatment.

Alternatively, the offeror may offer a "roll-over" into convertible securities in its own share capital. This is particularly common in employee option schemes, since there are often tax benefits to this approach. The number of shares available on exercise/conversion – and the exercise/conversion price – will be appropriately adjusted in light of the terms of the main offer.

The Code states that, if practicable, the offer to holders of convertible securities should be sent at the same time as the offer document is published and that, if this is not practicable, the Panel should be consulted. However, it is very common to wait to make offers to the holders of options and other convertibles until the main offer is wholly unconditional. This is because it can actually be quite complicated to work out and document the terms of the proposals, and there is little point in spending money on this process unless the main offer has been successful.

Holders of convertible securities which are exercisable during the offer period must, however, be simultaneously sent a copy of all relevant documents, announcements and other information sent to target shareholders and their attention should, where appropriate, be drawn to the fact that their rights are exercisable. Where holders of such securities are all able to exercise their conversion rights during the offer, the Panel will usually regard a proposal that such holders should "exercise and accept" as being sufficient to comply with the requirement for a proposal/offer to be made to them. However, the offer (including the highest value alternative) must in that case stay open for 21 days after the main offer becomes unconditional as to acceptances.

The target board must obtain competent independent advice as to the merits of the offers made to holders of convertible securities and this advice (together with the board's views on the offers) should be disseminated to the security holders. This can lead to conflict issues if, by the time each comparable offer is made, the offeror has already put its nominees on to the target board.

The offeror will also have to think carefully about how it can acquire (i) all of the shares issued on conversion during the offer (which can become part of the "squeeze-out" process – see section 12 above – or be brought into a scheme of arrangement, if used); and (ii) all of the outstanding convertibles whose holders do not either convert them into shares or accept the convertibles offer. Convertible securities (e.g. warrants) can be

made the subject of a "squeeze-out" process of their own if the offeror manages to acquire 90% (although the offer to the convertible holders cannot be made conditional on any level of acceptances). However, options cannot be made the subject of a statutory "squeeze-out" process.

The offeror will therefore also have to check the terms of issue of the various convertibles – many of which will provide that the convertibles will lapse after the making of a successful takeover offer for the target's shares. This is usually the case with employee option schemes. In the last instance, an offeror may wish to change the target's articles of association to provide for an automatic exchange into offeror shares if any remaining target convertible securities convert into target shares sometime after the bid has completed, thus avoiding the subsequent creation of a minority stake in the target. This is always done in a scheme of arrangement.

4. What are the consequences of an unsuccessful bid?

If a bid is withdrawn or lapses other than in accordance with the Code requirements relating to proceedings by the CMA or the European Commission, the offeror and its related concert parties cannot (except with the Panel's consent), within 12 months from the date on which the offer or possible offer is withdrawn or lapses:

- announce an offer or possible offer for the target;
- acquire any interest in shares in the target if it would thereby be required to make a mandatory offer;
- acquire any interests in, or procure any irrevocable commitments in respect of, shares which in aggregate (taking into account both interests and irrevocable commitments) carry 30% or more of the target voting rights;
- make any statement raising or confirming a possible offer for the target; or
- take any steps in connection with a possible offer for the target where knowledge might be extended outside those who need to know in the offeror and its advisers.

The Panel will normally only consent to a new bid within the 12-month period where:

- the new offer is recommended by the target board (but, if the offer is being made within three months of the earlier offer lapsing, consent will not normally be given if the offeror was prevented from revising or extending the earlier offer by a no increase or no extension statement);
- the new offer follows the announcement by a third party of a firm intention to make an offer for the target;
- the new offer follows the announcement of a whitewash proposal (see paragraph 3 of section 2 above) or a reverse takeover by the target company;
- the Panel determines that there has been a material change of circumstances; or

- it is likely to prove, or has proved, impossible to obtain material offer authorisations or regulatory clearances relating to an offer within the Code timetable.

If a mandatory offer lapses for a reason other than the acceptance condition not being satisfied, the offeror (and its concert parties) must consult the Panel before exercising the voting rights attached to any of the shares in the target in which it holds an interest. The Panel may apply voting restrictions in respect of such shares.

5. What regulates a "partial" offer?

A "partial" offer – i.e. an offer for part only of the target's shares – is also regulated by the Panel and the provisions of the Code. However, the Panel's consent is required for the making of such an offer and partial offers are, in practice, rare.

If a partial offer is to be in cash, then it may be carried out as a tender offer under Appendix 5 to the Code, which will mean that a simpler procedure may be followed which does not comply with full provisions of the Code. The Panel's consent is also required for any tender offer.

Consent will usually be given in the case of a partial offer (and also a tender offer) which could not result in the offeror holding an interest in shares carrying 30% or more of the voting rights of a company. (A tender offer may also be approved if the offeror already holds more than 50% of the target but is aiming to acquire less than all the remaining minority shares – but only if the Panel thinks it is justifiable.)

Consent will not normally be granted for a partial offer in the case of an offer which could result in the offeror and its concert parties holding interests in shares carrying 30% or more but less than 100% of the voting rights in a company, if either (i) the offeror or its concert parties have acquired, selectively or in significant numbers, interests in shares in the target company during the 12 months preceding the application for consent; or (ii) interests in shares have been purchased at any time after the partial offer was reasonably in contemplation.

The remaining paragraphs relate only to "partial" offers, not tender offers.

The offeror and its concert parties may not acquire any interest in shares in the target during the offer period relating to a partial offer. Also, where there is a successful partial offer which results in a 30%+ holding, neither the offeror nor its concert parties (past or present) may acquire any further interest in target shares during a period of 12 months after the end of the offer period.

When an offer is made which could result in the offeror and its concert parties holding an interest in shares carrying between 30% and 50% (inclusive) of the target's voting

rights, the precise number of shares offered for must be stated and the offer may not be declared unconditional as to acceptances unless acceptances are received for that number. In addition, any offer which could result in the offeror and its concert parties holding interests in shares carrying 30% or more of the target's voting rights must be conditional on "approval" of the offer being given by shareholders holding over 50% of the voting rights not held by the offeror and its concert parties. This "approval" is normally given by ticking a separate box on the acceptance form.

Where the offeror and its concert parties could acquire an interest in shares carrying over 50% of the target's voting rights as a result of a partial offer, the offer document must contain a prominent reference to that fact and the fact that, subject to the 12-month limitation referred to above, the offeror will subsequently be free to acquire further shares without incurring any obligation to make a general mandatory offer under the Code. It is important for this to be clear, since it would obviously remove a significant protection for the remaining target shareholders.

Partial offers must be made to all shareholders of the relevant class and arrangements must be made for those shareholders who wish to do so to accept in full for the relevant percentage of their holdings. Shares tendered in excess of this percentage must be accepted by the offeror from each shareholder in the same proportion as the number tendered by such shareholder, to the extent necessary to enable the offeror to obtain the total number of shares for which it has offered. This is to ensure that all shareholders are treated equally, whether large or small.

If a partial offer for a target company with more than one class of equity share capital could result in the offeror and its concert parties being interested in shares carrying 30% or more of the voting rights, a comparable offer must be made for each class of shares.

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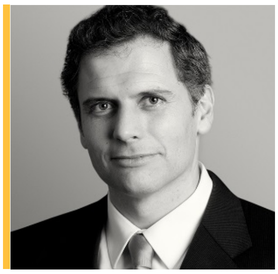

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