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Corporate M&A 2023

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UK: Law & Practice
Colin Rodrigues and Harminder Sandhu
Hawkins Hatton Corporate Lawyers Ltd

UK: Trends & Developments
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UK

Law and Practice

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Hawkins Hatton Corporate Lawyers Ltd is a niche corporate law firm based in London and Dudley, dealing primarily with corporate and commercial work together with commercial property and litigation. Formed in 2005, its client base includes European and Anglo-US companies, individuals and a number of banks, as well as a large number of small and medium-sized enterprises. Hawkins Hatton provides a full range of company and commercial services and is known for private equity work for management teams, management buyouts, sales, mergers, acquisitions and disposals for shareholders of small and medium-sized enterprises, and a broad range of day-to-day corporate work. Employment specialists work closely with the corporate team to take care of all employment aspects of a transaction. This often includes consideration of TUPE, advice on terminations/dismissals and the preparation of appropriate service agreements for the period after the completion of a business sale or acquisition.

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1. Trends

1.1 M&A Market

The M&A market in 2022 started off strong, returning to pre-pandemic levels but slowly declined towards the last two quarters.

1.2 Key Trends

The trends in 2022 followed very closely to the previous 12 months in terms of IT and digital businesses capitalising upon increased demands highlighted by the pandemic. Global activity took a fall but there is still plentiful appetite for foreign investment into the UK given the lower value of the pound sterling. There was a noticeable increase in private investor buyers.

1.3 Key Industries

The IT and digital sectors have continued a surge in transactional activity as the lockdown restrictions placed the spotlight on the skills, resource and technological gaps businesses faced. These were closely followed by healthcare and energy in light of the international commitment to tackle climate change.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Private

The acquisition of a private company is dependent on identifying a willing seller. Once you have a willing seller, you can acquire a private company in the UK either by way of a share purchase or an asset purchase. Whilst either method will achieve broadly the same commercial objective, there are important legal and tax differences between the two structures.

Asset Purchase

This is the purchase of specific assets (and sometimes) liabilities which comprise the business. The parties will negotiate and agree on which assets are being acquired and those which will remain in the selling company. In this way, the buyer does not acquire the limited company itself, but instead it buys certain elements that make up the business (eg, business records, equipment, stock, goodwill, the business contracts, intellectual property). This has the advantage for the buyer in that it can be

selective with what is included within the purchase and the buyer can exclude any assets/liabilities it considers problematic. Various consents and approvals may need to be sought in order to transfer the agreed assets. With an asset sale, the funds will be paid directly to the limited company with limited involvement from the company's shareholders, as opposed to a share sale which involves direct payment to the shareholders.

The transfer of assets involves tax considerations such as VAT, transfers of going concern, Stamp Duty Land Tax, deductions of acquisitions cost and corporation tax. Asset purchases are also likely to fall under the scope of Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE), which provides for certain employee protections as part of the transfer of assets.

An asset purchase is usually effected by entering into a business purchase agreement, which will cover:

- provisions identifying which assets are included and excluded from the sale;
- limited warranties;
- apportionment of liabilities and obligations between the buyer and seller in relation to the assets being transferred; and
- restrictive covenants.

Tangible assets are delivered to the buyer and intangible assets are formally assigned in a deed.

Share Purchase

This is where the shares in the limited company are purchased such that ownership of the assets and business will remain within the limited company but the overall ownership of that company is transferred. As the trading entity does not change, business continuity is preserved. The transfer is "warts and all", meaning that the buyer as the new shareholder of the company will take over all assets and liabilities. This presents a significant risk to any buyer making the due diligence process all the more important.

A share purchase is effected by entering into a share purchase agreement with the following provisions:

- warranties;
- indemnities;
- tax covenants; and
- restrictive covenants.

On completion of the share purchase agreement, a stock transfer form will be executed by the seller and new share certificates issued to the buyer.

Public

Public companies are acquired through the purchase of all or a substantial part of the shareholding. This can happen in two ways, namely recommended (ie, with approval of the target board) or hostile, where the management team has publicly advised the shareholders to reject the offer to prevent the takeover.

A takeover can be effected in two ways.

- A contractual takeover offer whereby the bidder makes an offer to the target shareholders which is subsequently accepted by over 50% of the voting shares. If 90% of the voting shares accept the offer, the buyer may be able to acquire the remaining shares from the minority. This method is more flexible than a scheme (see below) and can be implemented in a shorter period of time.

- A scheme of arrangement whereby 75% of the voting shares agree to the takeover, which is also approved by the High Court. In these circumstances, all of the shareholders will be bound. This method will generally be used to implement recommended bids and is a more efficient way of acquiring 100% control of the target company.

2.2 Primary Regulators

UK City Code on Takeovers and Mergers

The EU Takeover directive was implemented in the UK under the terms of part 28 of the Companies Act 2006 and within the City Code on Takeovers and Mergers (the "Code"). The Code provides the framework for public company takeovers in the UK and its objectives include ensuring that target shareholders are treated fairly and not denied the opportunity to consider the merits of a bid, and that they are afforded equivalent treatment by a bidder.

The Code is administered by the Panel on Takeovers and Mergers (the Panel) which has full jurisdiction to enforce the Code and place sanctions for non-compliance. The Panel regulates takeover bids and other merger transactions for companies with registered offices in the United Kingdom, the Channel Islands or the Isle of Man if any of their securities are admitted to trading on a regulated market or multilateral trading facility in the United Kingdom or on any stock exchange in the Channel Islands or the Isle of Man. The Panel comprises of 36 members, 12 of whom are appointed by large financial and business organisations.

Other Statutory Restrictions for Takeovers

- Companies Act 2006 – merger relief which prohibits unlawful financial assistance and provisions concerning a public company's right to investigate who has an interest in its shares;
- Criminal Justice Act 1993 – prohibits insider dealing;
- Financial Services and Markets Act 2000;
- Financial Services Act 2012;
- Market Abuse Regulation (see **4.3 Hurdles to Stakebuilding**);
- Enterprise Act 2002; and
- National Security and Investment Act 2022.

Other Relevant Regulatory Bodies

- Financial Conduct Authority;
- Competition and Markets Authority (CMA);
- the European Commission – has exclusive jurisdiction where transactions concern the EU Merger Regulation (EUMR), which regulates M&A at EU level – see **3.2 Significant Changes to Takeover Law**;
- ministerial departments – may be involved when a transaction is of national interest; and
- specific industries (such as banks) may have their own regulatory body.

2.3 Restrictions on Foreign Investments

Foreign companies are subject only to the same regulations that apply to UK-based companies, such as the UK merger control regime. Whilst the controls apply equally, intervention may be more likely in the case of foreign investors due to public or national interest.

The National Security and investment Act 2022 (NSI) came into force on 4 January 2022 and introduced a new foreign direct investments regime replacing the EA02 in relation to transactions involving national security concerns. There are 17 sectors which will require mandatory notification and clearance prior to completion of a transaction involving a company carrying out activities in those sectors, including defence, energy, transport, technology and artificial intel-

ligence (refer to Notifiable Acquisitions Regulations 2021). The trigger events for mandatory notification are:

- the acquisition of more than 25%, more than 50%, or 75% or more of the votes or shares in a qualifying entity; and/or
- the acquisition of voting rights enabling or preventing the passage of any class of resolution governing the affairs of the qualifying entity.

The government has retroactive powers to call for review any qualifying transaction completed between 12 November 2020 and 4 January 2022. It is important to consider the new regime for all transactions completed from 12 November 2020. Notifications should be made to the new Investment Security Unit (ISU). The secretary of state must reach an initial decision within 30 working days.

In respect of non-mandatory notifications (for these entities not in the 17 sectors), consideration would need to be given for a voluntary notification, the trigger for which would be the acquisition of “material influence” in a company and the UK government has the power to call for review of transactions five years after completion.

The government has introduced a Register of Overseas Entities (ROE) on 1 August 2022 as part of the Economic Crime (Transparency and Enforcement) Act 2022 (the Act). The purpose of the Act, and subsequently the ROE, is to tackle economic crime through increased transparency about the ownership of overseas entities. The Act applies retrospectively to oversee entities which own property or land acquired after 1 January 1999. Such entities should have registered with Companies House by 1 January 2023.

See **2.6 National Security Review**.

Competition Law

The UK government can intervene from a competition law perspective for public interest under the UK merger control regime as stipulated in the Enterprise Act 2002 (EA02). The UK government has a threshold of GBP70 million for intervention to protect public interest for targets involved in activities connected with three areas of the economy, namely, goods and services with military or dual use, computer hardware technologies and quantum technologies.

In June 2020, the UK government expanded its powers under the Enterprise Act 2002 such that it can intervene in the interest of the public on transactions which could impact the UK pandemic response. This is not just confined to health response but could include food supply and internet services.

The UK government announced changes to its competition and merger control regime in April 2022, namely:

- raising the UK turnover threshold from GBP70 million to GBP100 million;
- changes to how the CMA operates so its delivery is more effective; and
- increased sanctions for failure to comply with information requests.

The timeframe for these changes is unknown.

Section 13 of the UK Industry Act 1975 allows the Department for Business, Energy and Industrial Strategy to prohibit an acquisition by a foreign entity of an “important manufacturing undertaking” if there is a perceived risk that change of control would be contrary to the interests of the UK as a whole. These powers were used to con-

sider the acquisition by Gardner Aerospace (a subsidiary of a Chinese aerospace and mining company) of Northern Aerospace in June 2018.

2.4 Antitrust Regulations

The CMA undertakes merger control and investigations of mergers based primarily on thresholds including turnover, asset values and market shares. It derives most of its powers from the Enterprise Act 2002 and Competition Act 1998.

Transactions that qualify may be investigated by the CMA in an initial Phase 1 investigation. Where this initial phase determines that the merger could result in the substantial lessening of competition in a market in the UK, the CMA will refer the matter to a Phase 2 investigation.

The Phase 2 investigation may result in a prohibition decision or a decision that the transaction should be allowed to proceed subject to commitments or clearance.

There is no requirement to notify the CMA of a merger prior to implementation; however, a company may want to apply for clearance prior to completion in order to manage any risks.

The secretary of state also has limited powers of intervention if a merger raises a “public interest consideration”. These powers relate to specific sectors such as newspaper and media outlets as with the investigation into the Sky-Fox merger.

In July 2021, the UK government launched a consultation (A new pro-competition regime for digital markets) which will increase merger scrutiny especially in relation to large digital companies operating in the UK and also grant the CMA jurisdiction to investigate mergers even if target and acquirer are not competitors where the acquirer has over GBP100 million UK revenue and one party has over 25% share of supply. The consultation has concluded. The UK has also established a dedicated digital markets unit within the CMA to regulate competition and innovation in digital markets.

2.5 Labour Law Regulations

With an asset purchase of a private limited company, a buyer must have regard to its obligations under Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Where a relevant transfer is deemed to have taken place, anyone employed will be transferred to the buyer under their existing terms of employment.

Prior to completion of the purchase various steps must be taken in order to inform and consult with the employees in order to avoid any liability, such as:

- under TUPE, any changes in the employees’ terms of employment are void if the sole or principal reason for the change is the transfer itself, unless the reason for the variation is permitted under the contract or for an economic, technical or organisational reason; and
- dismissals will be automatically unfair if the sole or principal reason for the dismissal is the transfer, unless that reason is an economic, technical or organisational reason.

In respect of public takeovers, the Code sets out a number of obligations relating to employees. This includes providing the employees the following information:

- any possible offer announcement that commences an offer period;
- the offer announcement;
- the offer document;
- any circular sent to the shareholders containing the board’s opinion on the offer;

- any post-offer undertaking made by a party to an offer; and
- any announcement (or document which includes the contents of the announcement) which the Panel determines.

The employees must also be notified of the offeror's intentions with regards to:

- the future business and safeguarding of the jobs of employees and management;
- any material changes in the conditions of employment; and
- strategic plans for the two companies and the likely impact on:
  - (a) employment; and
  - (b) places of business.

2.6 National Security Review

The National Security and Investment Act 2022 (NSI) came into force on 4 January 2022 and introduced a new foreign direct investments regime which replaces the EA02 in relation to transactions involving national security concerns.

There is a significant increase in the types of transactions covered by such that it is not confined to M&A but includes minority investments, acquisitions of assets including property and IP. There are 17 sectors which will require mandatory notification and clearance prior to completion of a transaction involving a company carrying out activities in those sectors, including defence, energy, transport, technology and artificial intelligence (see the Notifiable Acquisitions Regulations 2021). The trigger events for mandatory notification are:

- the acquisition of more than 25%, more than 50%, or 75% or more of the votes or shares in a qualifying entity; and/or
- the acquisition of voting rights enabling or preventing the passage of any class of resolution governing the affairs of the qualifying entity.

The government has retroactive powers to call for review any qualifying transaction completed between 12 November 2020 and 4 January 2022. It is therefore important to consider the new regime for all transactions completed from 12 November 2020. Notifications should be made to the new Investment Security Unit (ISU). The secretary of state must reach an initial decision within 30 working days.

Failure to comply may result in significant sanctions, including turnover-based fines, criminal liability and transactions being void.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Legal Developments

The Economic Crime and Corporate Transparency Bill will deliver significant reforms to Companies House to improve transparency over UK companies and other legal entities to enhance national security.

The bill will reform the role of Companies House and improve transparency over UK companies and other legal entities in order to enhance national security and combat economic crime, by ensuring the UK operates a more reliable companies' register.

The reforms include the following.

- Introducing identity verification for all new and existing registered company directors, people

with significant control, and those delivering documents to the Registrar.
- Broadening the Registrar of Companies House's powers so that the Registrar can become a more active gatekeeper over company creation and custodian of more reliable data, including new powers to check, remove or decline information submitted to, or already on, the companies register.
- Improving the financial information on the register so that the register is more reliable, complete and accurate.
- Providing Companies House with more effective investigation and enforcement powers and introducing better cross-checking of data with other public and private sector bodies. Companies House will be able to proactively share information with law enforcement bodies where they have evidence of anomalous filings or suspicious behaviour.
- Enhancing the protection of personal information provided to Companies House to protect individuals from fraud and other harms.

The bill is also targeting the misuse of Limited Liability Partnership by tightening control on registration requirements and requiring the LLPs to have a connection with the UK. The provisions of a new EU regulation will apply from 12 July 2023 imposing new notification requirements to the European Commission as of 12 October 2023 if the acquired company or joint venture is based in the EU with a total turnover of at least EUR50 million and where the companies involved in the deal have received financial contribution from non-EU countries totalling EUR50 million in the last three years.

The M&A sector will also need to keep a close eye on the reforms taking place in the Financial Sector pursuant to the Financial Service and Markets Bill which was introduced to Parliament in July 2022 and will see a complete overhaul of the regulatory regime.

Significant Court Decisions

Okpabi and Others v Royal Dutch Shell Plc and Another (2021) UKSC 3

The Supreme Court overturned the Court of Appeal judgment and found that there was the question of whether a UK holding company had breached a duty of care to third parties over activities of its subquery in Nigeria, was an arguable case for trial. The judgment reinforces that a parent should ensure regulatory policies are implemented by its subsidiary's operations.

Quantum Actuarial LLP v Quantum Advisory Limited (2021) EWCA Civ 227

The Court of Appeal upheld a High Court decision that the restraint of trade doctrine did not apply to covenants in a service agreement where that agreement formed part of a wider restructuring and joint venture. The decision highlights that the courts are more likely to enforce restrictive covenants in commercial agreements as compared to employment contracts.

Dodika Ltd and Others v United Luck Group Holdings Ltd (2021) EWCA Civ 638

The Court of Appeal considered whether a buyer's notice of tax covenant claim under a share purchase agreement (SPA) was valid and compliant. Adding in the buyer's favour the Court of Appeal stated that where a contract prescribes that certain information must be included in a notice of a claim; if a party fails to do so then the notice will be invalid. If the SPA imply required "reasonable details" this would vary with the circumstances. The case is a reminder that the SPA should include prescriptive wording.

Re Cardiff City Football Club (Holdings) Ltd, Isaac v Tan (2022) EWHC 2023 (Ch)

The High Court revisited the question of unfair prejudice of a minority interest and the director's "proper purpose" test. The question was not the validity of the share allotment but whether it was unfairly prejudicial. The High Court decided it was not unfairly prejudicial because, despite the director's breach of duty giving rise to unfairness, there was no prejudice to the claimant as he would have made the same decision.

Zavarco plc v Sidhu (2022) EWCA Civ 1040

The Court of Appeal upheld an earlier High Court decision and found that it could not grant relief under Section 606 of the CA 2006 to a shareholder in respect of making a payment for shares on incorporation where it is just and equitable to do so, as this is not available to a subscriber in relation to their duty to pay cash for shares taken pursuant to their undertaking in the memorandum.

Barclay-Watt & Ors v Alpha Panareti Public Ltd & Anor (2022) EWCA Civ 1169)

The Court of Appeal decided that a director was not an accessory to the company's negligent corporate conduct in failing to warn customers of a currency risk. The judgment is useful in reinforcing when a director could be personally liable when acting on behalf of a company.

Re Compound Photonics Group Ltd, Faulkner v Vollin Holdings Ltd (2022) EWCA Civ 1371

The Court of Appeal allowed an appeal against an earlier High Court decision that exclusion of two minority founder shareholder-directors from management of a private company amounted to breach of a contractual good faith provision in a shareholders' agreement (SHA) and unfairly prejudicial conduct.

3.2 Significant Changes to Takeover Law

Changes to the UK's Takeover Code (the Code) came into effect in July 2021 and are the most key changes to the Code in many years. The changes relate to the conditions for regulation and merger control clearance and offer timetables, including the following.

- A single date for satisfaction of all conditions.
- Acceptance condition can only be satisfied once all other conditions are satisfied or waived.
- A bidder is required to set a long stop date for the offer. The Code now states that all conditions to an offer must be satisfied by no later than day 60 from publication.
- Acceleration statement – a bidder can bring forward the unconditional date of an offer from day 60.
- Acceptance condition invocation notices – a bidder must give shareholders at least 14 days' notice to invoke the acceptance condition to lapse its offer.
- An offer must remain open for 21 days. If a bidder wants to lapse an offer on or after day 21 before the unconditional date, it must give 14 days' notice;
- Acceptance Levels – must be announced on day 21 and every seven days after that; and
- Withdrawal rights – shareholders who have accepted an offer can now withdraw their acceptance of an offer any time prior to the unconditional date.

The Code was also updated to reflect that EU law will no longer apply to the UK. The Takeovers (Amendment) (EU Exit) Regulations 2019 (SI 2019/217) made the changes required to Part 28 of the Companies Act 2006 to enable the UK takeovers regime to operate outside the EU framework of the Takeovers Directive.

The UK will be outside the EUMR and merging parties may need to seek clearance from the UK authorities. Mergers, whether UK or foreign businesses that meet the UK and EU thresholds, will face a parallel review under both systems. UK turnover will no longer apply when assessing a merger which would fall under the EUMR. As there are a large number of international businesses that had a large part of their EU turnover created in the UK, this will result in fewer mergers meeting the EUMR thresholds and being reliant on the relevant EU member state jurisdiction instead of being reviewed by the European Commission.

From 13 June 2022, there were more key changes introduced to the Code including the removal of the restriction on anonymous order book dealing (Rule 4.2(b)). Additionally, the Panel published a new Practice Statement 33, relating to purchases of shares in the offeree company by a bidder during an offer period. It also made amendments to Practice Statements Nos 19, 20, 24, 28 and 29 to reflect these Takeover Code changes.

On 20 February 2023, further changes to the Code were effected including the circumstances in which the Panel will presume that parties are "acting in concert" with each other.

The Code defines persons "acting in concert" as those who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company.

The Panel treats concert parties as a single person for the purposes of the Code. The Panel has not amended the definition of "acting in concert" itself, but instead changes have been made to the "presumptions" surrounding it.

The Panel replaced the current presumption in relation to groups of companies with two new rebuttable presumptions namely:

- where there will be a presumption of "acting in concert" with any other company which controls it or is under the same control (being 30% or more of the voting rights); or
- where one of the companies is interested directly or indirectly in 30% or more of the other company's share capital.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

In the UK, it is not usual for a bidder to build a stake in the target prior to an offer; however, it does happen. There are pros and cons associated with stakebuilding; by way of example, stakebuilding could be positive as it could offset shares which might be voted against. On the whole, stakebuilding is regarded as a hard-hitting approach and is not therefore favoured in the UK.

4.2 Material Shareholding Disclosure Threshold

There is an ongoing disclosure requirement under Chapter 5 of the Financial Conduct Authority's (FCA) Disclosure Guidance and Transparency Rules (DTR) which governs UK companies traded on either a regulated or prescribed market. This obligation is triggered by the percentages of voting rights held, whether directly or indirectly or whether through a financial instrument or not.

A disclosure must be made when a holding's voting rights exceed 3% of the total and then every

time such voting rights increase or decrease by a whole 1% over 3%. The target must notify a Regulatory Information Service (RIS) as soon as possible and in any event by the end of the trading day following notification from the shareholder. The FCA can impose penalties for breach of the disclosure requirements, which can result in penalties, including the suspension of voting rights of the shares.

4.3 Hurdles to Stakebuilding

The Code imposes certain restrictions on a bidder acquiring a stake holding which must be adhered to. There are also controls with regard to market abuse prohibited by the Market Abuse Regulations (MAR), which include insider dealing, where a bidder has information which could place the bidder at an unfair advantage. Insider dealing can give rise to civil and criminal sanctions (Criminal Justice Act 1993).

The FCA has the power to impose unlimited sanctions on any contravention of the MAR, including Article 14 (prohibits insider dealing) and Article 15 (prohibits market manipulation). The market abuse regime cannot be diluted by any rules introduced by the company.

Following the UK's withdrawal from the EU on 31 December 2020, it has introduced a new regime for all issuers with securities listed or traded on the UK markets called the UK MAR, which is broadly along the same lines as the previous regime (aimed at discouraging insider trading, market manipulation and unlawful disclosure) with a few changes of which businesses will need to be aware.

The SME Growth Markets Regulation ((EU) 2019/2115) made some amendments to EU MAR with effect from 1 January 2021. As these amendments took effect after the end of the Brexit transition period, they do not automatically apply to the UK. The UK only adopted some of these amendments to UK MAR and, as a result, there is divergence in practice.

The changes below were made to the UK MAR from 29 June 2021:

- insider lists – issuers as well as any person acting on their behalf must maintain an insider list; and
- person discharging managerial responsibility (PDMR) transactions – issuers must make public any PDMR transactions within two working days of receiving notification of a transaction from the PDMR or person closely associated (PCA).

4.4 Dealings in Derivatives

The trading of derivatives is not fully prohibited; however, following the 2007-08 financial crisis, dealing in derivatives is highly regulated. The Financial Services and Markets Act 2000 restricts the carrying on of a regulated activity and making financial promotions unless authorised by the FCA.

4.5 Filing/Reporting Obligations

The European Market Infrastructure Regulation (EMIR) imposed reporting requirements to ensure transparency amongst derivatives markets, namely:

- information on each derivative contract must be reported to trade repositories and sent to supervisory authorities; and
- trade repositories are required to publish aggregate positions based on class of derivatives, for OTC and listed derivatives.

The European Union (Withdrawal) Act 2018 ensured that EU EMIR formed part of UK law.

Effectively, post-Brexit the original EU EMIR continued to apply to EU derivatives transactions and the UK version of the UK EMIR. The FCA has released guidance to explain the changes. EMIR legislation has not changed since the UK left the EU.

When the transition period ended on 31 December 2020, the European Securities & Markets authority (ESMA) switched off the FCA's access to its Markets In Financial Instruments (MiFID) systems. The FCA has built equivalent FCA systems in the UK.

4.6 Transparency

There is no requirement for a bidder to make known the purpose of its acquisition and its intention regarding control of the company.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

An announcement must be made where:

- there is a firm intention to make an offer notified to the target board, the Code governs the requirements for a firm offer announcement (Rule 2.7); or
- there is an acquisition of shares which results in an obligation to make a mandatory offer.

An announcement may have to be made subject to Panel consultation where:

- the target is subject to rumour and speculation; or
- there is unusual movement in the targets share price.

Once a takeover period has commenced, the disclosure requirement under Rule 8 of the Code applies. Rule 8 sets out the circumstances in which Dealing Disclosures and/or Opening Position Disclosures are required to be made. There must then be a disclosure of dealings by parties to the takeover in writing on a daily basis to an RIS.

After the opening position disclosure, if a person is interested (directly or indirectly) in 1% or more of any class of relevant securities of an offeror or the target, then a dealing disclosure must be made.

5.2 Market Practice on Timing

Market practice on timing for disclosure strictly follows the requirements of the Code, as non-compliance is considered seriously by the Panel.

5.3 Scope of Due Diligence

Generally, the due diligence (DD) conducted will fall into three main areas for a private limited company:

- business – considering the broader market issues such as competitors, business strengths and weaknesses, sales and marketing;
- financial – identifying the financial risks and opportunities of the business; and
- general/legal – identifying any areas of risk to the buyer as well as providing the buyer with a more comprehensive view of the company in its entirety.

In contrast, on a public acquisition, all persons with confidential information on an offer must keep the information confidential until the offer is announced publicly; therefore, due diligence, in the first instance, is limited compared to private sales. The offeror is under a duty to only announce an offer when it knows it will implement the offer (Rule 2.7 of the Code).

It is now standard practice for due diligence on acquisitions to be undertaken remotely with the use of data rooms.

5.4 Standstills or Exclusivity

To protect target shareholder value, the Code generally prohibits the bidder and target from entering into exclusivity agreements. However, the target can seek safeguards from the bidder that are not prohibited by the Code – see **6.7 Types of Deal Security Measures**.

5.5 Definitive Agreements

Tender offer terms and conditions are, generally, set out in the bidder's formal offer or in the scheme document.

6. Structuring

6.1 Length of Process for Acquisition/ Sale

The below is subject to **3.2 Significant Changes to Takeover Law**. The timeline for completing a public takeover depends on whether it is by way of an offer or scheme.

Takeover Offer

If the takeover occurs by way of takeover offer, the timeline is as follows:

- within 28 days (and no earlier than 14 days without the target board's consent) of an announcement of a firm offer, the offer documents must be sent the shareholders (offer date);
- the offer can be closed 21 days from the offer date;
- the offeror must announce the level of acceptances and will usually announce the next closing date 22 days after the offer date;
- an offer will become unconditional as to acceptance 60 days after the offer;
- on the basis the offer becomes unconditional as to acceptances on day 60, 81 days from the offer date is the last day for fulfilment of the other conditions, and 95 days after the offer date is the last date for consideration to be posted to the shareholders; and
- the offeror can complete a compulsory acquisition procedure 100 days after the offer date.

Scheme of Arrangement

If the takeover occurs by way of a scheme, the timeline is as follows:

- within 28 days, bidder and target announce the scheme;
- within 21 days of the scheme document, a meeting of the shareholders to approve special resolution;
- within 40 days, the court will sanction a hearing;
- on day 41, the court sanction is submitted to Companies House and the scheme takes effect; and
- day 55 is the last day for payment of consideration.

The pandemic's impact on timetabling of deals has rested primarily with regards to regulatory requirements, given the challenges faced by regulators, including the court system, Companies House and Financial Conduct Authority.

6.2 Mandatory Offer Threshold

Rule 9 of the Code provides that if a person acquires an interest in shares in the target resulting in the person holding 30% or more of the voting shares of that company or a person who already holds between 30% to 50% of the voting rights acquires an interest in any other voting shares, that person will be obliged to make an

offer to acquire all of the equity and voting share capital of the target on the terms set out within Rule 9.

The offer is to be made in cash (or cash alternative), level with the highest price paid by the offeror for any interest in shares in the previous 12 months. The offeror is not entitled to attach any condition to the offer, except for where it is refused on the grounds of competition.

6.3 Consideration

Cash remains more commonly used in the UK. More earn out or deferred consideration-based deals focused on adjustments to account for the current valuation uncertainties are expected. How a deal is structured (as well as tax considerations) can help reduce the gap between buyers and sellers and address risks caused by the uncertainty of whether a business can meet its financial projections in light of the pandemic.

6.4 Common Conditions for a Takeover Offer

The Code permits an offeror to include conditions or indeed pre-conditions to an offer; however, there are constraints, primarily that such conditions must not be dependent on the subjective judgement of the offeror. Common conditions include the following.

- Where consideration shares are going to be issued and such class of shares are already listed as consideration then a condition will be included such that the offer becomes unconditional only once the consideration shares are admitted to listing and to trading.
- That there will be no reference made to the Competition and Markets Authority or, where the takeover falls within the scope of EU Merger control, the European Commission.
- That all relevant authorisations/approvals for conducting the business are in full force and effect at completion.
- There being no material ligation or other disputes ongoing or pending against the target.
- There being no material adverse changes in the target's financial or trading position other than those which have been made known to the offeror; however, a change in economic, industrial or political circumstances will not normally justify the withdrawal of an offer according to the Panel.

6.5 Minimum Acceptance Conditions

The amendment to the Code in July 2021 means that the acceptance condition can only be satisfied once all other conditions satisfied or waived.

Under Rule 10 of the Code, an offeror must have agreed to acquire 50% of the voting rights in the target for it to be able to declare the offer unconditional as to acceptance. An offeror will often include a conditional threshold so that 90% of the shares to which the offer relates must accept. This allows the offeror to rely on Section 976 of the Companies Act 2006 to acquire the remaining 10% of the shares. Without the 90% condition, the offeror will be left to contend with minority shareholders remaining in the company, who it will have no right to buy out.

6.6 Requirement to Obtain Financing

Generally, an offer cannot be made conditional on obtaining finance; this is reflected within General Principle 5 and Rule 2.7 of the Code. Only in limited circumstances may the Panel permit obtaining finance as a pre-condition to the offer under Rule 13, for example, where it will take a substantial length of time to gain regulatory clearance or authorisation. A bidder must, therefore, ensure it has the funds to satisfy the consideration due in its offer.

Rule 24.3 (f) of the Code requires that offer documents set out how the offer is being financed, including terms of finance and interest rates.

6.7 Types of Deal Security Measures

There is a general prohibition on "offer-related arrangements" between a bidder and target company on takeovers of UK companies to which the Code applies. Pursuant to Rule 21.2 of the Code, the target company may not enter into any "offer-related arrangement" with the bidder during an offer period or when an offer is reasonably in contemplation without the prior consent of the Panel.

This prohibition covers any agreement, arrangement or commitment in connection with an offer, including any inducement fee arrangement or break fees. Some break fees are permitted, however, where they do not exceed 1% of the offer value and the target's financial adviser has confirmed it is in the best interest of the shareholders.

The following are examples of safeguards permitted under the Code:

- confidentiality constraints;
- non-solicitation of employees, customers or suppliers;
- requirement for assistance for the purposes of obtaining any official authorisation or regulatory clearance;
- employee incentive arrangements; and
- agreement in relation to the future funding of any pension scheme.

6.8 Additional Governance Rights

If a bidder does not seek 100% ownership of a target, there is no real scope for the bidder to seek additional governance rights from the target.

6.9 Voting by Proxy

Section 324(1) Companies Act 2006 sets out a statutory right of the members to appoint proxies to exercise all or any of the member's rights to attend, speak and vote at general meetings. This will override any conflicting provision in the company's articles, though the articles will usually prescribe how a proxy is to be appointed.

6.10 Squeeze-Out Mechanisms

An offeror can rely on Section 979 of the Companies Act 2006 in order to force minority shareholders into the transaction. This provision is subject to there being a "takeover offer" for the purchase of all of the shares in the target company (less the shares already held by the offeree). The offeror must also have acquired or agreed to acquire 90% of the shares which are not currently held by the offeror.

If the above conditions are met, the offeror can give a squeeze out notice under Section 981 (Companies Act 2006) within three months of the expiry of the original offer to the shareholder who did not accept the original offer ("minority shareholders"). The notice will obligate the offeror to acquire the shares from the minority shareholders on the same terms of the main takeover offer. The minority shareholders can apply to court to contest the compulsory acquisition; however, the court is likely to find that the offer the majority shareholder have accepted is fair and reasonable.

Six weeks after serving the squeeze out notice, the offeror must provide to the target company a copy of the entire squeeze out notices, a stock transfer form executed by a person nominated by the target in respect of the minority shareholder and the consideration for the shares.

6.11 Irrevocable Commitments

Irrevocable commitments are widely used to improve the chances of success of a takeover offer. In advance of the announcement of an offer and with the consent of the Panel, shareholders will give an undertaking notice that they will accept the offer and will vote in favour of any resolutions in order to progress the offer.

There are two types of irrevocable commitments:

- hard irrevocables, which are binding even if a higher offer is made; or
- soft irrevocables, which will fall away if a higher offer is made.

Usually, the higher offer must be at least 10% higher.

If an offeror obtains an irrevocable commitment during the offer period, this must be disclosed in writing to a Regulatory Information Service (RIS) (Rule 2.10(a) of the Code).

7. Disclosure

7.1 Making a Bid Public

Rule 2.7 of the Code sets out what needs to be included within an announcement, namely (not limited to) offer terms, identity of the offeror, details of any existing holding of shares, any conditions, details of any dealing arrangements, a list of documents which must be published on a website and, where there is a cash element involved in the offer, confirmation from the offerors financial adviser that there are sufficient resources to make the offer. Since January 2018, it is at this stage that an offeror must confirm its intentions with regards to the business, employees and pension scheme of target.

The announcement must be published via a Regulatory Information Service. If the announcement is submitted outside normal business hours, it must also be distributed to at least two national newspapers and two newswire services in the UK.

If a leak occurs, the announcement is governed by Rule 2.4 of the Code.

7.2 Type of Disclosure Required

It is unlawful for a public offer of transferable securities (including listed shares) to be made in the UK unless a prospectus approved by the FCA (or the competent authority of another EU state) has been issued beforehand, or an exemption applies. The prospectus regime was policed by the Prospectus Regulation (EU) 2017/1129, which sets out a number of exemptions from the requirements to produce a prospectus. However, following the UK's exit from the EU, it will have its own distinct prospectus regime. This new UK prospectus regime largely follows the structure set by the EU Prospectus Regulation, but with some important differences to reflect the UK's withdrawal from the EU.

7.3 Producing Financial Statements

A bidder is required to produce audited accounts/financial statements for the previous two years of trading.

7.4 Transaction Documents

Alongside the main bid documents, a bidder must disclose to the public other material documents, including irrevocable commitments, letters of intent, any offer-related arrangements, funding details and any other material contracts related to the offer.

8. Duties of Directors

8.1 Principal Directors' Duties

Directors owe statutory duties enshrined in the Companies Act 2006.

Duty to Act within Powers (Section 171)

If a director is allotting shares with the intention of preventing a takeover bid, this is deemed to be acting outside of the confines of the powers and was successfully challenged in Hogg v Cramphorn Ltd (1967) Ch 254.

Duty to Promote the Success of the Company (Section 172)

When considering whether to recommend an offer or in the case of competing bids, the directors will need to consider whether a bid is in the best interest of the company. This involves taking a long-term view of the interests of the company. The court is unlikely to disturb a decision unless no reasonable director could possibly have concluded that such action would promote the success of the company.

Duty to Exercise Reasonable Care, Skill and Diligence (Section 174)

Generally, a committee will be nominated to oversee the day-to-day responsibility of a takeover; the board are still under a duty to monitor the activities of the committee.

Duty to Avoid Conflicts of Interest and Conflicts of Duty (Section 175)

In a takeover, conflicts may arise where a director of the target also holds a position in the bidder company or vice versa, or if a target director will have a continued role in the group following the transaction. Where a director does have an interest in an arrangement, the director will be under a duty to disclose such interest (Section 177).

Directors owe their duties primarily to the company itself and, therefore, any action is taken by the company usually after a majority of shareholders have voted for action to be taken. Shareholders are unable to take action unless they can prove unfair prejudice or by bringing a derivative claim seeking relief on behalf of the company where the company has a cause of action against a director.

8.2 Special or Ad Hoc Committees

Usually, it is common for a committee to be appointed from the outset to deal with urgent issues relating to the takeover.

Where a company is subject to a management buyout or another connected party transaction which could result in a conflict, a special committee consisting of non-conflicting directors should be appointed in order to deal with the transaction.

Independent advisors should be consulted rather than using the company's existing advisors; it is not sufficient to simply establish information barriers.

8.3 Business Judgement Rule

Directors' judgement is rarely challenged in the UK courts and a court is unlikely to disturb directors' decisions unless no reasonable board could have reached that decision.

8.4 Independent Outside Advice

Rule 3 of the Code provides that the target must have an independent financial adviser. The target board must obtain competent independent advice as to whether the financial terms of any offer (including any alternative offers) are fair and reasonable.

The board will usually put together a team of advisers, including investment banks (who will act as the financial advisors), brokers, lawyers, accountants and public relations advisers. This is to enable the board to deal with the offer, the substance of the board's advice to the shareholders and the offer process.

8.5 Conflicts of Interest

See **8.1 Principal Directors' Duties**.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers are permitted in the UK and account for around 12% to 18% of bids, annually.

9.2 Directors' Use of Defensive Measures

The use of defensive measures is restricted by the Code. The Code will only apply once an approach has either been made or the board have reason to believe that a bona fide offer might be imminent.

In such circumstances, under Rule 21.1(a) of the Code, the board cannot, without shareholder approval, take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits. This includes:

- issuing shares;
- granting share options;
- disposing of any material assets; and
- entering into agreements outside the ordinary course of business.

The directors are also prevented from taking any action in so far as it puts them in breach of their director's duties owing to the target.

9.3 Common Defensive Measures

Urging shareholders to reject an offer is a commonly used defensive measure.

The board will seek to persuade the shareholders that the price being offered is an undervaluation of the company and that by not engaging in the sale, the shareholders will see a greater benefit in the long run. The board will make this judgement based on financial information with regards to the performance of the company.

A board may also release new information, such as business plans and forecasts to reinforce the idea that the long-term gain will outweigh the shareholders cashing out on the offer.

Where shares are being offered as consideration, the board may scrutinise the value of the offeror and will look to discredit its worth.

The board should ensure that where this tactic is employed, any information given must be adequately and fairly presented (Rule 19.1). There has been noticeable reporting of a change in the use of defensive measures due to the pandemic.

9.4 Directors' Duties

There are two main duties which are key when employing defensive measures. The first is the duty to act in a way the director considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (Section 172 Companies Act 2006). Success is determined based on the directors' judgement; however, the act does provide several factors which must be considered, including:

- the likely consequences of any decision in the long term; and
- the interests of the company's employees.

The second is that the directors must act within their powers (Section 171 of the Companies Act 2006), which requires the director to act within the confines of the company's constitution.

9.5 Directors' Ability to "Just Say No"

As detailed, in order for directors to comply with their statutory duties they cannot "just say no". They must make a reasonable assessment based on requisite independent advice in order to determine what is in the company's best interests long term. The Code generally allows for target shareholders to decide the outcome of an offer and, provided directors comply with their duties, they are allowed to express their opposition to a bid.

10. Litigation

10.1 Frequency of Litigation

Litigation is not common in connection with M&A deals in the UK. Generally, commerciality plays a much larger role, resulting in most issues being resolved on commercial terms rather than resorting to litigation. The Panel, whilst not strictly of judicial standing, does play a key role in determination of issues arising during the course of the bid process.

10.2 Stage of Deal

If litigation is brought (which is rare), there is no usual stage more likely to result in litigation.

10.3 "Broken-Deal" Disputes

The pandemic has seen a surge in disputes between buyers and sellers, including between exchange and completion. These have included buyers seeking to get out of a deal or stall the deal whilst the industry improves or forcing renegotiation on price. Sellers on the other hand have also been seeking to get the deal over the line even if structured in a different way (such as earn outs or deferred consideration). Deals may look completely different in a post-pandemic world compared to when the heads of terms were negotiated, and the resulting gulf between the buyer and seller has led to disputes. Sectors seeing the most disputes are travel, tourism, transport and retail.

Given the novelty of the current pandemic situation and the absence of decided cases, the outcome of these disputes remains uncertain. However, if the global financial crash of 2008 is anything to go by, then we can expect more litigation and strongly contested cases in the next 12 months as we adjust to a post-pandemic world.

11. Activism

11.1 Shareholder Activism

M&A activity remains a key focus for activists.

11.2 Aims of Activists

Increasingly, activists make their demands public by way of open letters, white paper reports, shareholder proposals and proxy contests. The general aim being to focus on issues relating to corporate governance, such as replacing the management team, level of dividend pay-outs, appointment of new directors and executive compensation. Activist shareholders have been fairly quiet during the uncertain times of COVID-19 and volatile trading conditions; hence, there is an expectation that activists will make up for lost time in the year ahead.

11.3 Interference With Completion

Activists have developed a number of M&A-related strategies to interfere with completion. These strategies include pressuring companies into a merger or acquisition, or ruining deals that would otherwise have proceeded.

A further popular strategy involves campaigning for improved deal terms, commonly referred to as "bumpitrage". This involves the activist acquiring shares in a company that is subject to a takeover bid, and then persuading the other shareholders that the current bid is insufficient and should be renegotiated.

Often, the threat that shareholder approval may not be forthcoming is sufficient to encourage a target board to renegotiate the terms of the deal.

Trends and Developments

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Hawkins Hatton Corporate Lawyers Ltd is a niche corporate law firm based in London and Dudley, dealing primarily with corporate and commercial work together with commercial property and litigation. Formed in 2005, its client base includes European and Anglo-US companies, individuals and a number of banks, as well as a large number of small and medium-sized enterprises. Hawkins Hatton provides a full range of company and commercial services and is known for private equity work for management teams, management buyouts, sales, mergers, acquisitions and disposals for shareholders of small and medium-sized enterprises, and a broad range of day-to-day corporate work. Employment specialists work closely with the corporate team to take care of all employment aspects of a transaction. This often includes consideration of TUPE, advice on terminations/dismissals and the preparation of appropriate service agreements for the period after the completion of a business sale or acquisition.

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Introduction

It has now been three years since Brexit on 31 January 2020, when every debate was dominated by "Brexit" being prefixed with "hard", "soft", "deal" or "no-deal" etc. Then another word took over, which was "COVID-19". This continued until the word "Ukraine" took prominence. It is safe to say these words have dominated the political landscape in the last three years.

2022 saw the word "recession" appear as a recurring theme in economic forecasts, with the Bank of England forecasting a recession in Quarter 4 of 2022. With inflation rampant and recession lurking, 2022 saw cash rich businesses change tack and seek a competitive advantage through consolidation and acquisitions. Coupled with increased private equity deals, this meant that M&A activity in the first half of 2022 was back to pre-pandemic levels. Private and public M&A deals are important in the UK market with the lion's share of the 2022 M&A deals being in the private sector.

The real estate, leisure and hospitality sectors remained lower in M&A activity whereas technology and healthcare sectors continue their robust activity. The Office for National Statistics reported the following statistics for M&A deals in 2022 involving UK companies.

- In Quarter 3 (July to September) 2022 there were a total of 459 completed domestic and cross-border M&A, a decrease of nine compared with the previous quarter (468), and 159 fewer than Quarter 3 2021 (618).
- The total value of inward M&A (international companies acquiring UK companies) in Quarter 3 2022 was GBP25 billion, GBP13.9 billion higher than Quarter 2 2022 (GBP11.1 billion).
- The value of outward M&A (UK companies acquiring international companies) in Quarter 3 2022 was GBP7.6 billion, GBP2.8 billion more than Quarter 2 2022 (GBP4.8 billion).
- The value of domestic M&A (UK companies acquiring other UK companies) was GBP2.6 billion in Quarter 3 2022, GBP0.7 billion less than in the previous quarter (GBP3.3 billion).

Rising interest rates to offset inflation resulted in borrowing costs increasing. Refinitiv data predicts the Bank of England will raise interest rates to 4.6% in 2023 and the US Federal Reserve to 5%. Higher interest rates will inevitably impact a sector accustomed to lower interest rates for longer periods of time. That said, the global economic conditions are very different to those during the credit crunch crisis. The banking sector in particular has a much stronger balance sheet, and in real estate during 2022, mainstream lenders continued to show a willingness to support the right opportunities.

Avondale Corporate advisory reported that cross-border deals were also on the rise in 2022 as the UK represents value for money against the strength of the dollar even on deal sizes below GBP10 million. Globally, however, M&A fell a third year-on-year to December 2022. Norton Rose reported in 2022 that in global M&A there was a 37% decrease in total deal value and the total number of deals reduced by 17% with the second half of the year seeing a considerable drop in activity (Refinitiv).

Valuations on the whole have remained consistent in 2022 but they could fall if the economic uncertainty and rise in cost of living (especially in the energy sector) continues and this could impact the volume of M&A deals in the year ahead.

Year Ahead

Deal activity continued its decline in the second half of 2022. The next 12 months will experience much of the same; however, prospects are improving. The reason for this is that domestically the UK has not yet navigated its way out of the downturn and pay disputes are still on the rise, fuelling inflationary pressures and the thunder of industrial unrest is still rumbling through the economy.

It is clear that the transient inflation has now whipped up a storm causing wage inflation, but the prospects of hitting the rocks of unemployment for the majority of the workforce still does not seem a reality, as one thing Brexit has taught the UK is that there is still a demand for talented skilled labour.

No one can predict how or when the war in Ukraine will end or whether the relaxation of the zero-COVID policy adopted by China will lead to a new strain of COVID and further worldwide restrictions. However, one thing is for certain: as with any extreme weather, provided you batten down the hatches and prepare for the worst, there is an opportunity to mitigate the devastation caused.

The depression sitting over the UK economy means that there is an unavoidable recession in the same way that when there is a storm there is rain. The smart money is ensuring that more resilience is built up within businesses through continued investment despite the higher borrowing costs as inevitably the investment should lead to productivity gains. What is not clear is whether or not the new shift in working patterns will absorb those productivity gains such that they will not translate into higher GDP for UK public limited companies (plcs) when the storm clouds have moved on and brighter skies appear in 2024.

Rishi Sunak's promotion from Chancellor to Prime Minister may mean that he is now in a better position to deliver on Big Bang 2.0. If he can get it right, it will be a game changer for UK plcs and will help make the UK economy more resilient to future inevitable cold fronts affecting

the economy. The only problem with this is the forthcoming election within the next two years and the uncertainty as to whether Rishi Sunak will still be Prime Minister and whether the Conservative Party will still control of the direction of the UK economy.

The UK intended to gain a comparative advantage by deregulation of the financial services industry akin to what occurred in the 1980s. To do this now, there has to be an implementation of deregulation in order to seize the opportunity and to simulate growth, which the UK economy desperately needs. Otherwise, the International Monetary Fund's (IMF) prediction that the UK economy will shrink by 0.6% may become reality. IMF predictions of the UK economy have previously been wrong so there is still room for re-evaluation. This will depend on Rishi Sunak turning the Big Bang 2.0 into reality now. The signs are all looking good, with growth in exports for financial services to Singapore, Switzerland and the USA. With less barriers to entry, the theory is there will be more innovation and more market entry, which will lead to an increase in long-term productivity; however, not only is the pace of this deregulation slow but certain decisions of late including the UK government's desire to introduce wider regulation in the M&A and financial sector (such as cryptocurrency) seems counterintuitive to Big Bang 2.0. Indeed, 2022 saw the introduction of increased regulation in the M&A sector, and this increased regulation is here to stay. The most noteworthy of these is the National Security and Investment Act (NSIA). Regulatory constraints will no doubt bring a new dimension and challenge to closing deals. Similarly, merger control has tightened as the transition period for Brexit ended with the UK Competition and Market Authority (CMA) playing a key role in scrutinising global transactions. Large tech and digital mergers will remain a key focus area for the CMA, which could influence an otherwise buoyant sector for M&A activity.

Future Trends

In 2023, we may see M&A activity strengthen as economic conditions settle in particular in relation to certain sectors where specific trends may fuel deals. Unlike past M&A declines, such as following the dot-com bubble and the financial crisis of 2008-09, Morgan Stanley's bankers say "it is likely the recent reduction in activity will be shorter lived. The growth in the private equity industry, sophistication of corporate clients and overall strength of corporate balance sheets and earnings should result in increased M&A activity in 2023 and beyond".

The above said, the extent to which the continuing war in Ukraine and the imposition of various export sanctions will impact global M&A in 2023 remains uncertain.

Environmental, social and governance (ESG)

ESG will continue to drive M&A in 2023 as both consumer demand and increased global legislation is encouraging political action and regulation to combat climate change. Businesses needs to align themselves with sustainability models, and in certain sectors transformative M&A will drive consolidation.

There will also be greater investment in energy/renewables and infrastructure as the global focus remains on securing sustainable, secure energy supplies.

Technology/digitalisation

These sectors show no sign of weaker performance or reduced M&A activity as the demand for technological advances continues since the pandemic to support new norms, including hybrid working, which are here to stay.

Private equity

Private equity investment was a driving force in M&A activity in the UK during 2022 with the availability of high levels of cash for investment due to the weakness in the pound. Latham & Watkins LLP's survey of transactions reported that 57% of the buyers in 2022 were private equity. This is a fairly shocking statistic and sets a new landscape for M&A activity in the years ahead.

Activism

Shareholder activism declined during the pandemic. However, for underperforming companies, in 2023 it is predicted that activists will launch campaigns to push for changes to create value. Morgan Stanley reported that the "number of activism campaigns at US companies in 2022 exceeded 2021 levels by approximately 14%, with M&A and improvement in operations as the most common activist demands last year, each occurring in 49% of campaigns".

Cross-border deals

Most economists forecast that the fall in cross-border deals triggered initially by the pandemic, trade tensions between USA and China and more recently the Ukraine war will level off. 2023 is expected to see an increase in international deals as companies globally seek to strengthen supply chains.

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