27 July 2010

PCP 2010/2 – review of certain aspects of the regulation of takeover bids

Response of the Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law

Below are the views of the Takeover Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law (the "Working Party") on PCP 2010/2.

1. What are your views on raising the minimum acceptance condition threshold for voluntary offers above the current level of "50% plus one" of the voting rights of the offeree company?

We think it would be illogical and would cause considerable difficulties (as identified in PCP 2010/2) if the minimum acceptance condition threshold for offers – be they voluntary, mandatory, recommended or hostile – were to be at a different level to that which confers the ability of a shareholder to determine the composition of the board (set by the Companies Act 2006, section 282 at the "50% plus 1" level). On this basis, any discussion of a change in the acceptance level must also take into account the implications for corporate governance outside the takeover context. In particular, increasing the acceptance condition level would to some extent further entrench existing management, and it is not clear on what basis this would be desirable.

If the threshold is raised for voluntary offers but not for mandatory offers (we oppose this change, see the response to question 2), then it would be comparatively easy to evade the raised threshold for voluntary offers.

2. What are your views on raising the acceptance condition threshold for mandatory offers above the current level of "50% plus one" of the voting rights of the offeree company?

Raising the threshold for mandatory offers would significantly undermine the shareholder protection currently provided, as it may deprive shareholders of the ability to sell to the offeror even though the statutory control level (i.e. where shareholders can change the composition of the board) has been passed. The possible solution of a requirement for the offeror in such a case to sell down (suggested in Paragraph 2.18(d) of PCP 2010/2) suffers from the problem of having to define the level to which the offeror's holding should be reduced.

Please also see response to question 1.

3. If you believe that an increase in the acceptance condition thresholds for voluntary and/or mandatory offers would be desirable, at what level do you believe they should be set and why?

Please see response to questions 1 and 2.

4. What are your views on the consequences of raising the acceptance condition thresholds?

We agree that the Panel has identified the key areas for further consideration given the consequences of raising the acceptance condition (as set out in Paragraph 2.18 of PCP 2010/2).

Please also see response to question 1.

5. What are your views on the suggestion that shares acquired during the course of an offer period should be "disenfranchised"?

We do not support the proposition that shares acquired during the course of an offer should be "disenfranchised". In principle, we do not support differential treatment of shares/shareholders, and such a move would go against the trend in the UK market over many years towards companies having a single class of fully fungible, freely transferable shares.

We believe that any attempt to disenfranchise shares acquired during the course of an offer would be very difficult to police, and may be relatively easy to circumvent through contractual arrangements.

Most members believe that the requirement under Article 3(1)(a) of the Takeovers Directive, that offeree company shareholders of the same class should be afforded "equivalent treatment", may not permit the Code Committee to amend Rule 10 and/or Rule 9.3 so as to provide that shares acquired during an offer period should not be counted towards the satisfaction of an acceptance condition of a contractual offer.

6. If you are in favour of "disenfranchisement", what are your views on how such a proposal should be implemented? In particular, what are your views on the various consequential issues identified in section 3 of the PCP?

Please see response to question 5.

We agree that there would be a number of practical problems inherent in disenfranchising shares acquired during an offer period, as set out in Paragraph 3.13 of PCP 2010/2. Disenfranchising shares under offer would also have the effect of removing the possibility that an existing or new shareholder could (legitimately) build up a stake in order to prevent the offer from succeeding.

If disenfranchisement is to be pursued it will be necessary to consider how it would apply to schemes of arrangement.

7. What are your views on the suggestion that shares in a company should not qualify for voting rights until they have been held by a shareholder for a defined period of time and regardless of whether the company is in an offer period?

We believe the arguments against qualifying periods set out in Paragraph 3.16 of PCP 2010/2 are compelling.

8. What are your views on the suggestion that the threshold trigger at which independent market participants become subject to the Code's disclosure regime, currently 1%, might be lowered to 0.5%?

We believe this is an issue on which investors and companies are better placed to comment. However, we would agree that there is a risk that a "blizzard" of disclosure is created which in fact hinders market transparency.

We also recognise the proposal may have disproportionate effects on shareholders in smaller companies (leading, for example, to retail shareholders being required to make Rule 8 disclosures). We have considered whether this could be mitigated by having a different regime for smaller companies. However, a two-tier system raises the risk of confusion and also the problem of defining 'smaller company' for these purposes.

9. What are your views on the suggestion that there should be additional transparency in relation to offer acceptance decisions and of voting decisions in relation to schemes of arrangement? If you are in favour of this suggestion, please explain your reasons and how you think such additional transparency should be achieved?

We agree that it is not the function of the Panel to regulate the relationship between institutional shareholders/nominees and underlying beneficial owners.

We doubt whether the additional cost and effort required to produce more frequent announcements of acceptance levels by the offeror would provide much useful information for the market and offeree company shareholders, not least because many acceptances will typically only be received towards a/the closing date (and often not until the end of the offer period). The same arguments could be made around disclosure of scheme voting decisions, where there is the added complication that such decisions may be changed up to the time of the meeting.

If more frequent announcements of acceptance levels are to be made, there would be some practical problems to be addressed about which acceptances could legitimately be announced by an offeror company before any offer is due to expire (or is revised or extended) and how such acceptances should be verified.

We note that if an offeree company wishes to establish who has accepted the offer at any point during an offer period, it may serve notice on those it believes to be its shareholders under section 793 of the Companies Act 2006 to obtain that information (although we acknowledge that this would not flush out all interests in its shares, for example certain contracts for differences).

10. What are your views on the suggestion that the application of the Code's disclosure regime to situations where the rights attaching to shares have been "split up" might be clarified?

We agree that this is an area which the Panel should consider in more detail in due course. We also consider that such information may be useful for companies more generally and not just in offer situations (although we appreciate that this is not a matter for the Panel).

11. **What are your views on the suggestion that the same requirements as to the disclosure of financial information on an offeror, the financing of the offer, and information on quantified effects statements should apply regardless of whether:**

   (a) the consideration being offered is cash or securities;

   (b) the offer could result in minority shareholders remaining in the offeree company; or

   (c) the offer is hostile or recommended, or whether a competitive situation has arisen?

In our view, the Takeover Code requires sufficient disclosure of financial information on an offeror.

Most of our members agree that more information on the financing of an offer would likely be useful in all circumstances (i.e. even on a pure cash offer, it would be useful to other stakeholders, such as employees).

On a pure cash offer, additional information on quantified effects statements would only really be of use for offeror company shareholders, and the Code does not on the whole, seek to protect offeror company shareholders (see also the response to question 18 below).

12. **What are your views on:**

   (a) disclosures made by offerors of their intentions in relation to the offeree companies under Rule 24.1; and

   (b) the views of the boards of offeree companies on offerors' intentions given under Rule 25.1?

If you consider that greater detail is required, how do you consider that this would be best achieved?

In our view, Rules 24 and 25 already require offerors to disclose their intentions in relation to the offeree company and boards of offeree companies to set out their views on the offeror's intentions in sufficient detail. We are aware of concerns that practice is inconsistent as to the amount of detail that is given in offer announcements and documents.

We believe that further guidance could usefully be given by the Executive through a Practice Statement on Rules 24 and 25. In particular, the Practice Statement could give parties some guidance on the interaction of Rule 19 and Rules 24 and 25, and how Rules 24 and 25 should be satisfied in hostile or other situations where access to due diligence has been very limited. However, we doubt whether there will be any significant change in practice unless the constituency with most influence (offeree shareholders) makes it clear that it regards these disclosures as important.

13. **What are your views on the matters to which the board of the offeree company should have regard in deciding whether or not to recommend acceptance of an offer?**

The offeree directors' obligation under the Takeover Code is to express their opinion on the offer to shareholders. That gives rise to a duty (of honesty and diligence) owed to the shareholders, in contrast to the fiduciary duties (in particular, to promote the success of the company for the benefit of its members as a whole) that are owed to the company. The opinion on the offer that shareholders are perceived to be principally interested in is that of the relative value of the offer compared to the value of retaining an interest in the company. It has become practice (but not a Code rule requirement) for this opinion to be reduced to a simple (binary) recommendation to accept or not. However, Rule 25.1 already requires a more broad ranging opinion.

The directors' duty (owed to the company) to promote the success of the company for the benefit of its members as whole is not strictly relevant to the directors expressing their opinion on the offer, and directors may have difficulty when they consider that an offer is at a fair price but that the offer (or a transfer of control to the offeror) may damage the company and therefore that it is not in the interests of *the company* that the offer should succeed. Such a dilemma faced the Manchester United directors in relation to the offer for Manchester United PLC by the Glazer family in 2005. The Manchester United board attempted to reconcile these two duties in their announcement on 11 February 2005 regarding the possible offer. The announcement contained the following statements:

"The Board believes that the nature and return requirements of this capital structure [i.e. the capital structure of the bidding vehicle] *will put pressure on the business of Manchester United, particularly if Glazer's business plan was not met. The Board continues to believe that Glazer's business plan assumptions are aggressive and that the direct and indirect financial strain on the business could be damaging.*

Glazer's financing is supported by commitment letters and the proposed offer is at a level which if made, the Board is likely to regard as fair. The Board believes that the proposal may be deliverable and that a majority of shareholders would want the Board to permit its development. Against that background, the Board has concluded that it now must provide limited due diligence, following which Glazer will be able to determine whether it wishes to put an offer to shareholders.

If the current proposal were to develop into an offer – and there can be no certainty that this will occur – the Board considers that it is unlikely to be able to recommend the offer as being in the best interests of Manchester United, notwithstanding the fairness of the price. However, it is ultimately for the shareholders to determine whether an offer will succeed."

Some members would argue that it is unhelpful for unsophisticated shareholders if directors' recommendations are complex in this way. They would argue that shareholders are entitled to receive clear advice from directors as to what they should do in relation to the offer, and such advice must be given in the shareholders' interests only. The contrary view is that sometimes reality is complex and in a proper case directors would be failing in their duties if the complexities were not described so that shareholders could make their own decision.

Some of our members consider that amendments could be made, or a Practice Statement usefully issued, so as to make clear(er) that the Takeover Code does not place any limitations on the considerations to which the board of the offeree company may have regard, in deciding whether or not to recommend acceptance of an offer.

14. What are your views on the suggestion that there should be a requirement for independent advice on an offer to be given to offeree company shareholders separately from the advice required to be given to the board of the offeree company?

We do not support the proposal of separate independent advice for offeree company shareholders.

We agree that Rule 3 meets the objective of ensuring that independent advice is made available to the shareholders in an offeree company, the substance of the advice being made known to offeree company shareholders under Rule 3.1 and Rule 25.1(a). Some members believe that there are good arguments for the proposition that Rule 3 advisers are potentially liable to offeree shareholders for that advice, although that has not been tested before a court. We do not suggest that this issue needs to be clarified and it is not a question for the Code Committee.

We agree that a "fairness opinion" would not add to the advice given by the Rule 3 adviser but may add further costs to the offeree company's advisory bill and lead to extensive additional disclosure by advisers to reduce the risk of them incurring liability in respect of such advice.

15. What are your views on the suggestion that the board of any offeree company should be restricted from entering into fee arrangements with advisers which are dependent on the successful completion of the offer?

We do not support the proposal that success fees should be prohibited. Part of the role of the adviser is to negotiate the value of the offer, and a success fee which incentivises this is an established and valuable protection for shareholders. We agree that these are legitimate commercial arrangements which offeree companies should be entitled to enter into.

However, we do not support the concept of a fee tied to the failure of the offer, as this could easily work to the disadvantage of shareholders.

16. What are your views on the suggestion that the fees incurred in relation to an offer should be required to be publicly disclosed?

In our view, if fees are considered to be material in the context of an offer, Rule 25.6 requires the contracts under which they are payable to be disclosed in the offer document and be put on display, as any other material contract.

We think both arguments against disclosure of fees set out in Paragraph 6.19 of PCP 2010/2 are forceful and outweigh the perceived benefits set out in Paragraph 6.18 of PCP 2010/2.

17. If you are in favour of the disclosure of fees, how do you think that any provision should operate? For example:

(a) to which fees (and other costs) should any provision apply and on what basis?

(b) **at what point(s) of the transaction should any disclosure be made?**

As stated above, we are not in favour of the introduction of any new requirement relating to the disclosure of advisory fees.

However, if it is decided that some further form of disclosure requirement should be introduced, consideration could be given to introducing a requirement similar to that contained in the FSA's Prospectus Rules, PR App 3 Annex III 8.1. Broadly this requires that an estimate of the company's expenses in connection with the transaction/issue of shares is disclosed in the prospectus. This is already an indirect way of disclosing advisers' fees (as it is done in the aggregate) for an offeror in respect of a share exchange offer involving the issue of a prospectus and something similar could be extended to all offers if thought desirable. This would address some of the transparency concerns whilst not disclosing sensitive information.

18. What are your views on the suggestion that shareholders in offeror companies should be afforded similar protections to those afforded by the Code to offeree company shareholders?

We do not support the proposal that offeror company shareholders be afforded any further protections under the Takeover Code. We do not consider that the Code Committee has jurisdiction to afford additional protections to offeror shareholders.

In our view, the FSA's Listing Rules provide adequate protection for the shareholders of offeror companies which have a Premium Listing of equity shares. We agree that it is entirely inappropriate (and impractical) for UK takeover law and regulation to seek to afford protections extraterritorially to the offeror's shareholders (who would not otherwise be protected by UK law or regulation), simply because the company in question was making a takeover bid for a company to which the Takeover Code applied. Any such requirement could also reduce the certainty of delivery of an offer, to the detriment of offeree company shareholders. If, for example, after a Rule 2.5 announcement of an offer in respect of which the Takeover Code required offeror shareholder approval, market conditions changed to the detriment of an offeror, the offeror directors would presumably advise offeror shareholders to vote against the necessary resolution, with the result that the offer would fail, although the offeror might not be able to lapse its offer for any other reason.

19. If you consider that offeror company shareholders should be afforded protections:

(a) **to which offeror companies should such protections apply and in what circumstances?**

(b) **what form should such protections take?**

(c) **by whom should such protections be afforded (for example, the Panel, the FSA, the Government or another regulatory body)?**

Please see response to question 18.

20. What are your views on the suggested amendments to the "put up or shut up" regime? In particular:

(a) **what are your views on the suggestions that "put up or shut up" deadlines might be standardised, applied automatically and/or shortened?**

(b) **what are your views on the suggestion that a "private" "put up or shut up" regime might be introduced?**

We do not support the proposal that "put up or shut up" deadlines should be standardised, applied automatically or generally shortened (but see below). In our experience the Panel's approach to PUSUs is quick and sensible, and the Panel should retain an element of flexibility. Obtaining a PUSU is purely within the offeree company's control as it may identify the offeror publicly and request a PUSU at any time. We believe that in general the 6-8 week deadline commonly granted by the Panel is often an appropriate length of time, given that offerors may have financing arrangements to finalise and/or regulatory filings to make. However, we believe the Panel needs (and should utilise when appropriate) flexibility to select a different deadline depending on the circumstances. We can see the arguments for a shorter deadline where an offeror has voluntarily announced its interest. We accept that it may be difficult to determine when such an announcement was truly voluntary or due to an involuntary leak, but a tougher approach on voluntary leaks would go along way to deal with the concerns expressed about an offeree being placed under an extended siege.

We can see some advantages to private PUSUs in certain circumstances, for the reasons set out in Paragraph 8.21 of PCP 2010/2.

21. **What are your views on possible offer announcements that include the possible terms on which an offer might be made and/or that include pre-conditions to the making of an offer?**

We do not think there is a real risk of shareholders mistaking possible offer announcements for formal offer announcements.

We can see the argument that possible offer announcements prolong the period for which an offeree company is under siege but it is always open to the offeree company to request a PUSU.

We do not think it would be practical to seek to prevent disclosure of terms or pre-conditions, principally because the risk of a leak is too great. The regime brought in with the Code changes in April 2005 has, we think, been successful in imposing sensible discipline on offerors in relation to their possible offer announcements.

22. **What are your views on the deadline for the publication of the offer document and the suggestion that the current 28 day period between the announcement of a firm intention to make an offer and the publication of the offer document might be reduced?**

We do not support the proposal that the 28 day period for publishing the offer document after an announcement of a firm intention to make an offer should be reduced. We do not consider that offerors deliberately extend this period in order to extend the offer timetable. On the contrary, it is very much in the offeror's interests to compress this timetable as much as possible in order to reduce the time for the offeree board to organise its defences or for competing offerors to enter the fray.

As the professionals largely responsible for the production of the offer document, we are very conscious of the often considerable pressure to produce it as quickly as possible. We agree that there are a number of situations where an offeror would be genuinely unable to produce an offer document within a shorter period of time following the announcement of its firm intention to make an offer, including where approval of a prospectus is required, where the structure of the offer is complex, where the document will be sent into a large number of overseas jurisdictions, or where there are other difficult legal or regulatory issues to address (for example SEC filings).

If it were decided to shorten the 28 day period, the Panel may often be asked to exercise its discretion to extend the period for the reasons set out above. Any shortening of the period could be used tactically by the offeree company board to distract the offeror team from the overall takeover process. Each offeror will want to be certain how long it will have to post its offer document before it makes the announcement of a firm intention to make an offer which will mean the Panel would have to look at every possible offer on its facts. Alternatively, offerors will delay making the announcement of a firm intention to make an offer where possible to allow the drafting of offer documents to be further advanced.

Although we do not support the proposal to shorten the 28 day period, an alternative to an "automatic" shortening of the period (if considered desirable) could be a system similar to that for PUSUs, i.e. an offeree board could apply to the Panel to shorten the 28 day period and an offeror would need to demonstrate to the Panel why it needed the full 28 days to prepare its offer document.

23. What are your views on the suggestion that the Panel should have the ability unilaterally to foreshorten the timetable for subsequent competing offers?

We do not support the proposal that the Panel should have the ability unilaterally to foreshorten the 60 day offer timetable for second and subsequent competing offers. This is for similar reasons to those set out in the response to question 22 – there are a number of situations where a competing offeror would be genuinely unable to meet shorter deadlines, including in particular where the document will be sent into a large number of overseas jurisdictions, or where there are other difficult legal or regulatory issues to address (for example SEC filings). Shortening the timetable could also put too much pressure on offeree company shareholders to decide between different offers quickly.

If the Panel was given the power to shorten the timetable for a competing offer, we assume it would consult fully on the factors it would take into account in deciding whether or not to exercise such power to ensure that offeree shareholders were not deprived of a competing/potentially better offer by undue restraints placed on a competing offeror.

24. What are your views on the Panel's approach to inducement fees? In particular:

(a) do you consider that inducement fees should be prohibited?

(b) if you consider that inducement fees should continue to be permitted:

(i) do you regard the de minimis nature of inducement fees (and the Panel's approach to what is de minimis) as a sufficient safeguard?

(j) do you consider that any further restrictions should be imposed on inducement fees by the Panel (for example, in relation to the timing of payment or the triggers for payment)?

(k) what are your views on the suggestion that the Panel should cease to require confirmations from the offeree company board and its financial adviser that they each believe the inducement fee to be in the best interests of shareholders?

Most of our members would not support a proposal that inducement fees at the current levels be prohibited. We agree that in many circumstances the offeror would not be prepared to make an offer without such a fee and so they facilitate shareholders receiving an offer. Inducement fees are not, in our experience, prohibited in other jurisdictions.

In our view, it has become more common for offeree boards to agree to an inducement fee. We agree that it is the triggers for payments of inducement fees that are of key importance. We believe that well-advised offeree company boards should, and do, generally resist inducement fees which would become payable other than when an alternative offer is successful. However, it may be that offeree company boards would benefit from more guidance in this area and that the Panel could usefully issue a Practice Statement which may assist offeree company boards in negotiations (for example, stating that the Panel would expect an offeree board to justify in great detail why it has agreed to an inducement fee which may become payable in circumstances other than where a competing offer is successful).

Most of our members regard the de minimis nature of inducement fees as sufficient protection. Some of our members would prefer to see inducement fees capped as the amount of costs reasonably incurred by the offeror (subject to an overall cap). (We acknowledge that there is a risk that such a limitation would bring the fees within the prohibition on financial assistance by way of indemnity and so if the provisions on inducement fees are to be amended, the financial assistance provisions would need to be amended to reflect this).

Most of our members also consider that the current prohibitions on financial assistance contained in the Companies Act 2006 continue sufficiently to restrict inducement fees to a de minimis level (although, as stated above, this may need to be considered further if the proposal to limit fees to costs incurred is to be pursued).

We agree that inducement fees of up to 1% have not in fact deterred competing offerors.

Some of our members consider that confirmation from the financial adviser to the Panel that an inducement fee is in the best interests of shareholders is a useful discipline to ensure that an agreement to pay an inducement fee receives the attention it deserves, whilst others consider that they have become too formulaic.

25. What approach should the Panel take to deal protection measures? In particular, do you consider that any specific deal protection measures should be either prohibited or otherwise restricted? Please explain the reasons for your views.

Some members are of the view that, by the same token, full deal protection packages have become considered by some advisers to be standard market practice on recommended offers and that this advice drives some offeree boards to agree unreasonable measures in certain circumstances.

In general we do not think the Panel should place restrictions on the terms that may be agreed between the offeror and offeree company unless it can be demonstrated that such restrictions are required to protect offeree company shareholders. Therefore most of our members do not support the proposal that deal protections measures should be restricted. Those that do consider some deal protection measures should be restricted are not agreed on which should be restricted.

We believe that well-advised offeree company boards should, and do, generally resist more onerous deal protection measures. In the event that the Panel is minded to issue a Practice Statement as suggested above in the response to question 24, it could consider including some guidance which effectively requires offeree boards to justify in detail any deal protection measures agreed. (See, for example, the statement, GN7, issued by the Australian Takeover Panel: http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=guidance_notes/current/007.htm&pageID=&Year=) .

26. What are your views on the suggestion that implementation agreements and other agreements containing deal protection measures should be required to be put on display earlier than at present?

We support the proposal that implementation agreements and other agreements containing deal protection measures should be required to be put on display earlier than at present, perhaps as soon as the offer is announced. This would ensure any potential competing offeror had as much information as quickly as possible in order to enable it to assess the scope for making a competing offer.

27. What are your views on "fiduciary outs" in the context of inducement fee arrangements?

We do not consider that "fiduciary outs" are implied into inducement fee and other deal protection arrangements – if the company contractually commits itself to take a certain course of action and then the directors do something different to meet their fiduciary duties, the company will be in breach of the agreement and can be sued as a result (assuming the offeror can prove loss etc.). Directors will, however, bear this in mind when agreeing to such terms, as they will not be excused from breach of duty by such a contract.

Even where "fiduciary outs" are expressly included in an inducement fee or other deal protection arrangement, we do not consider that these can be relied on as providing a solution for problems faced by offeree boards for the reasons set out in Paragraphs 9.21 and 9.22 of PCP 2010/2.

28. What are your views on the ability of deal protection measures to frustrate a possible competing offer and on whether linking deal protection measures to the payment of an inducement fee may cure any such potential frustration?

Most of our members do not consider that deal protection measures have in fact deterred competing offerors but all acknowledge that this is inherently difficult to assess. We believe that well-advised offeree company boards should, and do, generally resist inappropriately onerous deal protection measures.

However, some of our members are of the view that, to the extent deal protection measures do make it more likely that a particular offer will succeed, they are contrary to shareholders' interests as they have the effect of making it harder for shareholders to benefit from a competing offer.

In any event, those of our members who are concerned that deal protection measures can deter competing offerors do not think this can be rectified by limiting the consequences of breach/termination of the implementation agreement to the payment of an inducement fee.

29. What are your views on the suggestion that provisions similar to those previously set out in the Rules Governing Substantial Acquisitions of Shares should be re-introduced?

We did not support the abolition of the SARs in 2006. We attach a copy of our submission of 24 January 2006 to this effect. We would therefore be supportive of the re-introduction of provisions similar to the SARs and extending them to cover interests in shares and cash-settled derivatives.

However, if the objective of re-introducing the rules is to deter 'long term' shareholders from selling their interests during an offer period (which we do not agree is necessary or desirable in principle), we do not believe that such a change would have that effect.

Other issues that some of the working party would like the Panel and others to consider in the context of this debate

We set out below various other issues that some members think should also be considered if there is to be a full debate about the suitability of the current UK structure. We are not advocating these changes be made but some members think they deserve serious consideration and may provide a better solution (if a solution is needed) than some of the other suggestions considered in PCP 2010/2.

Minority shareholder protections

One possible alternative approach could be, rather than raising further impediments to takeovers, to make it easier for shareholders to remain as minority holders after a contractual offer has succeeded. We accept that this is not a matter solely for the Panel but also for Government and other regulators. At present, once an offeror has acquired more than 50%, it can be reasonably confident that other shareholders will also accept to avoid remaining as a minority.

As an alternative, key elements required to provide protection for minorities would need to remain at least in some circumstances:

- de-listing of shares could be made harder, so that shares would remain listed until for example an offeror had acquired a set level, say 75% of the offeree company's voting shares (as opposed to simply obtaining a vote of 75% of shareholders who vote at a meeting, which could be less than 75% of total shareholders/voting rights); and/or

- the existing mandatory bid rule which requires a cash offer to be made at a minimum price where an offeror acquires shares which take its holding to between 30% and 50%, could be continued in respect of further purchases above 50%, say to 75%. If this was adopted a shareholder which did not wish to accept an offer could remain as a minority holder even where an offeror acquired 60% or 70% of the offeree company pursuant to its offer – if the offeror subsequently wished to buy any further shares it would have to offer for them all, as distinct from the current position under which a majority shareholder can buy incrementally as and when it chooses from whichever shareholders it selects, with no further mandatory bid requirement.

Other aspects of minority shareholder rights might also need consideration, given for example the power of a majority shareholder to change the entire board.

Such proposals would have costs and drawbacks which may make it unwise – for example, it could delay the achievability of cost savings and efficiencies by a successful offeror, constrained by a continuing minority. It would, in certain cases, deprive the majority of their preferred outcome as the offeror might prefer to lapse a bid rather than tolerating continued minority holdings. These and other complications and appropriate exclusions would all need to be considered.

Defence tactics

In a variety of major jurisdictions, including the US and Germany, boards of offeree companies have considerably greater say in whether or not a bid may proceed, or at least in the timing of any hostile bid's success. In looking at the checks and balances between offerors and offerees, it seems odd to leave out consideration of the board's powers available in other sophisticated regimes. Whether such board rights achieve better economic or other outcomes and if so for whom, or do so at a justifiable cost, is a matter for further consideration by others better qualified to make these judgements. They do however potentially have significant negative impact on shareholder democracy.

Restrictions on offeror dealings

It could also be worth considering whether acquisitions of offeree company shares by offerors and their concert parties should generally be prohibited during offer periods (or immediately prior to the announcement of an offer). Particularly in competitive and hostile bids, offerors will endeavour to accumulate stock to block other potential offerors (or in the case of a hostile bid, win), and on recommended offers where it is feared other potential offerors may be around offerors may also aggressively stakebuild. If the aim is to give more "power" to longer term investors this proposal may merit consideration.