

*These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006*

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 28: Takeovers Etc

Introduction

1171. This Part implements the European Directive on Takeover Bids ([2004/25/EC](#), the “Takeovers Directive”) which was adopted on 21 April 2004 and had to be implemented by 20 May 2006. It also contains a few minor amendments to the existing law not required by the Directive.

Summary and background

1172. With the exception of Chapter 3 which restates, with amendments, Part 13A of the 1985 Act, the provisions in Part 28 are new. The principal body of provisions emerged from the consultation document, “Company Law – Implementation of the European Directive on Takeover Bids” published by the DTI in January 2005. Additionally, the CLR considered issues related to “squeeze-out” and “sell-out” (concerning the problems of, and for, residual minority shareholders following a successful takeover bid) in Chapter 11 and Annex B of “Completing the Structure” and presented their conclusions in Chapter 13 of the Final Report. Certain provisions in this Part have been developed in the light of these conclusions.

Overview of the Part

1173. The Part is divided into 4 Chapters:

- Chapter 1 deals with matters related to the Takeover Panel and its takeover regulatory functions;
- Chapter 2 concerns matters related to barriers to takeovers;
- Chapter 3 contains provisions relating to “squeeze-out” and “sell-out” (concepts designed to address the problems of, and for, residual minority shareholders following a successful takeover bid); and
- Chapter 4 amends the provisions in Part 7 of the 1985 Act about the content of annual reports of companies traded on a regulated market.

Note: It is intended that certain provisions of Part 28 will be extended to unregistered companies with shares traded on a regulated market. This will be achieved by the regulation-making power at section 1043 of the Act. It is necessary to ensure compliance with the Takeovers Directive.

Chapter 1: the Takeover Panel

Summary and Background

1174. Since 1968, takeover regulation in the UK has been overseen by the Panel on Takeovers and Mergers (“the Panel”) which administered rules and principles contained in the non-statutory City Code on Takeovers and Mergers. In order to bring UK takeover regulation within the requirements laid down in the Takeovers Directive, Chapter 1 places it within a statutory framework.
1175. The Panel will supervise takeover activity and similar types of transactions. The Panel will retain considerable autonomy to provide for its own constitution and appointment procedures. However, a minimum constitutional structure is laid down, providing for the Panel to make arrangements for carrying out its functions and, in particular, to function through committees, sub-committees, officers and members of staff. It is envisaged that the Panel will continue to carry out its day-to-day activities through its Executive. Provisions underpinning the funding of the Panel’s regulatory activities are also included.
1176. Principally, the Panel is placed under an obligation to make statutory rules giving effect to certain Articles of the Directive. It is also given a statutory rule-making power to make rules in relation to takeover activity and similar types of transactions, reflecting the current field of activity over which the existing Code lays down rules.
1177. Sections 945, 951, 955, 956 and 961 of the Act are intended to limit litigation by: (a) channelling parties to seek decisions of the Panel (including the Panel’s Hearings Committee and the independent Takeover Appeal Board) before having recourse to the courts; (b) excluding new rights of action for breach of statutory duty; (c) protecting concluded transactions from challenge for breach of the Panel’s rules; and (d) exempting the Panel and its individual members, officers and staff from liability in damages for things done in, or in connection with, the discharge of the regulatory functions of the Panel.
1178. The Bill does not affect the availability of judicial review by the courts. In the takeovers field, in the Datafin case (*R v Panel on Takeovers, ex parte Datafin plc* [1987] QB 815) the Court of Appeal concluded that generally the courts should limit themselves only to reviewing the Panel’s decision-making processes after the bid has been concluded.
1179. The Bill confers on the Panel powers to make rulings and directions and to enforce these through the courts, to obtain information and documents from those involved in regulated activities and to impose sanctions on those who transgress its rules.

The Panel and its rules

Section 942: The Panel

1180. This section confers on the Panel the takeover regulatory functions set out in Chapter 1. The Panel is empowered to do anything that it considers necessary or expedient in relation to its prescribed functions and it may also make arrangements for such functions to be carried out on its behalf by a committee or sub-committee of the Panel or an officer or member of staff of the Panel or a person acting as such.
1181. This Chapter does not confer on the Panel the status of a statutory body. The Panel will remain an unincorporated body, as constituted from time to time, and, as such, having rights and obligations under the common law. Those rights and obligations will be supplemented by the specific provisions set out in the Bill.

Sections 943 and 944: Rules; Further provisions about rules

1182. The Panel is given the power to make rules in relation to takeover regulation. The rule-making power is broadly drawn to ensure that the Panel can continue to make rules on the range of matters presently regulated by the City Code on Takeovers and Mergers. The following provisions are included:

- a) The Panel is placed under an obligation to make rules as required by specified Articles of the Takeovers Directive. These are the general principles (Article 3.1 of the Directive), jurisdictional rules (Article 4.2), matters related to the protection of minority shareholders, mandatory bid and equitable price (Article 5), contents of the bid documentation (Article 6.1 to 6.3), time allowed for acceptance of a bid and publication of a bid (Articles 7 and 8), obligations of the management of the target company (Article 9) and other rules applicable to the conduct of bids (Article 13). In making rules in relation to these Articles, the Panel will be entitled to exercise Member State options where these are provided for in the Directive. The Panel's rules will not, however, deal with certain matters contained in the Directive such as barriers to takeovers (Article 11), squeeze-out and sell-out (Articles 15 and 16), and information to be published by companies in their annual reports (Article 10) which are more appropriately dealt with in company legislation (and are the subject of further provision at Chapters 2, 3 and 4 of this Part).
 - b) The Panel is permitted to make rules on takeover bids (including, but not limited to, those which are the subject of the Directive), mergers and other transactions affecting the ownership or control of companies. The power is designed to be broad enough to cover the existing scope of the Code and sufficiently flexible to take account of future market developments. Types of matters currently covered by the Code but not covered by the Directive include the takeovers of companies not traded on a regulated market and transactions involving a change of control of a like nature to takeovers.
1183. When making rules under this section, the Panel must do so by a committee of the Panel, except in the case of rules for fees and charges under section 957 which must be made either by a committee of the Panel or by the Panel itself.
1184. The further provisions about rules that may be made by the Panel under section 944 include the power to grant derogations and waivers, which by virtue of section 943(1) must respect the general principles laid down in Article 3.1 of the Directive.
1185. [Section 944\(2\) to \(7\)](#) makes provision as to the form, public availability and verification of rules made by the Panel.

Section 945: Rulings

1186. This section enables the Panel, including (by virtue of section 942(3)) its Executive, to make rulings on the interpretation, application or effect of the rules made by the Panel.
1187. To the extent and in the circumstances specified in the rules, a ruling of the Panel has binding effect unless reviewed by the Hearings Committee or successfully appealed to the Takeover Appeal Board in accordance with rules made under section 951. It is envisaged that rules made under sections 943 and 944 will address matters such as notice to parties and right of representation of persons who might be bound by a Panel ruling.

Section 946: Directions

1188. This section allows the Panel to make provision in its rules for it to give a direction preventing a person from breaching the rules (including a direction operating on an interim basis whilst a matter is awaiting determination by the Panel) or otherwise to ensure compliance with the rules.

Information

Section 947: Power to require documents and information

1189. The Panel has historically had no formal power to require those involved in takeover activity to provide it with the information the Panel requires to carry out its functions.

Persons authorised under the Financial Services and Markets Act 2000 are required by the rules of the Financial Services Authority to provide information and assistance to the Panel. In relation to others, the Panel has relied on the voluntary co-operation of market participants to provide explanations and documents which are not publicly available.

- 1190. This section enables the Panel to require the production of such documents and information as it may reasonably require in the exercise of its functions. The Panel may also authorise a person to exercise the powers under the section on its behalf, for example, if the Panel were to appoint a law or accountancy firm to help it collect and analyse documents.
- 1191. *Subsection (7)* provides that a lien on a document is not affected by the production of that document in compliance with a requirement imposed by the Panel or someone authorised on its behalf. A lien is a legal right to keep possession of a document belonging to someone else until a claim is satisfied – for example, a claim for payment of professional fees. This subsection does not entitle a professional to refuse to hand over a document to the Panel but preserves his rights over those documents.
- 1192. The section provides that the Panel may require the production of information in hard copy where it is held in some other form (for instance, electronically on a floppy disk).
- 1193. The Panel may not compel the production of documents which would be protected from disclosure in legal proceedings on the grounds of legal professional privilege or confidentiality of communications.

Sections 948 and 949: Restrictions on disclosure; Offence of disclosure in contravention of section 948

- 1194. These sections provide that information obtained by the Panel in the course of exercising its functions will be subject to restrictions on onward disclosure. Aside from the desirability of such provisions, so that those providing information to the Panel can do so knowing that it will not be subject to improper further disclosure, these provisions also meet a requirement under Article 4.3 of the Directive that Member States shall ensure that information provided to those employed, or formerly employed, by takeover supervisory authorities shall not be further divulged: “to any person or authority except under provisions laid down by law.” Section 948, accordingly, prescribes the conditions under which such information can be released.
- 1195. Information concerning the private affairs of an individual or a business provided to the Panel in connection with its functions may not be disclosed during the individual’s lifetime or while the business is carried on without the consent of the individual or business in question except for the purposes of carrying out the Panel’s functions or unless it is disclosed to a person or for a purpose set out in Schedule 2.
- 1196. *Schedule 2* sets out the “gateways” for disclosure of information obtained by the Panel in the exercise of its functions which are permitted under section 948, including the circumstances in which a disclosure to an overseas regulatory authority is permitted. Under section 948(4) and (5), the Secretary of State has the power to amend the Schedule, but only to specify persons exercising functions of a public nature or descriptions of disclosure where the purpose for which the disclosure is permitted is likely to assist in the exercise of a function of a public nature.
- 1197. *Section 948(6)(a)* provides that certain authorities mentioned in *subsection (7)* are not bound by the restrictions on disclosure imposed by *subsection (2)*. These bodies are those other takeover supervisory authorities and financial services regulators with which the Panel has a duty to co-operate. *Subsection (6)(b)* provides that persons or bodies obtaining information from those authorities (whether directly or indirectly) are also not bound by the restrictions on disclosure imposed by *subsection (2)*. These provisions are necessary to implement fully Article 4.4 of the Directive. Those bodies mentioned in *subsection (7)*, and persons and bodies receiving information from them,

will themselves be subject to restrictions on disclosure that will mirror those imposed by section 948, and so information originating from the Panel will still be protected from improper further disclosure.

1198. **Section 949** makes it an offence to disclose information in contravention of section 948. A person guilty of such an offence is liable on conviction on indictment to two years' imprisonment or a fine or both; and on summary conviction to twelve months' imprisonment (six months in Scotland and Northern Ireland) or a fine or both. Section 949(1) provides a person with a defence if he can prove that he did not know, and had no reason to suspect, that the information in question had been provided to the Panel in the exercise of its functions; or that he took reasonable steps to prevent wrongful disclosure.

Co-operation

Section 950: Panel's duty of co-operation

1199. **Article 4.4** of the Directive requires that takeover supervisory authorities and financial services regulators provide reasonable assistance to other such authorities within the EEA for the purposes of the Directive. This section is designed to give effect to this requirement by obliging the Panel to co-operate with overseas takeover and financial services regulatory authorities.
1200. The form and manner of co-operation will be as the Panel considers appropriate in the light of the circumstances (in particular, its power to require documents and information may be exercised to support such an authority) and may include sharing information which the Panel is not prevented from disclosing. The section mirrors similar co-operation obligations imposed on the Financial Services Authority by section 354 of the Financial Services and Markets Act 2000.

Hearings and Appeals

Section 951: Hearings and Appeals

1201. This section ensures that proper procedures for review of and appeal against decisions taken by the Panel in connection with its regulatory functions are provided. Section 951(1) requires that the rules made by the Panel provide for a decision of the Panel to be subject to review by a "Hearings Committee" when requested by affected persons specified in the rules. Section 951(3) provides that the rules must give a right of appeal to an independent tribunal (the "Takeover Appeal Board") against a decision of the Hearings Committee. The rules may make provision in relation to the Hearings Committee as to procedural matters, evidence and the powers of the Committee. Further, rules may contain provisions related to enforcement of decisions of the Hearings Committee and the Takeover Appeal Board.
1202. The section also requires the rules to provide that:
- a) when appearing before the Hearings Committee or the Takeover Appeal Board, the Panel must act through an officer or member of staff of the Panel (who must not be a member of the rule-making committee referred to in section 943(5), the Hearings Committee or the Appeal Board); and
 - b) no person who is, or has been, a member of the rule-making committee can be a member of the Hearings Committee or the Takeover Appeal Board.
1203. The general rules of natural justice will preclude a person who had taken part in a decision from later considering a review or appeal in relation to that decision.
1204. This approach is designed to ensure a clear and transparent division of responsibilities between the various organs of the Panel in its executive, judicial and rule-making roles.

Contravention of rules, etc

Section 952: Sanctions

1205. This section confers on the Panel the power to make rules for imposing sanctions for breach of its rules or directions given under section 946. The Panel's current sanctions regime, which is set out in the Introduction to the City Code on Takeovers and Mergers and which it is envisaged will remain in place under the Act, provides for private and public statements of censure of persons in breach of the Code.
1206. Particularly flagrant breaches may lead to the Panel publishing a statement indicating that the offender is someone who is not likely to comply. The rules of the Financial Services Authority and certain professional organisations contain provisions obliging their members, in certain circumstances, not to act for a person named in such a statement. This is referred to as "cold-shouldering". The provisions in question cover transactions that are subject to the City Code on Takeovers and Mergers, such as transactions in relevant securities requiring disclosure under rule 8 of the Code. Under section 952, it will continue to be possible, in the case of transactions that are subject to the Panel rules, for the Panel to issue "cold-shouldering" statements in appropriate cases. (The Panel will also be able to pass information concerning breaches of rules to other regulatory authorities and professional bodies by virtue of the statutory "gateways" set out at section 948 and Schedule 2.)
1207. Should future rules made by the Panel confer a power on the Panel to impose a sanction of a kind not contained in the City Code on Takeovers and Mergers as it has effect immediately before the passing of the Act, the Panel must prepare a policy statement in respect of the sanction. The policy statement must set out the policy of the Panel with regard to imposition of the sanction and, for financial penalties, the penalty that may be imposed. An element of the policy must be that the Panel, in making a decision about any such matter, have regard to the seriousness of the breach or failure, the extent to which the breach or failure was deliberate or reckless and whether the person on whom the sanction is to be imposed is an individual.

Section 953: Failure to comply with rules about bid documentation

1208. This section creates new offences in relation to takeover bid documentation (i.e. offer documents prepared by the bidder and documents in response to the bid prepared by the board of the target company). Provisions related to bid documentation are laid down in particular by Articles 6.3 and 9.5 of the Directive which are to be implemented by rules which the Panel are obliged to make under section 943. Consequently, in each case an offence will be committed where the document in question does not comply with rules designated by the Panel as giving effect to those provisions. The offence relating to offer documents may be committed by the bidder and any of its directors, officers or members who caused the offer document to be published. The offence relating to response documents may be committed by directors or other officers of the target company. Where either offence is committed by a corporate body (for instance, a corporate director), provisions are also included dealing with liability of directors, officers or members of that body. In each case, an offence will be committed only where the relevant person knew that the document did not comply (or was reckless as to whether it did so) and failed to take all reasonable steps to ensure that it did comply.
1209. A person guilty of an offence under this provision is liable on conviction to a fine (on summary conviction limited to the statutory maximum).

Section 954: Compensation

1210. This section confers on the Panel the power to make rules providing for financial redress (together with interest (including compound interest)) in consequence of a breach of rules which require monetary payments to be made (for instance, a payment by the

bidder to shareholders of any difference between the price actually paid and any higher price for shares that the bidder should have paid under the rules).

Section 955: Enforcement by the court

1211. This section provides a mechanism by which the Panel may, if necessary, apply to the court in order to enforce Panel rule-based requirements as well as requests for documents and information under section 947. The Panel may apply to the court either where there is reasonable likelihood that a person will contravene a requirement imposed by or under the rules or where a person has failed to comply with such a requirement or with a requirement imposed under section 947.
1212. It is expected that in accordance with usual practice, the court will not, in exercising its jurisdiction under this section, rehear substantively the matter or examine the issues giving rise to the ruling or, as the case may be, the request for documents or information except on “judicial review principles”, where there has been an error of law or procedure.
1213. The court is given a broad discretion as to the order it may make to secure compliance with the requirement; but aside from the power granted to the Panel by this section, there is no right to seek an injunction (or interdict) to prevent a person contravening, or continuing to contravene, a rule-based requirement or disclosure requirement.

Section 956: No action for breach of statutory duty etc

1214. Compliance with the rules made by the Panel is a matter solely for the Panel. This section does two things:
- a) it excludes new rights of action for breach of statutory duty for contraventions of requirements imposed by or under rules or a requirement imposed under section 947; and
 - b) in order to ensure certainty, it provides that a contravention of a rule based requirement does not make a transaction void or unenforceable and (subject to any provision of the rules) does not affect the validity of any other thing. As currently, transactions will be capable of being set aside or unravelled in cases of, for example, misrepresentation or fraud.

Funding

Section 957: Fees and charges

1215. This section enables the Panel to make rules for the payment of fees or charges to the Panel for the purposes of meeting the Panel’s expenses incurred in exercising its functions. Such fees and charges may be imposed to meet expenses of the Takeover Appeal Board; the cost of repaying capital and paying interest on loans; and the cost of maintaining adequate reserves. The rules under this section must be made by the Panel itself or by a committee of the Panel (section 943(4)).

Section 958: Levy

1216. This section gives the Secretary of State the power to make regulations imposing a levy for meeting the costs of the Panel. In determining the appropriate rate of the levy, the Secretary of State must take account of other income received, or expected to be received, by the Panel (which would include fees and charges under section 957) and may take account of estimated as well as actual costs of the Panel.
1217. It is anticipated that a levy would only be imposed if the existing voluntary levy funding arrangements (contributions collected by member firms of the London Stock Exchange and Ofex currently set at a flat rate charge of £1 on contract notes on all chargeable transactions with a consideration in excess of £10,000) were no longer viable. The

categories of persons or bodies to which the levy would apply may include only those capable of being directly affected by the exercise of the Panel's functions or otherwise having a substantial interest in the exercise of those functions.

1218. The first regulations made in respect of the levy power – and any further regulations which change the persons or bodies by whom, or the transactions on which, the levy is payable – will be subject to the affirmative resolution procedure in both Houses of Parliament. A draft of an instrument containing such regulations will not be treated as being hybrid even if otherwise it would be. Any other subsequent regulations will be subject to the negative resolution procedure.

Section 959: Recovery of fees, charges or levy

1219. This section provides that an amount payable by a person as a consequence of fees and charges imposed by the Panel under section 957 or as a result of any levy fixed by the Secretary of State under section 958 will constitute a debt owed by that person to the Panel and be recoverable by the Panel as a debt.

Miscellaneous and supplementary

Section 960: Panel as party to proceedings

1220. This section provides that, notwithstanding its unincorporated status, the Panel may in its own name bring proceedings under this Chapter and bring or defend other proceedings.

Section 961: Exemption from liability in damages

1221. This section confers limited immunity on the Panel and those involved in carrying out its regulatory activities. The immunity provisions are consistent with those recently extended to the Financial Services Authority and the Financial Reporting Council in the exercise of their duties under financial services and companies legislation.
1222. The section exempts the Panel, its members, officers and staff (which would include secondees), and persons authorised under section 947(5) by the Panel to exercise its powers in relation to requiring documents and information, from liability in damages for things done or omitted in relation to the Panel's regulatory activities. (The Takeover Appeal Board benefits from a common law immunity on account of its exercise of judicial functions.)
1223. [Section 961\(3\)](#) sets out the circumstances where the exemption will not apply – that is to say, where the act or omission was in bad faith or where it was unlawful under section 6(1) of the Human Rights Act 1998.

Section 962: Privilege against self-incrimination

1224. This section provides that a statement made by a person to the Panel, or a person authorised on its behalf, in compliance with a requirement to provide information under section 947 (or a court order made to secure compliance with such a requirement under section 955) cannot be used against that person in most types of criminal proceedings. Such statements can, however, be used in proceedings for offences of making false statements otherwise than on oath under section 5 of the Perjury Act 1911 and its Scottish and Northern Irish equivalents. These offences exist to deter and punish the making of false statements and it would not be possible to prosecute such offences if the false statements themselves could not be used in evidence against those by whom they were made.

Section 963: Annual reports

1225. As is the Panel's existing practice, the Panel will be required to publish an annual report containing annual accounts, setting out how the Panel's functions were discharged and including other matters considered by the Panel to be of relevance. Annual reports published by the Panel are available on the Panel's website.

Section 964: Amendments to Financial Services and Markets Act 2000

1226. This section repeals section 143 of the Financial Services and Markets Act 2000 ("FSMA") which, by endorsing the City Code on Takeovers and Mergers, presently provides a mechanism for the Financial Services Authority to bring disciplinary and enforcement action against authorised persons for misconduct in relation to the Code. Given that the Code will be replaced by rules which have legal force as a consequence of the Act, it is considered that there is no longer a need to maintain section 143.
1227. This will not, however, preclude the Panel from reporting breaches of the Code by authorised persons in relation to takeover bids to the Financial Services Authority, as at present, and any such breaches will still be taken into account by the FSA, for example, in assessing whether such persons are fit and proper to be authorised for business of that kind or have otherwise complied with their regulatory obligations (for example, whether they are meeting proper standards of market conduct).
1228. A consequential amendment is made by section 964(3) to preserve the definition of "consultation procedures" currently contained at section 143(7) for the purposes of the provisions in *section 144* of FSMA relating to price stabilising rules. Additionally, to ensure consistency with the requirements of Article 4.4 of the Directive as regards the duties of takeover regulatory and financial services authorities within the EU to co-operate with each other, the existing disclosure and regulatory co-operation obligations of the Financial Services Authority under sections 349 and 354 of FSMA are amended to include cooperation with relevant authorities referred to by the Directive and to remove restrictions on disclosure to such authorities. These duties reflect the disclosure and co-operation provisions in sections 948 and 950 (including provisions related to the rules on disclosure that apply where information is passed to other takeover supervisory authorities and financial services regulators described in relation to section 948(6)).

Sections 965 and 973: Power to extend to Isle of Man and Channel Islands

1229. These sections allow any provisions of Chapters 1 and 2 to be extended to the Isle of Man or any of the Channel Islands by Order in Council, with any specified modifications.

Chapter 2: Impediments to Takeovers

Summary and background

1230. Article 11 of the Takeovers Directive seeks to override, in certain circumstances relating to a takeover, a number of defensive devices that may be adopted by companies prior to the bid, such as: differential share structures under which minority shareholders may exercise disproportionate voting rights; restrictions on transfer of shares in the company articles or in contractual agreements; and limitations on share ownership.
1231. There are currently no restrictions on the way that UK companies which are admitted to trading on a regulated market can structure their share capital and control. However, market pressure brought to bear, in particular, by institutional investors has ensured that there are now few UK listed companies with differential voting structures.
1232. As permitted by Article 12 of the Directive, it has been decided not to apply the provisions of Article 11 in all cases but instead to include in the Act (sections 966 to

972) provision for companies with voting shares traded on a regulated market to opt in to its provisions should they choose to do so.

Sections 966, 967 and 970: Opting in and opting out; Further provision about opting-in and opting-out resolutions; Communication of decisions

1233. A company may pass a special resolution opting in to Article 11 (an “opting-in resolution”) provided that three conditions are met:
- a) it has voting shares admitted to trading on a regulated market (it is not considered necessary to extend this provision to other types of companies which are not covered by the Directive);
 - b) the company’s articles of association do not contain restrictions of the kind mentioned in Article 11 (or other provisions which would be incompatible with Article 11) or, if they do contain such restrictions, the restrictions will not apply in circumstances related to a takeover bid as described by Article 11. Article 11 relates to both the takeover bid period and the time following the bid when the bidder has acquired 75% or more of the company’s capital carrying voting rights. It provides that restrictions both on the rights to transfer shares and on voting rights that are contained in the articles of the company should not apply. It also provides that, in certain circumstances, shares carrying multiple voting rights shall only have one vote and extraordinary rights of shareholders concerning the appointment or removal of board members should be disapplied; and
 - c) no shares are held by a Minister conferring special rights in the company and no such special rights are provided for in law. The Directive expressly provides that Article 11 does not apply to shares held by Member States conferring special rights on the Member State which are compatible with the Treaty, or to special rights provided for in national law which are compatible with the Treaty. The UK Government holds a number of so-called “golden shares” in formerly publicly-owned businesses which have been privatised to ensure that essential public interest considerations are protected. This provision will exclude all such companies where the Government holds the beneficial ownership of a golden share (since holdings by nominees and subsidiaries are also covered). The concept of Minister is broadly defined in section 966(7) of the Act to include Scottish Ministers and Northern Ireland Ministers under section 7(3) of the Northern Ireland Act 1998. (As a result of the Government of Wales Act 2006, the definition of Minister will be changed to include Welsh Ministers). Under section 966(8), a power is provided to the Secretary of State by the negative resolution procedure to apply the provision in section 966(4) (Minister holding golden shares) to persons or bodies exercising functions of a public nature as it applies in relation to a Minister.
1234. **Section 966(5)** enables a company to revoke an opting-in resolution by means of a further special resolution (an “opting-out resolution”).
1235. **Section 967** sets down provisions relating to the date on which the opting-in and opting-out resolutions will take effect. Generally, this will be the date stated in the resolution.
1236. **Section 970** requires companies, within 15 days of an opting-in or opting-out resolution being passed, to notify the Panel and any other takeover supervisory authority in a Member State in which the company has shares admitted to trading on a regulated market or has requested such admission. Where a company fails to comply with this requirement, the company and every officer in default will be guilty of an offence and be liable on summary conviction to a fine not exceeding level 3 on the standard scale (and to a daily default fine for continued contravention).

Section 968: Effect on contractual restrictions

1237. This section provides that agreements entered into between shareholders in the company on or after 21 April 2004 (the date on which the Takeovers Directive was adopted), and agreements entered into between a shareholder and the company before as well as on or after that date, are invalid in so far as they impose any of the restrictions set out in *subsection (2)*.
1238. Those restrictions relate both to the bid period and to the time following a takeover bid when the bidder holds 75% or more in value of all the voting shares in the company. Types of restrictions overridden are those imposing restrictions on the transfer of shares and on rights to vote at general meetings of the company to decide on action to frustrate the bid and at the first meeting to be held after the end of the offer period. For the purposes of determining when the bidder holds 75% or more in value of all the voting shares in the company, both debentures and shares which do not normally carry rights to vote at a general meeting (such as preference shares) held by the bidder are to be disregarded (see *subsection (8)*).
1239. The provisions related to the types of contractual agreements to which the override will apply (including the date at which such contracts were entered into) and the restrictions which are made invalid are designed to replicate the provisions of Article 11 of the Directive.
1240. **Section 968(6)** provides that a person who suffers loss as a result of a contractual agreement being overridden can apply to the court for compensation. It is expected that, in the first instance, such compensation will be offered by the bidder in making the takeover offer. Where, however, the compensation offered by the bidder is not acceptable to the person whose rights are being overridden, there is a right to apply to the court. The court will award compensation to the person who suffers loss on a just and equitable basis to be paid by any person (which could include the bidder or the other party to the contract which has been overridden) who would have been liable to him for committing or inducing the breach of contract which would have been committed had the restriction in question not been made invalid by this section.

Sections 969 and 972: Power of offeror to require general meeting to be called; Transitory provision

1241. **Section 969** provides the bidder with the special right to require the directors of an opted-in company to call a general meeting of the company when he holds 75% in value of all the voting shares in the company (excluding debentures and shares that do not normally carry rights to vote at a general meeting (such as preference shares)). **Section 969(3)** applies sections 303 to 305 of the Act, which deal with the calling of meetings, to such a request (with the necessary modifications). But as those sections may not be in force at the time when section 969 comes into force, section 972 makes the same sort of adaptations in relation to the equivalent provisions of the 1985 Act. In particular, section 972(3) alters the application of section 378(2) so that a special resolution may still be passed at a general meeting called at only 14 days' notice (normally at least 21 days' notice would have to be given of the meeting for it to be able to pass a special resolution).

Chapter 3: “Squeeze-Out” and “Sell-Out”

Summary and background

1242. The concepts of “squeeze-out” and “sell-out” are designed to address the problems of, and for, residual minority shareholders following a successful takeover bid. Squeeze-out rights enable a successful bidder to compulsorily purchase the shares of remaining minority shareholders who have not accepted the bid. Sell-out rights enable minority shareholders, in the wake of such a bid, to require the majority shareholder to purchase their shares. Because they involve the compulsory purchase or acquisition of shares

against the will of the holder of the shares or the acquirer, high thresholds apply to the exercising of such rights and there are protective rules on the price that must be paid for the shares concerned.

1243. Squeeze-out and sell-out provisions have been a feature of national company law for many years (and were previously contained in Part 13A (Takeover Offers) of the 1985 Act). Articles 15 and 16 of the Takeovers Directive, however, introduce EU-wide rules requiring all Member States to put appropriate provisions in place for the first time. The provisions at sections 974 to 991 of the Act restate Part 13A of the 1985 Act in a clearer form. However, in doing so they also make important changes to reflect the need to ensure compliance with the Directive and the decision to accept some recommendations of the CLR. These are described below.

Detail of changes made to the operation of provisions previously contained in Part 13A of the 1985 Act

1244. The rules laid down in the Directive in relation to squeeze-out and sell-out are broadly consistent with provisions of Part 13A (sections 428 to 430F) of the 1985 Act. The restated and amended provisions will apply equally to all companies and all bids within the ambit of Part 13A of the 1985 Act, regardless of whether or not the Directive is required to be applied to such companies and bids.
1245. The following changes are made in implementation of the Directive:
- Calculation of Squeeze-out Threshold (section 979) – there is a dual test imposed: in order to acquire the minority shareholder's shares, the bidder must have acquired both 90% of the shares to which the offer relates, and 90% of the voting rights carried by those shares. Where the offer relates to shares of different classes, then, in order to acquire the remaining shares in a class, the bidder must have acquired 90% of the shares of that class to which the offer relates, and 90% of the voting rights carried by those shares. Under section 429 of the 1985 Act, in each case only the first limb of that test applied.
 - Calculation of Sell-out Threshold (section 983) – mirroring the change to be made in relation to the squeeze-out threshold, a dual test is similarly imposed in relation to the sell-out threshold, so that a minority shareholder may force a bidder to acquire his shares (i) when the bidder holds 90% of the shares in the company, and 90% of the voting rights attached to those shares, or (ii) when the bidder holds 90% of the shares in the class to which the minority shareholder's shares belong, and 90% of the voting rights attached to those shares. Under section 430A of the 1985 Act, the test was that the bidder should have acquired 90% of all shares in the company (or in the class concerned).
 - Revised Period during which Squeeze-Out and Sell-Out Rights may be Exercised (section 980(2)) – the Directive provides (Articles 15.4 and 16.3) that squeeze-out and sell-out rights must be exercisable within a three month period following the time allowed for acceptance of the bid. Section 429(3) of the 1985 Act provided that squeeze-out could be exercised within a period of four months beginning with the date of the offer and had to be exercised within two months of reaching the 90% threshold. Accordingly, the rule provided by the Directive is substituted for the rule in the 1985 Act. An exception to this rule is provided where takeover bids are not subject to the Directive, for instance takeovers of most private companies. In these cases, the squeeze-out notices must be given within six months of the date of the offer if this is earlier than the period ending three months after the end of the offer. This is intended to prevent offerors in such circumstances continually extending the offer period. A change is also made as regards the period during which sell-out may be exercisable so that this period is to be either three months from the end of the offer or, if later, three months from the notice given to the shareholder of his right to exercise sell-out rights (section 984(2)). An extended period during which the sell-out right can be exercised where notice of such a right is only given after the

end of the offer period is consistent with provisions of the Directive allowing more stringent provisions to be put in place (in this case to ensure the proper protection of minority shareholders).

- The court will no longer be able to reduce the consideration in relation to squeeze-out or sell-out following a takeover bid to below the consideration offered in the bid (which the Takeovers Directive presumes to be fair in all cases). Again utilising provisions of the Directive which allow more stringent provisions to be included to protect minority shareholders, minority shareholders will continue to be able to apply to the court to request that consideration higher than that offered in the bid be paid in exceptional circumstances (section 986(4)).

1246. In most instances, it is considered that the first and second changes above will make no practical difference as the percentage of total capital carrying voting rights in a company (or class of shares) and the percentage of voting rights will normally be the same. The provisions about voting rights will not apply where the shares being squeezed out or sold out are non-voting shares.

1247. The CLR also considered the issue of squeeze-out and sell-out and the scope for improving the provisions in the 1985 Act. Its Final Report (chapter 13, pages 282 – 300), made a number of recommendations in relation to the reform of the squeeze-out and sell-out regime. Some of these recommendations are closely related to implementation of the Takeovers Directive. For instance, the CLR questioned whether, in calculating the relevant squeeze-out and sell-out thresholds, only shares that had been unconditionally acquired should be taken into account or whether shares acquired subject to contract should also be included.

1248. In implementing the Takeovers Directive, the opportunity is being taken to adopt recommendations of the CLR, whether or not related to implementation of the Directive, except to the extent that they are not consistent with Articles 15 and 16 of the Directive or are no longer appropriate as a consequence of the Directive. The recommendations made by the CLR implemented by Chapter 3 of Part 28 are set out below:

Meaning of takeover offer and entitlement to dividends (sections 974 and 976)

1249. In order to be a takeover offer for the purposes of Part 13A of the 1985 Act, an offer to acquire shares had to be on terms which were the same in relation to all the shares to which the offer related. One problem with the 1985 legislation was how to treat any variations in value between shares of the same class that were attributable to the fact that some of the shares, because they were allotted later, do not yet carry a dividend. Section 976(2) rectifies this problem by providing that, even if the offeror offers to pay more for shares that carry a dividend than for those in the same class which do not, the offer will be treated as being made on the same terms in relation to those shares.

Meaning of a takeover offer and communication of that offer (sections 974 and 978)

1250. To deal with issues arising from an increasingly globalised market in shares and different legislative regimes outside the EEA, it is made clear that an offer is not prevented from being a takeover offer for the purposes of Chapter 3 of Part 28 merely because there are some offerees who will be unable to accept it (for instance, where the offeree cannot accept the offer because of restrictions on the cross-border transfer of cash or securities in the country in which the offeree resides). It is also provided that an offer can still be a takeover offer for the purposes of the squeeze-out and sell-out provisions if a shareholder has no registered address in the UK and the offer is not communicated to him to avoid contravening the law of another country as long as either the offer itself is published in the Gazette or a notice is published in the Gazette stating that a copy of the offer document can be obtained from a place in the EEA or on a website.

Shares that the offeror has “contracted to acquire” (section 975)

1251. Clarificatory amendments are made on this issue. Section 428(5) of the 1985 Act dealt with the offeror's position at the start of the bid, for the purpose of determining which shares could not be counted towards the achievement of the 90% threshold (at which point shares may be compulsorily purchased). It was unclear as to whether the phrase "contracted to acquire" in section 428(5) covered conditional as well as unconditional contracts. It is, therefore, clarified that, in ascertaining the offeror's position at the start of the bid, the shares he has conditionally contracted to acquire (other than those subject to irrevocable undertakings (see below), as under the 1985 Act) should be treated as being shares already held by the offeror. This means that only shares that the offeror has either acquired or unconditionally contracted to acquire will count towards the 90% total needed to exercise squeeze-out. Consequential changes are also made to the provisions on joint offers and associates of the offeror to bring these into line with the above.
1252. Under the 1985 Act, the registered holder of shares could give an irrevocable undertaking to accept a takeover bid, and if he did this for no consideration or only in exchange for a promise to make the bid, his shares were still treated for the purposes of squeeze-out as included within the offer. This is extended to include undertakings given for only negligible consideration and undertakings the effect of which is to require the registered holder to accept the offer (where the undertaking is given by a person who is not the registered holder of the shares but can contract to bind the registered holder, such as the manager of shares held by a bare nominee). ("Irrevocable undertakings" are contractual agreements entered into by a bidder usually with major shareholder(s) of a proposed target company. Such agreements aim to give the bidder certainty – he will know that support for the offer can be guaranteed from shareholders party to the contract – so that his bid has a greater prospect of success. Such undertakings would normally prevent the giver of the undertaking from selling their shares or exercising voting rights to prevent the takeover from becoming successful.)

Date of the offer (section 991(1))

1253. The "date of the offer" is defined to mean either the date of publication, or if the offer is not published or notice of the offer is sent out earlier, the date on which the offeror first sends notice of the offer to the offerees.

Right of offeror to buy out minority shareholders: treatment of options etc (section 979(5))

1254. Where an offeror makes an offer for all the target company's allotted shares and all or any shares subsequently allotted, it is provided that (a) in deciding whether the offeror has reached the 90% threshold for the purposes of section 979, the offeror need only bring into the calculation shares which are actually in issue (i.e. allotted) at the relevant time; (b) if the offeror serves squeeze-out notices and more shares are subsequently allotted which take the percentage of acceptances then received below 90%, that will not invalidate squeeze-out notices already served; and (c) if the offeror wishes to serve further squeeze-out notices, he must have at least 90% acceptances of shares (or shares in a class) then in issue and subject to the offer at the time he sends the notices out.

Consideration not exclusively in cash (section 981(5))

1255. It is clarified that where an offer of shares, or a mixture of shares and cash, is made, and it is no longer possible when the offeror exercises his right of squeeze-out to give the consideration in shares, the offeror should pay the cash equivalent irrespective of whether the shareholders had previously been offered a choice (i.e. whether the offer was "mix and match" or not). Parallel changes are made as regards sell-out (section 985(5)).

Shares that the offeror has "contracted to acquire" (section 983)

1256. It is clarified that, in addition to shares acquired by the offeror, shares subject to both conditional and unconditional contracts of acquisition are included in calculating whether the sell-out threshold has been reached. As a result of this change, there might be circumstances where the 90% threshold required for sell-out to be exercised

was reached only because of shares which the offeror had conditionally contracted to acquire. However, if the conditions of such contracts were not fulfilled, the offeror could in fact find that he was being required to buy a minority shareholder's shares even though the offeror had not actually acquired 90% of the shares. So section 983 also provides that, if that is the case at the time when the minority shareholder exercises his right of sell-out, the offeror does not have to purchase the shares unless he has acquired or unconditionally contracted to acquire 90% or more of the shares by the time the period referred to in section 984(2) (the period within which shareholders can exercise sell-out rights) ends. (A corresponding change is made in section 979(6) and (7) to prevent minority shareholders in this situation who have to wait to see if they can exercise sell-out from being squeezed out in the meantime.)

Applications to the Court (section 986)

1257. This section provides that a shareholder receiving a squeeze-out notice may make an application to the court (within six weeks of receiving the notice) seeking to overturn an offeror's intention to purchase his shares compulsorily (or the terms of that purchase). A requirement that the offeror be promptly notified of such an application is now included (this was not previously required by section 430C of the 1985 Act). As a consequence of this requirement, it is also required that the offeror is obliged, at the earliest opportunity, to notify shareholders who are being squeezed out or who are exercising their rights of sell-out, and are not party to a section 986 application, that proceedings have been initiated.

Chapter 4: Amendments to Part 7 of the Companies Act 1985

Section 992: Matters to be dealt with in directors' report

1258. This section implements Article 10 of the Takeovers Directive. Article 10.1 and 10.2 require companies admitted to trading on a regulated market to provide in their annual reports detailed information relating to matters such as the control and share structures of the company. It is, therefore, provided by amendment to Part 7 of the 1985 Act that the information required by the Directive must be set out in the directors' report.
1259. Additionally, Article 10.3 of the Directive requires boards of companies to present an explanatory report to shareholders on the issues referred to in Article 10.1 and 10.2 at the company's annual general meeting. This section requires this additional explanatory material to be contained in the directors' report submitted to the annual meeting of shareholders.
1260. **Section 992(5)** amends section 251 of the 1985 Act on summary financial statements. It provides for the explanatory material required by Article 10.3 of the Takeovers Directive either to be included in the summary financial statement or to accompany it.
1261. Failure to include either the information concerning control and share structures or explanatory material in the annual report will attract existing criminal sanctions under section 234(5) of the 1985 Act (directors responsible for the failure to comply with provisions related to the directors' report are to be liable to a fine).
1262. **Section 992(6)** provides that these new provisions will apply in relation to directors' reports for financial years beginning on or after 20 May 2006 (the date by which the Directive had to be implemented).
1263. These are general requirements designed to bring greater transparency to the market and apply to all relevant companies whether or not they are involved in a takeover. Accordingly, the requirements will apply to all companies registered in the UK which have voting shares traded on a regulated market, whether or not that includes an official listing on the London Stock Exchange.

Under Part 15 of the Act (section 416), the Secretary of State may in future make regulations as to the contents of the directors' report and those regulations will be able

*These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006*

to incorporate the provisions introduced by section 992(2) to (4). Regulations under sections 427 and 428 will be able to make provision for the additional explanatory material when a summary financial statement is sent out rather than the full accounts and report.