

UK Takeover Code: Key Takeaways of the Panel's Proposed Changes

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INTRODUCTION

The UK Takeover Panel has published a consultation paper proposing a number of changes to the Takeover Code rules governing the timetable for contractual offers and invoking certain offer conditions. The proposed changes aim to simplify the contractual offer timetable and to accommodate the potentially lengthy timeframes required to satisfy regulatory approvals. The proposed amendments are subject to a public consultation which closes on 15 January 2021, with the final amendments to the Code expected to be published in Spring 2021. The changes to the Code would take effect three months thereafter.

In this update we summarise the key takeaways from the proposals and the potential implications for parties to an offer if these proposals are implemented in their current form.

KEY CHANGES

The key changes proposed by the Panel include:

- **Suspending the timetable for official authorisations or regulatory clearances.** The bidder and target company would be able to jointly request that the Panel suspend the offer timetable if one or more conditions relating to an official authorisation or regulatory clearance have not been satisfied or waived by Day 37 (being the 37th day after publication of the offer document). In addition, either party would be able to unilaterally request a suspension if the condition relates to a *material* authorisation or clearance. In determining materiality in this context, the Panel will need to be satisfied that circumstances could arise that are of material significance to the bidder in the context of the offer as a result of a failure to obtain the relevant authorisation or clearance. This is a very high threshold that is assessed by reference to the particular facts in each case at the time that the relevant circumstances arise.

The proposed changes would remove the special treatment currently afforded to UK and EC antitrust conditions so that all official authorisations and regulatory clearances are treated the same. Under the current rules, the parties to an offer can only request a suspension of the offer timetable if no decision has been made on whether there will be a Phase 2 UK or EC antitrust review.

- **Long-stop dates for contractual offers.** Bidders will have to set a “long-stop” date in their Rule 2.7 firm offer announcement by which their contractual offer must be declared unconditional (including the acceptance condition). This change brings contractual offers into line with schemes of arrangement, where bidders and targets typically agree a “long-stop” date between themselves, and aims to address the risk for a bidder of having an open-ended offer that is incapable of lapsing where the contractual offer timetable has been suspended due to certain regulatory conditions remaining outstanding. In the case of a hostile offer, the bidder will agree the “long-stop” date with the Panel based on the bidder’s reasonable expectations of the timeframe for obtaining required regulatory clearances.
- **Acceptance condition invocation notices.** Currently, offers specify a closing date, the first closing date typically being set as 21 days after publication of the offer document (“Day 21”). Where the bidder’s acceptance condition is not satisfied on that closing date, or any subsequent closing date if the offer is extended, the bidder has the choice of whether to lapse its offer or to extend it further. Under the proposed new rules, if a bidder wishes to lapse its offer because the acceptance condition has not been satisfied, it must serve an acceptance condition invocation notice on the target’s shareholders at least 14 days prior to the proposed date of lapsing. This is intended to give target shareholders adequate opportunity to decide whether or not to accept the offer. If the acceptance condition is not satisfied on the proposed date of lapsing, the offer would lapse. On the other hand, if on such date sufficient acceptances have been received, the offer would remain open until all other conditions have been satisfied or waived.
- **Withdrawal rights.** Shareholders of the target would be able to withdraw their acceptance of an offer at any time during the offer period. At present, shareholders who have accepted an offer are only able to withdraw their acceptances from the date falling 21 days after the first closing date (typically set at Day 21 by bidders). This proposal would bring offers under the Code into line with U.S. tender offer rules, which apply to offers under the Code where the target has a certain number of shareholders based in the United States. It is also worth noting that it would still be possible for target shareholders to give contractual undertakings not to exercise withdrawal rights in irrevocable undertakings to accept a bidder’s offer.

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- **Other changes.** The consultation also contemplates a number of other changes including:
 - a new “acceleration statement” upon resumption of a suspended offer, allowing the bidder to waive any unsatisfied conditions and set a new date by which the offer would need to be unconditional in all respects;
 - an amendment to achieve an equality of approach and materiality requirement for invoking conditions/pre-conditions to an offer; and
 - amendments to the rules governing mandatory offers to bring these into line with the new position on official authorisations and regulatory clearances outlined above.

WHAT THIS MEANS FOR PARTIES TO AN OFFER

In our view, the proposed rule changes, while extensive in their scope, are unlikely to have a large impact on UK public takeover practice given their largely procedural focus. Most recommended offers will continue to be implemented by way of schemes of arrangement, which are, largely, unaffected by the changes. The proposals are likely to lead to greater certainty that a contractual offer, once announced, will complete and will therefore benefit target companies and their shareholders.

Removing the different treatment of UK and EC antitrust conditions is a change that will come as little surprise to many market participants. A different approach to these approval conditions is no longer easily justifiable in light of the international nature of the businesses of listed companies, coupled with the increasingly international reach of antitrust regulations.

We would be delighted to share thoughts on how takeover strategies may develop if the Panel’s proposals are implemented in their current form.

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Please do not hesitate to contact us with any questions.

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