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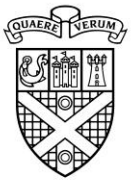

Response from The Institute of Chartered Accountants of Scotland

The Takeover Panel Code Committee Consultation on the Review of Certain Aspects of the Regulation of Takeover Bids: Proposed Amendments to the Takeover Code (PCP 2011/1)

1 June 2011

INTRODUCTION

We thank The Takeover Panel for the opportunity to comment on consultation PCP 2011/1 on the review of certain aspects of the regulation of takeover bids and the proposed amendments to the Takeover Code.

The Institute of Chartered Accountants of Scotland, through its Business Policy Committee, responded to the Panel's initial consultation (PCP 2010/2) on this issue in July 2010 and are pleased that our arguments on a number of the Panel's proposals, especially surrounding bid acceptance levels and the disenfranchisement of shareholders were included in the Panel's Response Statement 2010/22 issued in October 2010. We are also pleased that our other suggestions on the topical subject of "virtual bids" were recognised by the Panel and included within this further important consultation.

We are in general comfortable and in agreement with the main thrust of the Panel's arguments in the majority of areas in this consultation: we do however have a number of reservations on the extent and reach of some of the Panel's proposals in relation to offeree companies and have set these out in our responses to the Panel's relevant consultation questions.

It has certainly been the case in recent years that the profile of offeree companies in takeover situations has been in the spotlight and subject to more scrutiny than ever before; and whilst we would agree that a certain amount of protection is both necessary and welcome in the majority of these situations, we would take this opportunity to caution the Panel not to level the playing field too much in this area and risk creating a scenario where the amount of protection afforded to offeree companies acts as a significant deterrent to the mechanism and commercial realities of takeovers in the UK.

We believe that any revised Takeover Code must retain, as a general concept, that takeovers are neither encouraged or impeded by the Code and that there is sufficient flexibility built into the process that allows the Panel to intervene in a bid process in exceptional circumstances.

Part A: Increasing the protection for offeree companies against protracted "virtual bid" periods

Requiring potential offerors to clarify their position within a short period of time (Q1)

In our submission to the Panel in July 2010, we asked for greater clarification of the responsibilities of when "virtual bids" would crystallise into the formal timetable. This was an area we believed needed tightening due to the disruption and pressure this could place on offeree companies during protracted virtual bid periods.

Whilst we welcome the increased debate the Panel has created in the area of "virtual bids", we believe that the proposals for the new Rule 2.4 along with the proposed new Note 3 on Rule 2.2 to effectively force the disclosure of bidders in the circumstances set out in the consultation document may have the unwanted effect of acting as a deterrent to potential bidders.

We would agree that the Panel should be active in taking appropriate action to unearth where the concept and ideologies surrounding a "virtual bid" has on occasion been subject to mischief by various parties involved in the process. This should not however be at the expense of those bidders who diligently adhere to the Code and, as they should continue to be allowed to, do not want to be publically named at too early a stage of the proposed transaction for a variety of reasons which would include reputational as well as commercial considerations. We do not believe that the proposals, as they currently stand, will prove to be overly helpful in terms of encouraging deals going forward.

We do not consider that the Panel has put forward a robust enough argument to merit the proposed change in this area and that the suggestion (as noted on page 6 of the consultation) that the identity of the potential offeror may be important information for the offeree company shareholders and other market participants at this early stage of any transaction carries the danger of being too premature and would suggest that the identity of the offeror only really becomes of significance and more importantly relevant once a firm offer has been made. It is only at this stage that the shareholders need to make an investment decision.

We believe that the Panel's proposals in this area could have the unintended consequence of being open to manipulation by the boards of certain offeree companies who believe that by forcing a potential acquirer into the unwanted glare of the public arena at too early a stage, and on the basis of mere rumour or speculation (whether accurate or not), will effectively panic that potential offeror into withdrawing from a potential transaction at a stage where they may still be legitimately weighing up the pros and cons of making an offer. We doubt if this creation of a potential "virtual shut out" scenario is the Panel's intention in this area.

We would ask the Panel to give further consideration to the "alternative approach" as highlighted on pages 13 to 15 in the consultation paper and would refer you to our comments under question 3.

Requirement for a potential offeror to "put up or shut up" or to obtain a deadline extension (Q2)

Our previous submission to the Panel noted that we believed the Panel already had the necessary flexibility to set up appropriate deadlines under which the offeree company board should theoretically be able to avoid coming under siege for too long a period and that it would be difficult to see how imposing a standard or automatic process would improve on this.

We remain to be convinced that imposing an automatic 28 day deadline after being publically named allows sufficient time for a fully considered and measured bid to be tabled. There are a number of situations that can arise in relation to the financing of complex deals and enforcing such a strict deadline may only have the effect of increasing the number of pre-conditional offers that are attached to a deal.

If the Panel considers that offeree companies, together with their shareholders, are in need of further market protection, then we cannot see how imposing such a deadline will serve this purpose in all cases. We believe that even one instance of increased uncertainty as a result of increased pre-conditions is too a high a price to pay and is ultimately not in the best interests of the offeree company shareholders.

Whilst we would agree there is indeed a case to be made for prospective bidders being much more organised and better researched than some of them perhaps are at present before coming forward, these types of normally complex financial transactions need a necessary, but not drawn-out, period to reach the stage needed in the deal process and an unnecessary mandation of an unrealistic 28 day deadline could put in jeopardy otherwise perfectly acceptable deals.

Alternative approach to the identification of potential offerors (Q3)

We believe that the alternative approach as suggested on pages 13 to 15 does have merit and we consider this to be the best course of action. We would ask the Panel to reconsider their initial views on this area.

A situation that gives the discretion to the board of the offeree company of whether or not to publically identify a potential offeror may have the effect of encouraging bids as any offeror will not be exposed to the risk of being automatically named and it is surely in keeping with the Panels' philosophy that the ultimate decision lies in the hands of the board of the offeree company and its shareholders.

We do not share the Panel's view that "the chances of an offeror not being publically identified would only be marginally less under the alternative approach" and consider that in making this statement, the Panel is in effect making decisions on behalf of offeree company boards and their shareholders without affording them the right to make that decision based on their own circumstances and the relevant details and situation surrounding the proposed deal.

We would support the Panel in advocating the proposed alternative approach should it decide to revisit this.

Extending the 28 day deadline (Q6)

We are unsure whether the Panel's proposal to extend the 28 day deadline only at the request of the offeree company is truly one that will ultimately deliver increased value for the shareholders of offeree companies.

There will inevitably be situations where an offeror is unable to persuade an offeree company board for an extension for whatever reason. This does not, however, mean that any final offer by that offeror would not have ultimately been unattractive to the shareholder of the offeree company and we believe that by denying them the opportunity to approach the Panel for an extension, without recourse to the offeree company board, goes against the Panel's views in offering protection to offeree company shareholders.

In relation to the situation where there may be multiple offerors, we do not believe that allowing different systems to run in parallel is in the spirit of allowing all offerors an equal playing field. As the Panel notes at section 2.40 in the consultation, "in practice, the board of an offeree company may wish to request deadline extensions such as to achieve a common deadline for all potential offerors".

We believe that if the Panel is correct in its statement at section 2.40 in the consultation, then all offerors should be afforded the same rights in this situation and that the offeree company would need to apply any extension granted to any offeror to all other offeror companies.

Part B: Strengthening the position of the offeree company

Prohibiting deal protection measures and inducement fees, other than in certain limited cases (Q9 and Q10)

As noted in our response to the Panel in July 2010, we remain supportive of the Panel's stance on prohibiting deal protection measures and inducement fees, including those relating to the introduction of the "white knight" dispensations

Clarification that offeree company boards are not limited in the factors that they may take into account in giving their opinion on an offer (Q15)

As we noted to the Panel in our previous response, whilst we believe that the board of the offeree company should continue to focus on the value of the offer as being of prime importance, there is undoubtedly scope for the Panel to provide suggestions and additional guidance to the boards of offeree companies on the matters to be considered in assessing whether the offer is "fair and reasonable" and that a Practice Statement may be the best way of achieving this.

We would also reiterate that the boards of offeree companies should not lose sight of the wider implications of any proposed takeover for their stakeholders, be they employees, customers, suppliers or other. The proposed new Note 1 on Rule 25.1 is certainly helpful in achieving this, but we would ask the Panel to also consider supplementing this with the issue of a Practice Statement.

Part C: Increasing transparency and improving the quality of disclosure

Pro-forma balance sheets (Q22) and Ratings (Q23)

Whilst we can understand the cost rationale behind not requiring the production of a pro forma balance sheet, it would seem to be in keeping with the Panel's objective of seeking to offer protection to offeree company shareholders and other market participants that, as per the initial view, ***"where the offer is material"*** a pro forma balance sheet of the combined group is prepared.

When this is taken in conjunction with the comments on ratings in section 6.24 of the consultation document regarding the provision of "**valuable information as to how the financial strength and creditworthiness of the offeror may be affected by the offer"** we believe that the Panel is being inconsistent in its approach in these two areas.

Section 6.22 notes that a pro forma balance sheet "is historical and would not reflect the adjustments and actions that would be taken after completion of the transaction" and that "it may not present a reliable starting point for assessing the financial position of the group" and we believe that if the Panel is true to this view, then it would equally apply to the ratings of the offeror and offeree company and be of no benefit in assessing the eventual rating of the combined entity.

We believe there must be parity in these connected areas and would suggest the Panel revisit its rationale for either requiring both or neither of these documents.

Part D: Providing greater recognition of the interests of offeree company employees

Improving the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees (Q26) and Statements to hold true for at least one year (Q27)

We are comfortable with the proposed requirements on the proposed new Rule 24.2 including the "negative statement" under the new Rule 24.2 (b) where the offeror must make a statement to the effect that it has no intentions to make any changes in relation to the offeree company's employees or the location(s) of its place of business.

This is an area where we believe there needs to be complete transparency of the offeror's intentions and there should be no reason why these can't be publically stated.

However, the proposed extension of this into the new Note 3 on Rule 19.1 that will bind the offeror (and offeree) to any public statements of intention made ***"whether in a document, an announcement or otherwise"*** for a period of at least one year is in our view unnecessary and too restrictive.

We believe that the Panel would need to ensure there are safe harbour provisions attached to any proposed changes of this nature to protect against those situations where natural market forces or other unforeseen circumstances have necessitated a change from the proposed stance, which was made in good faith at the time of the offer stage.

We do not believe that companies should be unnecessarily penalised for breaking these provisions in exceptional situations and nor should they feel constrained to adhere to statements which were made in all sincerity at the time but that subsequent events have compelled a change in direction in relation to the bigger picture.

We would suggest that there may be a need for the Panel's future involvement in this area. It may be necessary for the Panel to provide additional guidance or examples on where such deviations from the previously published positions are deemed to be acceptable.

Part E: Miscellaneous amendments

Nature and purpose of the Code (Q34)

As we have noted above, there may be an element of over protection afforded to offeree companies in some instances and a number of inconsistences where the rationale of offeree company shareholder protection is being applied.

We would therefore ask the Panel to address these before finalising its approach to revising the Takeover Code.