Takeover Panel review of aspects of the regulation of takeover bids
CBI response to proposed amendments to the Takeover Code, May 2011

Introduction

1. The UK's open capital markets, and our openness to investment and ownership, are key strengths of the UK as a place to do business. But a number of high profile takeovers of so-called "British" firms have put the political spotlight on company ownership, corporate governance and the UK takeover regime. So the question to address is whether the Takeover Code is consistent with promoting long-term economic growth.

Executive Summary

2. The CBI supports the Takeover Panel's stated objective to ensure a level playing field, and redress any tactical advantages that hostile offerors hold over offeree companies. We believe this is an important part of a broader agenda to promote a long-term view of ownership and make the UK the best place to invest.

3. The UK has a highly respected takeover regime. We support the view that it is not the purpose of the Code either to encourage or impede the making of takeover offers. The Code should provide an orderly framework within which takeovers are conducted, to maintain and promote the integrity of financial markets.

4. The CBI agrees that there are areas where the Takeover Code can be improved, and we support the Panel's broad direction of reform. Specifically, we set out in our submission the CBI view that:

   - Changes to the Code should seek to minimise periods of uncertainty facing companies

   - Greater disclosure and transparency should help to ensure the outcome of takeover bids are determined fairly and on rational economic grounds, and advisory fees should not overtly bias the outcome of bids

   - Boards should be empowered to consider a full range of factors in evaluating a bid

   - We support the concept of "truth in takeovers" but this requires sufficient flexibility to reflect changing circumstances and must not deter potential bids from coming forward

   - The Takeover Panel should keep under close review its proposed changes to ensure that they neither encourage nor impede the making of takeover offers, and retain sufficient flexibility in its approach to takeover bids

   - There is a broader set of policy solutions that could best deliver the aim of promoting a long-term view of ownership

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Changes to the Code should seek to minimise periods of uncertainty facing companies…

5. The CBI supports the intention to reduce the window of uncertainty around bids and potential bids.

6. In connection with reform of the PUSU regime, we consider that the arguments for naming all offerors in an announcement by the offeree which commences an offer period, which the Code Committee has proposed, are finely balanced. We are inclined to support the arguments expressed in the Alternative Approach in the consultation, and leave it under the control and determination of the offeree whether all offerors are named at the outset. Offerees would be concerned that a premature announcement of a competing offeror could well discourage that offeror from proceeding any further with its negotiations and cause it to make a decision not to bid, to the disadvantage the offeree's shareholders.

7. If the Code Committee decides to proceed with its PUSU proposals as proposed, the Panel should closely monitor the effect of the changes after implementation to ensure that they satisfy the objectives for the UK takeover regime discussed above, and that there are no unintended consequences.

Greater disclosure and transparency should help to ensure the outcome of takeover bids are determined fairly and on rational economic grounds, and advisory fees should not overtly bias the outcome of bids…

8. The CBI supports the principle behind greater disclosure and transparency in takeover bids. As a general approach on fees, the CBI would advocate fee arrangements that do not result in a bias towards the outcome of a deal, and we would support transparency and disclosure in fee arrangements.

9. We note the further proposals to benefit offerees with the proposed prohibition of inducement fees and deal protection measures, subject to the possibility of derogations, if the Panel consents, in respect of a "white knight", in the case of a "formal sale process", and when the offeree is in financial difficulties. We broadly support these proposals, and the ability of the Panel to grant derogations.

10. With regard to the proposed new rules relating to information to be provided to, and rights proposed to be afforded to, employees and employee representatives, we have a concern that the proposals as currently drafted may be impractical for offerees with operations in numerous countries worldwide with many different bodies of employees and a multitude of consultation arrangements across those jurisdictions. Some further guidance on how these provisions are intended to operate would be helpful.

Boards should be empowered to consider a full range of factors in evaluating a bid…

11. The CBI supports the proposal to clarify that boards are not limited in the factors that they can take into account when weighing up a bid and deciding whether or not to recommend it to shareholders. We do though believe that the reality is that the offer price will continue to be the key determinant for shareholders.

We support the concept of "truth in takeovers" but this requires sufficient flexibility to reflect changing circumstances and must not detract potential bids from coming forward…

12. The CBI supports the concept of so-called "truth in takeovers", where there is greater emphasis on providing more information in relation to both the financing of takeover bids, and their implications and effects.

13. This support comes with two important health warnings attached. First, that any reforms would require sufficient flexibility to reflect a genuine change in economic circumstance surrounding the bid or changes that come to light after the bid was made. And second, it would need to avoid deterring potential offerors from making a bid. This might arise particularly in a hostile bid situation when a potential new bidder may not have time to carry out full due diligence, and considers that it is not in a position to make binding statements (positive or negative, as now proposed) regarding its intentions for the acquired business, and decides to withdraw from making a competing bid. This would be damaging to offeree company shareholders.

14. Whatever the final outcome regarding these proposals, some guidance on their meaning and intended operation would seem appropriate.

The Takeover Panel should keep under close review its proposed changes to ensure that they neither encourage nor impede the making of takeover offers, and retain sufficient flexibility in its approach to takeover bids…

15. There are two general principles that we believe should be applied across the reforms being proposed by the Takeover Panel.

16. The first is that in finalising its proposed Code changes, the Code Committee should ensure that the Panel has sufficient flexibility to intervene in any bid when appropriate, in order to address and resolve any issues which may arise, and generally to ensure the appropriate and efficient conduct of the bid process.

17. The second is to keep the impact of the changes under active review in order to ensure that in seeking to redress any tactical advantage currently held by offerors the reforms do not swing the pendulum too far, with the consequence that potential bids are stifled. In our view the Code should neither encourage nor impede the making of takeover offers, but rather provide an orderly framework within which takeovers are conducted.

There is a broader set of policy solutions that could best deliver the aim of promoting a long-term view of ownership…

18. Finally, we believe that a broad mix of policy solutions could make a difference to promoting a long-term view of ownership, not just changes to takeover rules. These are matters for Government and other regulators, not the Takeover Panel, but include:

    - Regulatory and tax changes to promote and reward long-term equity ownership

    - Corporate governance measures, particularly stronger shareholder engagement including for international investors

    - Greater clarity on where the “public interest test” might be applied, for example in areas of critical national infrastructure

19. We set out below further comments on the specific areas covered in the consultation paper. These comments do not address every consultation question, so we have not set them out individually.

Specific comments on the Takeover Panel code review proposals

SECTION A: INCREASING PROTECTION FOR OFFEREE COMPANIES AGAINST PROTRACTED VIRTUAL BID PERIODS, REFORM OF THE "PUT-UP OR SHUT-UP" REGIME

20. We agree that some potentially hostile bidders have had too much flexibility to stalk their prey for a significant period of time without launching a bid and ultimately walking away.

21. On the proposal that all offerors should be named at the commencement of the offer period, we are concerned that an offeree might not wish to name all competing offerors at that time. Therefore we consider that the arguments for naming all offerors at the commencement of the bid period are finely balanced.

22. However, the conclusion CBI members have reached is that they are inclined to support the arguments expressed in the Alternative Approach set out in the consultation, and leave it under the control and determination of the Offeree whether all offerors are named at the outset. Whereas a hostile virtual bidder may not be concerned at being identified, offerees would be concerned that a premature announcement of a competing more credible offer could well discourage that offeror from proceeding any further with its negotiations and cause it to make a decision not to bid, which would thus disadvantage the offeree's shareholders.

23. If the Code Committee does not wish to leave this discretion solely with offeree boards, we consider that that the Code should make provision at least for the Panel Executive to have the ability to grant a dispensation from naming all offerors on the application of the offeree if the circumstances and reasons warrant this.

24. We also have concerns that the lock-out period imposed on a potential offeror that has ceased actively to consider making an offer in return for no announcement being made under Rule 2.2 (c) or (d) may be disproportionate and be a deterrent to legitimate takeover activity.

25. For the purposes of establishing the offer timetable, there may be some ambiguity in the use of the phrase "commencement of an offer period" in Rule 2.4 and the reference in Rule 24.1 to a firm intention to bid under Rule 2.7.

26. The Code Committee should closely monitor the effect of the changes to the PUSU regime after implementation, to ensure that that there are no unintended consequences, and to ensure that they satisfy the objectives for the UK takeover regime discussed above.

SECTION B: STRENGTHENING THE POSITION OF THE OFFEREE COMPANY

Chapter 3: Prohibiting deal protection measures and inducement fees, other than in certain limited cases

27. We broadly support the proposals to prohibit deal protection measures and inducement fees, and we note the possibility of dispensations from the prohibitions in respect of a "white knight", in the situation of a "formal sale process" and in the case of the takeover of a business in financial distress, if the Panel consents.

Chapter 4: Clarifying that offeree company boards are not limited in the factors that they may take into account in giving their opinion on an offer

28. We support this clarification, although we suspect that for shareholders, the offer price will ultimately continue to be the key criterion.

SECTION C: INCREASING TRANSPARENCY AND IMPROVING THE QUALITY OF DISCLOSURE

Chapter 5: Requiring the disclosure of offer-related fees and expenses

29. We support these proposals for more transparency. We also support fee arrangements that do not cause or result in a bias towards the outcome of a bid.

Chapter 6: Requiring the disclosure of the same financial information in relation to an offeror and the financing of an offer irrespective of the nature of the offer

30. We support these proposals in principle, although it may be worth observing that in respect of agreed cash bids, this will increase the cost of such bids, which will be borne by the offeror and its shareholders, perhaps to the detriment of the price it offers to offeree shareholders.

31. We support the exception in cash bids regarding the provision of details of changes in the financial or trading position since the last accounts, which requirements will be limited to securities exchange offers only. However, the offeror may be required to make an announcement of such matters under the general requirements of the Listing Rules or DTRs.

SECTION D: GREATER RECOGNITION OF THE INTERESTS OF OFFEREE COMPANY EMPLOYEES

Chapter 7: Improving disclosure of offeror's intentions regarding the offeree company and its employees

32. We support full information on the bid being provided to employees of the offeree and / or their representatives in a timely manner, as is already provided by the Code.

33. Whilst we support encouragement to offerors to make a statement of their intentions if they are in a position to do so, we consider that the contents of any such statement, including any negative statements, should be a matter for the offeror, and for the offeror to determine whether it wishes to include any statements on timeframes.

34. Particularly having regard to the proposed requirement for a negative statement, it will very often be the case that offerors will consider that they are not in a position to formalise and publicise any intentions for the acquired business, or indeed its own, until they have had an opportunity to properly familiarize themselves with the acquired business, which they will not be able to do until after the acquisition has been completed. The potential impact of the current proposals may be that a prospective bidder may decide not to intervene in the bid at all.

35. The situation where the offeror has not formed any intentions at the time of the bid, but reserves the right to do so following the acquisition (which would only be normal and to be expected), perhaps needs to be spelt out and recognized in the Code, as appropriate.

36. Whatever the form of the Code provisions ultimately adopted, some additional guidance from the Panel will be helpful.

37. We also consider that that the Code should provide that, in event of exceptional circumstances outside the bidder's control, such as the discovery of a significant fraud in the target group, or an unforeseen and significant change in the market in which the target or bidder operates, the Panel may agree that the bidder should not be held to a statement of intention it has made.

Chapter 8: The ability of employee representatives to make their views known

38. CBI members have concerns that the proposals as currently drafted in proposed Rule 24.2 may not be practical for offerors (in respect of Rule 24.2(c)) and offerees who are large companies operating in numerous countries around the world with many different bodies of employees and a multitude of consultation arrangements.

39. In respect of the offeree's obligations, we suggest that its obligation is limited to publishing a single opinion (not multiple opinions) presented by the employee representatives who speak for the largestnumber of the offeree's UK employees.

40. We also question whether it will necessarily always be appropriate for the offeree company to cover the costs of the employee representatives in verifying their opinion on the bid. We understand that one means of addressing this issue currently should employee representatives wish to seek advice and verification, is for the party that was supported by the employee representatives' preliminary opinion (whether the offeror or the offeree) would help to fund the advice and verification needed before its finalization and publication, and that this arrangement generally works satisfactorily.

41. The proposals in Chapters 7 and 8 provide further reasons for the Panel Executive to have the authority to be able to grant dispensations or to show other flexibility. Some further guidance on how these provisions are intended to operate would be helpful.

SECTION E: MISCELLANEOUS AMENDMENTS

Chapter 9: Nature and purpose of the code

42. In the proposed wording set out in Paragraph 9.2, in the second paragraph we prefer the word "encourage" to "facilitate", and we would like to reiterate our support for the statement (with this amendment) that "it is not the purpose of the code either to encourage or to impede the making of makeover offers" and that issues of competition policy are rightly for the Government and the competition authorities.

SECTION F: IMPACT ASSESSMENT

43. Although we support disclosure and transparency of fee arrangements, they will not cause a reduction in the overall costs of undertaking or defending takeovers.

44. The employee consultation and opinion arrangements need to be applied sensibly and flexibly, if they not to cause difficulties and problems in their practical application, and hinder the efficient conduct of the bid process.

CBI
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