

**OPERATING GUIDELINES BETWEEN
THE FINANCIAL CONDUCT AUTHORITY
AND
THE PANEL ON TAKEOVERS AND MERGERS
ON MARKET MISCONDUCT**

A. Purpose, status and application of the guidelines

1. These guidelines have been agreed by the Financial Conduct Authority (the “**FCA**”) and the Panel on Takeovers and Mergers (the “**Panel**”). They replace guidelines previously in place between the Financial Services Authority (the “**FSA**”) and the Panel and have been amended to reflect the provisions of the EU Market Abuse Regulation.
2. The FCA and the Panel acknowledge their statutory duties of co-operation under section 950 of the Companies Act 2006 and section 354A of the Financial Services and Markets Act 2000 (“**FSMA**”).
3. The FCA and the Panel also acknowledge the importance of protecting the integrity of UK financial markets from market misconduct. The regime for dealing with market misconduct gives the FCA responsibility for enforcing Part V of the Criminal Justice Act 1993 (insider dealing), Part 7 of the Financial Services Act 2012 (offences relating to financial services), the market abuse regime, the Listing Rules, the disclosure requirements, the Transparency Rules, the Prospectus Rules, the Short Selling Regulation and relevant provisions applicable to authorised firms and approved persons. Accordingly, the regime creates a common objective for the Panel and the FCA to have in place effective mechanisms for communication with each other in relation to market developments and practices, responses to policy issues and the publication of guidance, as well as efficient enforcement arrangements for preventing and responding to market misconduct. The FCA and the Panel recognise the desirability of avoiding undue duplication of work in these areas.
4. These guidelines are intended to assist the FCA and the Panel when considering cases of possible market misconduct which are, or could be, of mutual interest to the FCA and the Panel. Their implementation and wider points arising from such cases will be kept under review by the FCA and the Panel, which will liaise regularly.
5. The purpose of these guidelines is to set out the broad principles which the FCA and the Panel agree should be applied by them in order to assist them to:
 - 5.1 decide what issues each should refer to the other, either for information or for consideration and review;
 - 5.2 discuss and co-ordinate the provision of general guidance on issues of mutual interest;

- 5.3 decide which of them should investigate a particular case and, where appropriate, whether a joint investigation should be conducted;
 - 5.4 co-operate with each other, particularly in cases where both are investigating;
 - 5.5 prevent undue duplication of investigation and enforcement work by reason of the involvement of both parties; and
 - 5.6 prevent unfair treatment for persons who are subject to investigations and enforcement by reason of the inappropriate involvement of more than one party.
6. These guidelines are subject to the restrictions on disclosure of information held by the FCA or the Panel and do not override those restrictions.
 7. For the avoidance of doubt, the guidelines describing the circumstances and manner in which the FCA might exercise its powers during an offer to which the City Code on Takeovers and Mergers (the “**Takeover Code**”) applies (a “**takeover bid**”) are set out in Section C of this document; none of the guidelines contained in Section D of this document relating to the exercise by the FCA of its powers have any application during a takeover bid. In this context, references to the FCA exercising its powers encompass the powers given to the FCA by FSMA (guidance on which is set out in the Decision Procedure and Penalties Manual (“**DEPP**”) and the FCA’s Enforcement Guide (“**EG**”) and which include information gathering and investigation powers, injunctions, restitution and redress, discipline, sanctions for market abuse and prosecution of criminal offences. These guidelines are intended to be read in conjunction with the FCA’s policy as set out in DEPP and EG.

B. Co-operation and information sharing

8. The FCA and the Panel will maintain a close working relationship to deal with relevant policy and enforcement issues arising in relation to matters governed by the Takeover Code which may also fall within the scope of the market abuse regime and/or the criminal offences contained in Part V of the Criminal Justice Act 1993 and Part 7 of the Financial Services Act 2012 (offences relating to financial services).
9. The FCA and the Panel will discuss relevant matters as and when they arise and will hold regular meetings to liaise on market, policy and enforcement issues of mutual interest to both parties.
10. Where the Panel is the initial recipient of information which is relevant to possible market misconduct in the course of its activities, it is anticipated that the Panel will make any additional preliminary enquiries needed to establish the basic facts. Equally (subject to paragraph 12 below), where the FCA is the initial recipient of relevant information, it will undertake such additional preliminary enquiries. Where, based on the information obtained, it appears

that both the Panel and the FCA have an interest in the case, the FCA and the Panel will discuss the case to agree what steps should be taken and by whom.

C. Issues arising during current takeover bids

11. It is not uncommon for matters to arise during a takeover bid (which means the period between the start of the offer period and the date on which the offer is declared wholly unconditional or lapses) which require the Panel to make a ruling within a short timescale in order to minimise any disruption to the takeover bid process. The FCA recognises the importance of minimising disruption to the takeover bid process.
12. Accordingly, where matters arise during a takeover bid which may amount to market misconduct, the FCA and the Panel will act in accordance with the following principles:
 - 12.1 the FCA will not exercise its powers during a takeover bid prior to the conclusion of the procedures available under the Takeover Code save in exceptional circumstances;
 - 12.2 the exceptional circumstances in which the FCA will consider exercising its powers during a takeover bid are:
 - 12.2.1 where the Panel requests the FCA to consider the use of any of the following powers: the FCA's power to impose penalties or issue censure (section 123 of FSMA), the FCA's power to prohibit individuals from managing or dealing (section 123A of FSMA), the FCA's power to suspend permission to carry on regulated activities etc. (section 123B of FSMA), the power of the court to impose penalties (section 129 of FSMA), injunctive powers (section 381 of FSMA) and restitutionary powers (sections 383 or 384 of FSMA);
 - 12.2.2 where the suspected misconduct contravened Article 14 or 15 of Regulation (EU) No 596/2014 on market abuse (the "**Market Abuse Regulation**") or Part V of the Criminal Justice Act 1993 (insider dealing);
 - 12.2.3 where the suspected misconduct extends to securities or a class of securities which may be outside the Panel's jurisdiction;
 - 12.2.4 where the suspected misconduct threatens or has threatened the stability of the financial system; and
 - 12.3 the FCA will consult the Panel before taking any action which may affect the timetable or outcome of a takeover bid.
13. In the event that one of the exceptional circumstances set out in paragraph 12.2 arises, the FCA will consider whether it is appropriate to exercise its

powers. The FCA will have regard to the matters set out in DEPP and EG in reaching its decision. The FCA will also give due weight to the views of the Panel.

14. In the event that the FCA decides to exercise its powers during a takeover bid, both the FCA and the Panel will have regard to the following principles:

- 14.1 the FCA will keep the Panel informed of the steps it is taking in the exercise of its powers and will give due weight to the Panel's views on any issues which arise; and

- 14.2 in cases where the Panel also has the power to take action, the matter will be reviewed regularly as it develops to determine whether the lead responsibility for dealing with the matter should be with the FCA or the Panel.

D. Investigations conducted other than during a takeover bid

(a) General principles

15. The FCA and the Panel recognise that there are areas in which they have an overlapping remit in terms of their functions and powers in relation to market misconduct. The FCA and the Panel will therefore endeavour to ensure that only the party or parties with the most appropriate functions and powers will commence investigations. For the avoidance of doubt, the provisions of this Section D do not apply during a takeover bid (see paragraph 11 above).

16. In cases where both the FCA and the Panel can use their investigation and enforcement powers, they will have regard to the following principles when discussing how to proceed:

- 16.1 persons should not be subject to more than one investigation or set of enforcement proceedings for the same misconduct unless it is appropriate for the FCA and the Panel to exercise different powers in relation to that person or the two sets of investigations or proceedings relate to different aspects of the suspected misconduct; and

- 16.2 cases of mutual interest will be reviewed regularly as they develop to determine whether the lead responsibility for conducting any necessary investigation should be with the FCA or the Panel.

17. The FCA and the Panel further recognise that, in certain cases, concurrent investigations may be the most quick, effective and efficient way for some cases to be dealt with. However, if either the FCA or the Panel is considering commencing an investigation and the other party is already carrying on a related investigation or proceedings or is otherwise likely to have an interest in that investigation, the FCA and the Panel will liaise and discuss which of them should take action, i.e. investigate, bring proceedings or otherwise deal with the matter. In appropriate cases, the FCA and the Panel may conduct, in effect, a joint investigation; for example, the FCA may appoint a member of the

Panel Executive as one of the statutory investigators in a particular case, although such an arrangement will not override the statutory restrictions on disclosure of information held by the FCA or the Panel.

(b) Indicators for deciding which party should exercise its powers

18. The FCA and the Panel will consider all relevant factors on a case by case basis, including the following:
 - 18.1 the nature of the misconduct, for instance whether criminal offences are suspected;
 - 18.2 the scale of the misconduct or the matters of concern and the severity of the consequences;
 - 18.3 the breadth of the misconduct or concerns;
 - 18.4 the need for consistency in the application of enforcement and disciplinary powers;
 - 18.5 the need for expertise in investigating and instituting enforcement cases or in requiring and supervising remedial action and how existing expertise can be most effectively deployed; and
 - 18.6 the availability of appropriate resources at the appropriate time.
19. Where the apparent misconduct or concern appears to amount to a breach or breaches of provisions that both the FCA and the Panel have powers to enforce, the FCA and the Panel will discuss which party should lead the investigation and/or take protective or remedial action on the basis of the principles set out below:
 - 19.1 whether the suspected misconduct would be best dealt with by:
 - 19.1.1 criminal prosecution of offences which the FCA has powers to prosecute by virtue of FSMA and other incidental offences;
 - 19.1.2 civil proceedings under FSMA (including applications for injunctions, restitution and to wind up firms carrying on regulated activities);
 - 19.1.3 regulatory action which can be referred to the Upper Tribunal;
 - 19.1.4 proceedings for breaches of Listing Rules, Transparency Rules, Prospectus Rules or the Market Abuse Regulation; and
 - 19.1.5 disciplinary or other enforcement action by the Panel (including restitutionary and/or remedial action);
 - 19.2 whether the suspected misconduct constitutes a breach of the Takeover Code;

- 19.3 whether the misconduct is such that it extends beyond the remit of the Panel;
 - 19.4 whether the Panel is able to act more speedily than the FCA and accordingly is better equipped to deal with concerns regarding market confidence;
 - 19.5 whether there is likely to be a case for the use of FCA powers which may take immediate effect (e.g. powers to vary the permission of an authorised firm, to impose a requirement on an authorised firm or to suspend listing of a security);
 - 19.6 whether the misconduct is so large in scale as to potentially pose a risk to the FCA's regulatory objectives;
 - 19.7 whether the potential consequences of the misconduct are severe, for example involving loss or risk of loss to consumers such that the exercise of restitutionary powers is appropriate;
 - 19.8 whether the case is similar to other cases dealt with by the FCA, the FSA or the Panel and should be treated in a consistent manner;
 - 19.9 whether any of the circumstances set out in DEPP 6.2.26 are present; and
 - 19.10 whether the FCA's or FSA's approach in previous similar cases (which may have happened otherwise than in the context of a takeover bid) suggests that a financial penalty should be imposed.
20. The FCA and the Panel will continue to liaise as appropriate during the course of an investigation in order to keep under review the decisions as to which party should investigate or bring proceedings. This is particularly the case where there are material developments in an investigation that might cause the FCA and the Panel to reconsider its general purpose or scope and whether additional investigation is called for.

(c) **Conduct of concurrent investigations**

21. The FCA and the Panel recognise that where concurrent investigations are taking place, action taken by one party can prejudice the investigation or subsequent proceedings brought by the other. Consequently, the FCA and the Panel will, when involved in concurrent investigations, notify each other of significant developments in their respective investigations and of any significant steps they propose to take in the case, such as:
- 21.1 interviewing a key witness;
 - 21.2 requiring provision of significant volumes of documents;
 - 21.3 executing a search warrant; and

21.4 instituting proceedings or otherwise disposing of the matter.

22. If the FCA and the Panel identify that particular action by one party might prejudice an investigation or future proceedings by another, they will discuss the matter and decide what action should be taken and by whom. In reaching these decisions, they will bear in mind how the overall regulatory objectives of the FCA and the Panel are best served. The indicators set out at paragraphs 18 and 19 above may also be used as indicators of where the overall balance of interest lies.

(d) Deciding to bring proceedings

23. The FCA and the Panel will consider, as necessary, and keep under review whether an investigation has reached the point where it is appropriate to commence proceedings of an enforcement or disciplinary nature. The FCA will have regard to the matters set out in DEPP and EG in deciding whether, in any event, it is appropriate for the FCA to institute proceedings. The Panel will have regard to the criteria for taking disciplinary action and proposing appropriate sanctions contained in the Note on Disciplinary Proceedings published on its website in deciding whether, in any event, it is appropriate for the Panel to institute disciplinary proceedings.

24. The FCA and the Panel recognise that in taking a decision whether to commence proceedings, relevant factors will include:

- 24.1 whether commencement of proceedings might prejudice ongoing or potential investigations or proceedings conducted by the other party; and
- 24.2 whether, in the light of any proceedings being brought by the other party, it is appropriate to commence separate proceedings against the person under investigation.

25. The FCA and the Panel will liaise as appropriate before a decision is taken by either party to commence proceedings.

(e) Closing cases

26. The FCA and the Panel will, at the conclusion of any investigation where it is decided that no further action need be taken, or at the conclusion of proceedings, notify each other of the outcome of the investigation and/or proceedings and provide any other helpful feedback.