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The Secretary to the Code Committee
The Takeover Panel
One Angel Court
London EC2R 7HJ

By email to: supportgroup@thetakeoverpanel.org.uk

Our ref

Your ref

Date
15 January 2021

By email

Dear Sir/Madam

Response on PCP 2020/1 - Conditions to offers and the offer timetable

Below are our comments on the changes to the Takeover Code proposed in PCP 2020/1. We have not sought to answer each of the questions posed in the consultation paper but instead have set out below a general observation which we have on the proposals, and then answer those questions where we have a strong view or substantive comment.

Overall, we welcome the key proposals in the paper and believe that it is right that the Code is updated to reflect the increased number of, and more protracted timetables for, regulatory and merger clearance regimes around the world. We also agree that there is no reason why the Code should treat conditions relating to clearance by the European Commission and the Competition and Markets Authority differently to merger control clearance in other major jurisdictions. We particularly welcome the fact that the proposals in the consultation paper address some of the concerns that we raised with you as part of the pre-consultation.

General observation

Whilst we are supportive of the proposed changes, we have a concern regarding the proposals in relation to regulatory clearance conditions and the Panel's expectations around the analysis which an offeror conducts before launching an offer. It is important that, following these changes to the Code, an offeror is not required to have a higher degree of certainty in relation to anti-trust clearance before launching an offer than is currently required.

That could result in some companies becoming bid-proof simply because any offer for them would raise anti-trust issues. That should not be the case, even if an offer may carry significant anti-trust issues. The Takeover Code does not currently, and should not, only permit an offeror to launch a bid if it is confident that the offer will be successful. Such an approach could also prevent an offeror launching a bid at a low price which may or may not be successful. Discouraging offerors from risk-taking on the reactions of their own shareholders, offeree shareholders and other bona fide third parties would be a level of disincentive to takeovers not currently applied in practice, and therefore in our view likely to be damaging to the UK market. It is also not an approach generally adopted in other competing markets.

We understand the obligation on an offeror to launch an offer only after careful consideration and when it is has every reason to believe that it can and will continue to be able to implement the offer, but that should not be interpreted as meaning that any offer which may not be successful, or even an offer which only has a 50%, or indeed less, chance of success (because of the price being offered, anti-trust or other regulatory issues or the need for offeror shareholder approval) should not be launched in the first place. The conditions to an offer are disclosed in the Rule 2.7 announcement and the market is well used to taking a view on any anti-trust and other risks to a transaction.

It is also important to note that when the National Security and Investment Bill comes into force, offerors will (in the short term at least, and given the political nature of the power, quite possibly for the long term) find it hard to evaluate the risk and consequences of intervention – again that should not mean that they simply are not allowed to make an offer, because it is beyond their own risk assessment of the merits.

It is also harder on a hostile or contested offer for an offeror to get access to the necessary information to evaluate any merger control or other regulatory risk – again this should not mean that an offeror is prevented from launching a hostile or contested offer. For example, a second offeror might well not be confident of success, but not want to miss its only opportunity to try to acquire the relevant target.

Any move towards making it harder to bid for a UK target will likely result, in the long term, in less investment into the UK.

Whilst we do not believe that the proposed rule changes, or the guidance in proposed Practice Statement No. 5, would necessarily be interpreted to mean that, it is important that this is not the approach or direction that the Panel Executive takes in practice.

Q7 Should an offeror be required to set a "long-stop date" for a contractual offer, as proposed?

We agree that it is sensible to have a long-stop date on a contractual offer. As noted in the consultation paper, an offeror is likely to have a limit to the window for financing and if an offer timetable extends beyond that date, an offeror may simply not have the finance available to satisfy the consideration payable under the offer.

We do not agree with the statement in paragraph 4.11 of the consultation paper, which says that

> *"If, however, the offeror has received sufficient acceptances as at the long-stop date to satisfy the acceptance condition, the offeror would need either to obtain the Panel's consent to lapse the offer on account of a condition relating to an outstanding official authorisation or regulatory clearance (see below) or, in the absence of receiving such consent, to waive any outstanding conditions and declare the offer unconditional."*

We believe that an offeror should not be required to waive any outstanding condition at that point. Instead the long-stop date on a contractual offer should be akin to the position on a scheme, as stated in paragraph 4.24 of the consultation paper, so that an offeror can automatically lapse its offer if it has not become unconditional by the long-stop date.

Our concern is that an offeror taking on debt to fund its offer will have a certain funds-compliant facility, and there will be an end-date to that. Where there is an unexpected regulatory delay (for example due to the provisions of the National Security and Investment Bill) and both parties want to do the deal, then they will agree extensions. In a scenario where the offeror runs out of time and wants to walk away, then the offeree should be ready to take action well ahead of the long-stop date. If the long-stop date is a hard deadline allowing the offeror to walk, that will encourage the offeree board and its advisers to precipitate the issue well ahead of the deadline (i.e. Panel hearings about breach of Rule 13.5(b) and using reasonable efforts to ensure conditions are satisfied). A soft deadline would encourage the offeree to sit and wait, which then would leave the Panel Executive, the Hearings Committee and the Takeover Appeal Board in the difficult position of trying to force an offeror to extend the financing commitment (where ultimately no one can truly force the parties to find the money). Contrast this to the position where there is a hard deadline – in that case, the position is clear and the offeree shareholders have only the offeree board to blame if the issues are not resolved ahead of the long-stop date. Not having a hard deadline would also undermine certainty in the market.

Q8 Should there be a requirement for an offeror to take the procedural steps necessary for a scheme of arrangement to become effective, as proposed?

We agree that an offeror should be required to take the procedural steps necessary for a scheme, and this requirement reflects what is often negotiated into a co-operation agreement. However we disagree with the proposed Note on Section 3 of Appendix 7. If an offeree decides to try and accelerate the scheme timetable but fails to get the deal closed by the long-stop date, the offeror should not have to extend the long-stop date. The long-stop date will have been flagged in the scheme documentation and markets will therefore understand it is a hard deadline. As with the points we make above in relation to the long-stop date on a contractual offer, our concern is that the Panel Executive, Hearings Committee and Takeover Appeal Board could look toothless in trying to force parties to find new financing at the back end of a long timetable, and that offeree shareholders are left with a ruling in their favour and no recourse. In our view, it is better for all concerned to have a hard and clear rule: the long-stop date is a walk right. As a separate concern about the same issue, we believe that this Note could encourage hedge/arb funds to pressure for extensions for their own commercial objectives.

Q12 Should an offeror be required to serve an "acceptance condition invocation notice" in the form proposed if it wishes to lapse its offer on the acceptance condition prior to the unconditional date?

We welcome this proposal and agree that 14 days' notice is appropriate.

Comments on the draft of revised Practice Statement No.5

Phase 2 reference

On the guidance on the ability of an offeror to invoke a regulatory condition in the event of a Phase 2 reference, we believe that an additional factor that the Panel Executive should consider is whether the offeror has disclosed in its offer documentation that any Phase 2 reference would be material to it. It may not necessarily be the case that the remedies required to obtain clearance would be significant, but many offerors may decide in advance that they would not wish to incur the significant extra expenditure in the event of a Phase 2 reference (which would require them to keep financing available for an additional six months and incur the additional advisory fees associated with a Phase 2 reference).

We think that an offeror should be able to make clear from the outset, as a bespoke and negotiated condition drawn to the attention of offeree shareholders, that in the event that Phase 1 clearance is not achieved, the offeror will walk away (a commercial role currently performed by the Rule 12 term in the event of a Phase 2 reference by the Competition and Markets Authority or European Commission). Paragraph 9.53 of the consultation paper and paragraph 4.3 of the new Practice Statement No. 5, do not currently make allowance for this. Instead the offeror has to demonstrate that proceeding is injurious to its business or the likelihood of success is low. Our view is that the time and cost involved in a six month Phase 2 process is a good enough reason for an offeror to have a walk right (where that is a negotiated position and clearly signalled to the market).

Whilst an offeror could set its long-stop date earlier so it does not have to keep the offer open for, say, six months, it may nonetheless still have to keep the offer open beyond the Phase 2 reference if the long-stop date also needs to cater for other clearances. If the offer will eventually be lapsed on the long-stop date, there is no benefit (for the parties to the offer or the market) in keeping the offer open beyond the Phase 2 reference if it will inevitably lapse on the long-stop date.

Material significance requirement

In the context of the "material significance" requirement and invoking regulatory conditions, it will be important that the offerors and their directors are not required by the Takeover Panel to complete a bid where to do so would involve a criminal offence. Whilst we appreciate that in some circumstances the jurisdiction in question might not be material to the transaction or the offeror's or offeree's business, and closure or disposal could resolve the issue – and that the Panel is keen to ensure that offerors cannot effectively use such a condition as a walk right – language similar to that in the Note on Rule 30.4 may provide comfort to directors that they will not be compelled to complete an offer in circumstances which exposes them to criminal proceedings. If an offeror is forced to complete an offer where there is an outstanding regulatory or other clearance, and it has genuine concerns about its integrity and reputation (because by completing it and/or its directors would commit a criminal offence), the offeror may well seek judicial review of the Panel's decision.

Your faithfully

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