The City of London Law Society

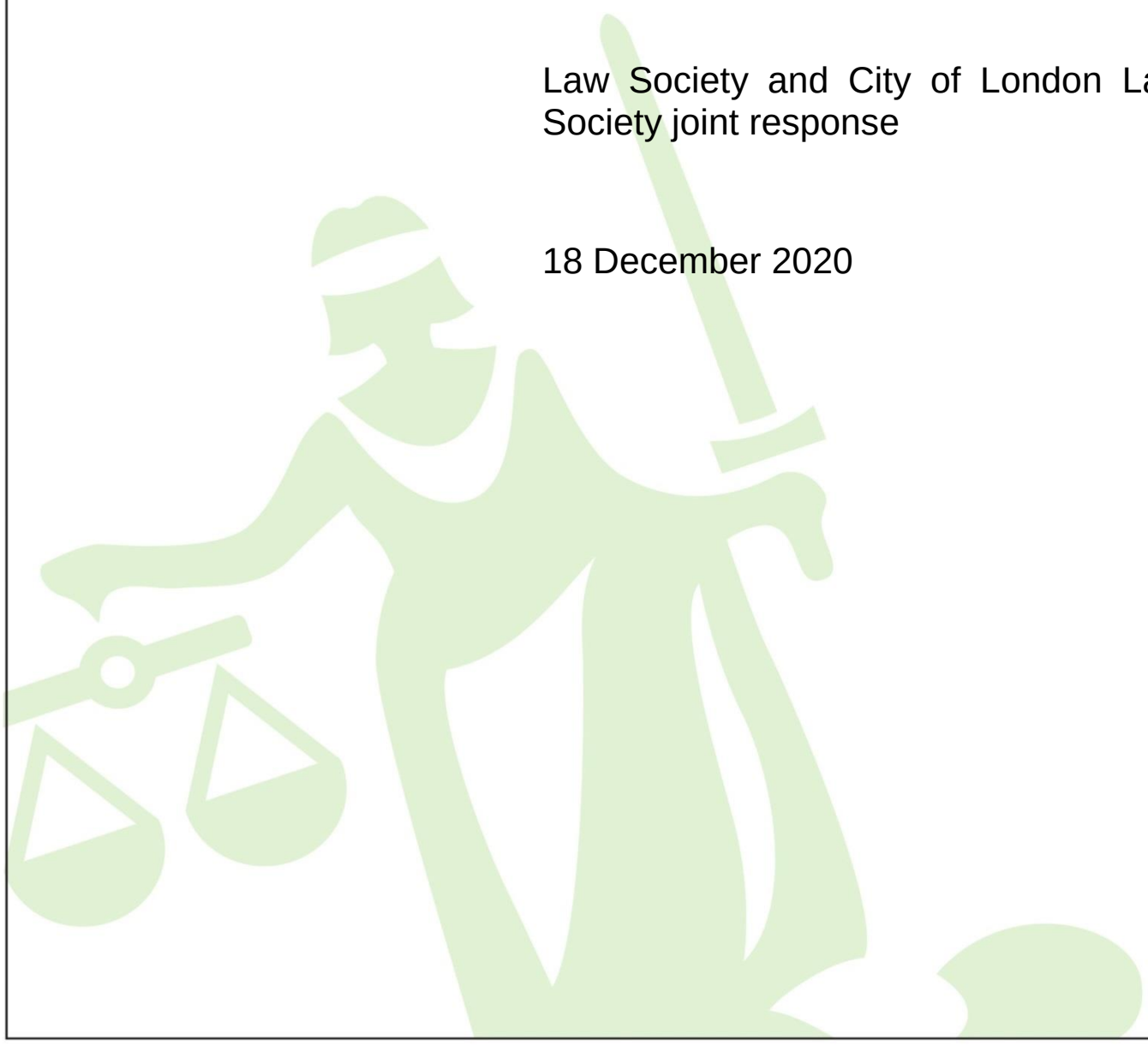
The Law Society

Takeover Panel PCP 2020/1

Conditions to offers and the offer timetable

Law Society and City of London Law Society joint response

18 December 2020



Introduction

1 The views set out in this paper have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).

2 The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

3 The Law Society is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.

4 The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to takeovers.

General comments

5 We are generally supportive of the changes proposed in PCP 2020/1 (the **Consultation**), including the move towards a more consistent approach to treatment of conditions relating to regulatory approvals or official authorisations. However, we have certain concerns as well as a number of comments and questions on the detail of the changes, as discussed further below in response to the specific questions raised in the Consultation.

6 One particular area of concern relates to invocation of offer conditions – in this context we believe that further changes should be made to Practice Statement 5 to confirm that a bidder would not be required to close its offer in circumstances where to do so would result in a breach of law. We also think additional clarity on the Panel's approach to the operation of long-stop dates in contractual offers would be helpful for the reasons discussed in response to the relevant questions below.

7 More generally we note that there are a number of areas where the Panel discusses its proposed approach on particular points in the body of the Consultation but this is not necessarily apparent from the wording of the revised Rules alone – in this context (and given the significant and wide-ranging nature of the changes being made to the Code) we believe it would significantly aid market understanding if key information could be included in Notes to the relevant Rules or new or revised practice statements.

8 We note the new National Security and Investment Bill (**Bill**) published by the UK Government in November. We believe that it should be possible to accommodate clearances under this proposed new regime within the revised framework set out in the Consultation. However, we have significant concerns in relation to the scope and technical detail of the Bill and as to the operation of the Bill in practice. In particular, we have significant concerns about the potential for transactions to be rendered void where there has been a failure to comply with the mandatory notification regime, and these concerns are particularly acute in the context of public market transactions involving listed companies such as transactions subject to the Code. We would note that such non-compliance with the new regime may be entirely inadvertent given the breadth of scope of the regime and the lack of precision and clarity in relation to certain critical aspects of it. Furthermore we would note that there is a "look back" period of potentially up to 5 years under the new regime, within which period the Secretary of State may call in a transaction for review retrospectively and it is possible that there are currently "live" offers that could be subject to the retrospective scope of the proposed new regime. It would, in particular, seem exceptionally difficult, and particularly unfair, to seek to claw back money and property from public market investors including innocent retail investors who have had no direct involvement in the transaction or the assessment of whether or not it may be within the scope of the proposed regime. If the Government is ultimately minded to continue to have the

Bill provide for transactions – including public takeovers - to be "void" (as opposed to "voidable"), or the ability to unwind transactions in certain circumstances, we believe that (*inter alia*) transactions subject to the Code should be exempted (or granted a safe harbour) from these consequences. We also believe that the Panel should clarify the circumstances in which a bidder may seek to invoke a condition relating to approval under the proposed regime.

9 As a related point, once the new national security and investment regime has come into force, this may be an opportune point in time for the Panel to consider a review of the Code rules on post-offer undertakings (and intention statements) given that undertakings may be given under the new regime, the time that has elapsed since the Code rules were first introduced, and the fact that there have now been a reasonable number of examples in practice.

10 As a general trend, we observe increasing levels of regulatory intervention on M&A transactions globally, including transactions which are subject to the Code, which we expect to continue. In many cases, the approach of regulators and the actions and remedies which are required in order to secure regulatory approvals cannot accurately be predicted at the time of announcement of a transaction and may not be consistent with the commercial objectives of the parties. We consider it important that the Panel takes this trend into account in considering the proposed new regime and the manner in which it will be applied in practice. In particular, we would urge caution in drawing conclusions as to what could or could not have reasonably been foreseen at the time of an offer announcement for the purposes of determining whether a bidder has a right to invoke a condition under the Code.

11 Finally, and as has been done with similarly significant amendments to the Code in the past, we think it would be helpful for the Panel to undertake to review the operation of the revised rules after an appropriate period of time has elapsed. In this context, we would suggest a period of 12 – 24 months, subject to the level of bid activity during that period.

Q1 Do you have any comments on the amendments to the Code in relation to the offer timetable proposed in Section 2 of the PCP?

<u>Setting of unconditional date/last date for revisions</u>

12 It is clear that a bidder would not be permitted to set an unconditional date which is earlier than Day 21 (**D21**) – it may be helpful (for the avoidance of doubt) to specify this in a Note on the definition of unconditional date.

13 Revised R32.1(c) notes that a revised offer may not be made after Day 46 (**D46**) or, where the bidder has made an acceleration statement (**AS**), after the date which is 14 days prior to the unconditional date. The Consultation notes (paragraph 2.21) that where, for technical reasons, a bidder sets a slightly earlier unconditional date at the outset of its offer it will not usually be treated as having made an AS. It would therefore appear that, technically, in those circumstances the last date for revision would be D46 (which would be less than 14 days prior to the unconditional date) which we assume is not the intention.

This could be dealt with by amending the definition of Day 60 (**D60**) along the following lines:

"*Day 60 means the 60th day following the publication of the initial offer document* ***or such earlier date as the Panel may (pursuant to the Note on Rule 31.1) agree to the offeror setting without treating it as having made an acceleration statement*** *or such later date as is set pursuant to Rule 31.3.*

NOTE ON RULE 31.1

The Panel will not normally treat an offeror as having made an acceleration statement pursuant to Rule 31.1(b) in circumstances where it sets an unconditional date that is only slightly earlier than Day 60 for practical reasons (for example, where Day 60 would otherwise fall on a weekend or public holiday)."

14 From the wording of R32.1(c) we understand that if a bidder made an AS setting an unconditional date more than 14 days later, it could revise its offer after making the AS provided the revision is made at least 14 days before the unconditional date. If this is correct, it would be helpful for this to be noted in the Notes on R32.1 or R31.5.

Scope of regulatory clearances/official authorisations

15 It would be helpful if the Panel could provide guidance on the scope of what it would consider to be regulatory clearances/official authorisations. For example, we assume that it would include: (a) antitrust/competition clearances; (b) sector or industry specific clearances (e.g. FCA, PRA etc.) which are required; and (c) other mandatory or customary regulatory clearances sought (which would include clearance under the UK's new national security and investment regime or clearance from the Committee on Foreign Investment in the United States). Would other clearances of a regulatory nature which may not be mandatory but which the bidder decides its offer should be conditional on be within scope, such as clearance from the Pensions Regulator?

Acceleration statements (AS)

*Waiver of conditions relating to regulatory clearances/official authorisations (**Regulatory Conditions**)*

16 In the context of the requirement, when making an AS, to waive any specific or general Regulatory Conditions how does the Panel anticipate this waiver would be framed? Will general wording to the effect that the bidder waives its conditions to the extent they relate to regulatory clearances/official authorisations be sufficient or would the Panel expect the AS to list out specific conditions that are waived? Depending on the approach, there will likely be consequences for the drafting of certain conditions.

*Impact on Day 39 (**D39**)*

17 Our understanding from the Consultation is that the impact on D39 of making an AS would be as follows:

- If the AS is made before D39, D39 falls away even if the unconditional date specified is after D39.
- If the AS is made after D39, the bidder can set the AS aside if the target company announces material new information and the bidder has reserved the right to set the AS aside in those circumstances.
- If a competing possible offer is announced after the AS has been made, again the bidder can set the AS aside if it reserved the right to do so – we assume D39 would then be reinstated by reference to the first bidder's timetable. What approach would be taken if the competing possible offer was announced after D39 of the first bidder's timetable?
- If a firm competing offer is announced after the AS has been made, again the bidder can set the AS aside if it reserved the right to do so, and D39 would be set by reference to the second bidder's timetable.

It would be helpful if the Panel could confirm this analysis is correct.

Setting aside an AS

18 We assume that where a bidder is permitted to set aside an AS this will not "reactivate" any Regulatory Conditions that were waived at the time the AS was made but will simply mean that the timetable reverts to D60 as the date for satisfaction of all conditions. Could the Panel confirm whether this is the case?

19 Where a bidder does not set aside its AS on the announcement of a possible competing offer we assume it could still subsequently choose to set it aside if a firm competing offer is announced (provided the AS included appropriate reservation language) but it would be helpful if this could be confirmed.

20 It would be helpful for the market to have example reservation wording that bidders can use when making an AS, in a similar way to the examples of R2.8 statements appended to RS 2017/1.

Other

21 We note that it is not proposed that an AS must be sent to target company shareholders by the bidder as well as being announced. We think that this is the correct approach and, in our view, a consistent position should be adopted in relation to acceptance condition invocation notices (i.e. these should not be required to be sent by the bidder to target company shareholders as well as being announced). A target company may wish to send the notice to its shareholders, with the board's advice as to what action (if any) it recommends shareholders take.

Technical conditions that can be satisfied after the acceptance condition

22 We assume that a bidder would be required to specify (in its firm offer announcement and offer document) any conditions that could only be satisfied after the acceptance condition. If this is correct, it would be helpful if this could be specified in the Note on R10.2. It would also be helpful if the Panel could provide guidance on what period of time the Panel would be prepared to permit for satisfaction of any such conditions.

23 The Note on R10.2 refers to listing/admission conditions as examples of conditions that may be satisfied after the acceptance condition is satisfied. In our view the Panel should apply a similar approach to conditions relating to – for example – divestments by the target company that have to be inter-conditional with the closing of the offer. It would be helpful for this to be clarified in the Code or in a Note on R10.

Q2 Should the Panel have the ability to suspend an offer timetable if a condition relating to an official authorisation or regulatory clearance has not been satisfied or waived by the second day prior to Day 39, as proposed?

24 As a general point, in order to limit any scope for confusion with the "material significance" test for invoking conditions, we think it might be helpful to use a term other than "material" to refer to clearances/consents that would permit a timetable suspension (for example "significant" clearances/consents). In addition (or as an alternative), a Note drawing attention to the fact that the test is not the same as that for invoking conditions (for example by cross-referring to the definition of "material official authorisation or regulatory clearance") would be helpful.

25 For clarity, it would be helpful if R31.4 could be amended (for example by the inclusion of additional Notes) to:

- Specify that the Panel would expect a request to suspend the timetable to be made by 5pm on Day 37 (**D37**) (the Rule only refers to circumstances where a relevant condition is outstanding as at that deadline).

- Provide guidance on the circumstances in which the Panel may consent to a timetable suspension after D37 (as discussed in paragraphs 3.31 – 3.32 of the Consultation). In this context, as an additional point, paragraph 3.32 of the Consultation talks about a timetable suspension at the request of the bidder in circumstances where it unexpectedly becomes apparent that a clearance/authorisation is required – presumably the Panel would adopt a similar approach where the need for clearance/authorisation is previously known but it only (and unexpectedly) becomes apparent after D37 that the regulator is not going to reach a conclusion within the expected timeframe?

26 More generally, how would the Panel approach a situation where a requirement for an "unexpected" clearance arises which could not have reasonably been foreseen and was therefore not included as a specific condition to the offer? We assume that, from the Panel's perspective, this could be dealt with under the customary sweeper condition in the same way as if a specific condition had been included.

Q3 Should an offer timetable which has been suspended under the proposed new Rule 31.4(a) normally resume on the 28th day prior to Day 60 when the last relevant condition is satisfied or waived?

27 We agree with this proposal.

Q4 Do you have any comments on the proposals in relation to a suspended offer timetable resuming with the consent of the offeree company?

28 No.

Q5 Do you have any comments on the proposals in relation to offer timetable suspensions in competitive situations?

29 No.

Q6 Should an offeror continue to be able to announce an offer subject to pre-conditions in accordance with Rules 13.3 and 13.4?

30 Yes – we think it is important that bidders should continue to have the ability to use a pre-conditional offer structure. As the Panel notes in the Consultation, there may be a number of reasons why a bidder could prefer to use this structure notwithstanding the revisions to the rules on suspending the offer timetable.

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

31 We agree that a bidder should be required to set a "long-stop date" for a contractual offer – this will be of particular importance to bidders in light of the proposed amendments to the rules on suspending the offer timetable which, as the Panel notes, are likely to give rise to concerns on the part of bidders about potentially open-ended timetables.

Interaction of long-stop date and other conditions

32 The formulation of the long-stop date under new R12.1(a) is essentially a date (specified by, or acceptable to, the bidder) by which the acceptance condition and any Regulatory Conditions must be satisfied. Paragraph 4.11 of the Consultation seems to indicate that if the acceptance and any Regulatory Conditions are satisfied the bidder must waive any other conditions and close its offer. Presumably this is not intended to prevent the bidder from seeking to invoke any other conditions to its offer in the normal way on the long-stop date (i.e. it would not require a bidder to waive other conditions which were capable of invocation) - it would be helpful for this to be clarified in the Rule or a Note on the rule.

Ability to lapse on the long-stop date for failure of Regulatory Condition

33 R12.2 sets out the test for lapsing for failure of a Regulatory Condition (or pre-condition). While we agree with this in principle, we have certain comments/questions about how this will operate in practice.

34 R12.2(b) refers to circumstances where it is "sufficiently clear" what action would be required to be taken in order for the authorisation or clearance to be obtained – it would be helpful if the Panel could provide guidance on what it would take into account when determining whether this is the case. In our view, the action required would need to be very clear in order for the Panel to be able

to make an informed assessment as to materiality – i.e. a final decision on the conditions or remedies to which clearance is subject. For example, in a UK context CMA clearance may have been obtained subject to undertakings being agreed, and consultation on the undertakings may not have concluded (this can take up to 12 weeks). Would the Panel normally regard this as "sufficiently clear"?

35 Where it is sufficiently clear what action would be required, R12.2(b) notes that the offer would only lapse in circumstances where the taking of that action would give rise to circumstances of material significance to the bidder. There could, however, be circumstances where the taking of the action would not of itself meet the material significance test, but it could not be completed before the long-stop date and related to a suspensory regime (i.e. it would be illegal to close before clearance was obtained). In a recommended scenario the bidder and target company could agree to extend the long-stop date but in a hostile situation this would not be possible. We assume that the Panel would not force the bidder to waive the relevant condition and close where it would be illegal for the bidder to do so, particularly where there are significant potential penalties (see also our comments in relation to Q20 below) – in those circumstances would the Panel allow the bidder to lapse its offer or would it automatically lapse? Or would the Panel require or permit the bidder to extend its long-stop date without target company agreement? Depending on the approach there would be implications, for example, in relation to the period for which certain funds for cash consideration could be required; cash confirmation arrangements are typically put in place by reference to a stated long-stop date and may expire on or shortly after that date. Accordingly, in our view it would not be appropriate to require an extension of the long-stop date against the bidder's wishes.

36 In this context, we note that R12.3 provides that "Except with the consent of the Panel, the long-stop date may only be extended by the offeror with the agreement of the offeree company". In our view, the Panel should normally be prepared to consent to a unilateral request from the bidder to extend the long-stop date in circumstances where it is in compliance with its obligation to use all reasonable efforts to ensure the satisfaction of the offer conditions, and it would be helpful if a Note to this effect could be included. For the avoidance of any doubt, we also suggest the inclusion of a Note explicitly making the point that the long-stop date cannot be extended without the consent of the bidder.

Other

37 Paragraph 4.9 of the Consultation notes that where the bidder sets a long-stop date unilaterally, the Panel will require it to be no earlier than the date by which the bidder reasonably expects the condition or pre-condition relating to the "slowest" material official authorisation/regulatory clearance to be satisfied. We assume that, to support this, the Panel would only need to be provided with an overview of the bidder's analysis of the likely timelines for the applicable regimes, but it would be helpful if this could be confirmed. There may be legal privilege and other legal and regulatory issues with sharing detailed analysis.

38 Paragraph 4.9 of the Consultation also notes that it would be permissible to set a long stop date which is shorter than any Phase 2 reference in circumstances where the bidder "reasonably" expects to get clearance in Phase 1 (or its equivalent). How would the Panel approach a situation where a bidder believes it will get clearance in Phase 1 but, because it will not be able to predict the outcome with certainty, cannot rule out the possibility of a Phase 2 reference? What information would it expect to review in this context? As a practical matter, a bidder may well want to specify a shorter long stop date, possibly in conjunction with a condition that the offer is not referred to Phase 2, in those (or other similar) circumstances in light of factors such as financing costs and commercial or market risk, and in our view should not be prevented from presenting an offer to target company shareholders on those terms.

39 We assume that there would be no objection to the long-stop date being included as a condition to the offer (as well as a term) if so desired (i.e. a similar approach to that taken on schemes of arrangement) but it would be helpful if this could be confirmed.

40 For the avoidance of doubt, it may be helpful to include a Note on R12 that a bidder cannot set a long-stop date earlier than the 61st day after the posting of its offer document.

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?

41 While we agree with this in principle, we have a number of comments on how it would operate in practice and/or where we think it would be helpful for additional guidance to be included in the Code.

42 Section 3(g) of Appendix 7 notes that a bidder will not be required to take the relevant procedural steps if a condition relating to a material official authorisation/regulatory clearance is outstanding, provided the test in sections 3(g)(A) or (B) are met. However, paragraph 4.31 of the Consultation also notes that a bidder should not have to take the relevant procedural steps if it is entitled to invoke any other conditions – to avoid any confusion, this should be included in the Notes on Section 3.

43 As a separate point, it would be possible for a target company to convene the sanction hearing prior to the scheme long-stop date when substantive conditions were outstanding. Given the requirement for the bidder to confirm that the conditions to the offer have been satisfied or waived, this could potentially put the bidder in a position where the timetable is effectively accelerated by the target company when substantive conditions to the offer remain outstanding. We think the Panel should clarify how it would approach a situation where the sanction hearing is proposed to be convened prior to the long-stop date but where substantive (as opposed to general/material adverse change) conditions remain outstanding. We assume (in light of R21.2) the Panel would not generally permit the target company to agree with the bidder that it would not convene the sanction hearing prior to the long-stop date without the bidder's consent. However, we believe it would be disproportionate and unfair (as well as inconsistent with the operation of the proposed new rules on long-stop dates for contractual offers) to effectively enable the target company to be able to accelerate the timetable in this way ahead of the long-stop date. This could be dealt with by way of an exception to the prohibition in R21.2 allowing a target company to commit not to convene the sanction hearing prior to the long-stop date without the bidder's consent (unless all substantive conditions have been satisfied or waived). If the Panel is not minded to agree to an exception of this nature, then in our view additional language should be included in section 3(g) (or a Note thereon) to the effect that a bidder will not be required to give the undertakings in circumstances where the sanction hearing is, without the bidder's agreement, convened prior to the long-stop date (or no earlier than such date which still enables the effective date to occur on the long-stop date) where substantive conditions remain outstanding or where the Panel otherwise agrees (for example, if the bidder is seeking to invoke another condition).

44 We also note that Section 3(g)(i) refers to any conditions which are only capable of being satisfied upon/following the scheme being sanctioned being "specified in the scheme circular". It would be helpful if this requirement could be included as a Note on the relevant Section to ensure that it is sufficiently prominent.

Q9 Should the requirement for an offer to include a "mandatory lapsing term" if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated be removed from the Code?

45 We agree with this proposal.

Q10 Should the exemption from the "material significance" requirement in Rule 13.5(a) for CMA and European Commission clearance conditions and pre-conditions be removed?

46 We agree with this proposal.

Q11 Should a pre-condition relating to a clearance from the CMA or the European Commission be treated in the same way as a pre-condition relating to any other official authorisation or regulatory clearance?

47 We agree with this proposal.

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?

48 We understand that under the revised rules:

- The general position is that a bidder will be able to waive down its acceptance condition at any point (including on D60) without giving prior notice of its intention to do so.

- This will continue to be the case where a bidder has made an AS – per paragraph 6.20(b) of the Consultation (although this refers to waiving down the acceptance condition on the unconditional date, we assume that a bidder would also be able to waive down prior to that date).

- The only circumstance where a bidder would be restricted from waiving down its acceptance condition would be where it had given an acceptance condition invocation notice (**ACIN**).

It would be helpful if the Panel could confirm that our understanding is correct.

49 Where a bidder gives an ACIN and, on the testing date, meets the acceptance threshold it will not be able to declare the acceptance condition satisfied unless it can declare the offer wholly unconditional (other than any technical conditions that are permitted to be satisfied after the acceptance condition). If the offer is not declared wholly unconditional it would be possible for acceptance levels to fall below the acceptance threshold after the testing date (as a result of subsequent withdrawals). We assume that, in those circumstances, the bidder would be free to waive its acceptance condition down in the usual way – i.e. once the testing date has passed (and assuming the offer did not lapse on the testing date) the normal rules would apply. It would be helpful if the Panel could confirm our understanding.

50 See our response to Q1 in relation to consistency of approach to distribution of an ACIN and an AS.

Q13 Do you have any comments on the proposals relating to the removal from the Code of references to "closing dates"?

51 We agree with the comment noted in paragraph 6.25 of the Consultation that the removal of closing dates from offers could have the effect of removing the incentive for target company shareholders to accept the offer prior to the unconditional date.

52 In this context, we welcome the suggestion that a bidder that wished to create a sense of momentum should be permitted to announce that it intends to waive any outstanding conditions if the acceptance condition is met on a specified future date.

53 We assume that the reference to the announcement being binding on the bidder simply means that if, on the specified date, the acceptance condition is met the Panel would, on that date, require the bidder to waive any outstanding conditions but not if the acceptance condition was not met. As a result we assume that a bidder:

- Would be able to rely on (and seek to invoke) the conditions to its offer as usual in respect of any material change in circumstances that may occur or come to light during the period leading up to the specified date.

- Would be able in the usual way to waive down its acceptance condition (either in advance of, or on, the specified date) without giving prior notice of its intention to do so.

It would be helpful if the Panel could confirm our understanding is correct.

Q14 Should an offeror be required to make announcements as to acceptance levels as proposed in the amended Rule 17.1?

54 We agree with these proposals.

55 As a minor drafting point, proposed new R17.1(a)(ii) refers to "*each of the five business days leading up to, **and including**, the unconditional date*" (emphasis added) - this presumes that the unconditional date will always be a business day, which may not be the case. This could be addressed by amending the Rule as follows

"*each of the five business days leading up to, and including, the unconditional date **or, where the unconditional date is not a business day, the first business day after the unconditional date***".

Q15 Should there be a single latest date (i.e. Day 60) for the satisfaction of (a) the acceptance condition and (b) the other conditions to an offer?

56 We agree with these proposals (subject to the proposed flexibility in relation to the satisfaction of conditions which can only be dealt with later such as listing conditions).

Q16 Should the Code provide that the acceptance condition must not be capable of being satisfied until all of the other conditions have been satisfied or waived, subject to the ability of the Panel to grant dispensation where this is not possible?

57 We agree with these proposals.

Q17 Do you have any comments on the proposals in relation to the period for which an offer must remain open for acceptance and the closing of the offer?

58 No.

Q18 Should Rule 13.6 in relation to invoking offeree protection conditions be deleted as proposed?

We note the comments in the Consultation in relation to the fact that the Panel is not aware of any target company having invoked an offeree protection condition in a contractual offer and that offeree protection conditions are not typically included in schemes of arrangement. However, on balance, we believe that R13.6 should be retained and that where offeree protection conditions are agreed between the bidder and target company (for example on a “merger of equals” where mutuality as regards conditions may be desired to reflect that commercial principle) this is the appropriate standard to apply to their invocation.

We also note the Panel’s comment that, under the revised rules, target company shareholders will (on a contractual offer) have withdrawal rights from the outset. We agree that this is helpful and also that, as a result, Note 2 would become irrelevant. However, in our view it does not necessarily follow that R13.6 itself (or Note 1) is no longer required – in particular, although withdrawal rights are available to target company shareholders from the outset this does not operate in the same way as an offeree protection condition and is reliant on shareholders being able to exercise those withdrawal rights sufficiently promptly in advance of the offer becoming unconditional, likely following a change in board recommendation.

Q19 Do you have any comments on the proposed amendments to the Code in relation to withdrawal rights?

59 No.

Q20 Do you have any comments on the proposed amendments to Rule 13.5(a) with regard to the invocation of conditions and pre-conditions?

60 We do not have any comments on the wording of revised R13.5(a).

61 We welcome the provision of additional guidance on the Panel's approach to invocation of conditions in relation to revised Practice Statement 5 (**PS5**). However, as noted in paragraph 10 above, we consider it important that the Panel Executive has consideration for the general trend of increased regulatory intervention and the often unpredictable nature of the remedies which may be required in order to secure clearances when applying R13.5(a). Given this regulatory environment, paragraph 4.1(d) of PS5 in particular may present difficulties in assessing whether a regulatory condition is capable of invocation as it is unclear what factors or evidence the Panel Executive would take into account in considering whether the relevant circumstances could reasonably have been foreseen (or the likelihood of the circumstances occurring). Any additional guidance on this would be welcomed.

62 We note that paragraph 4.2(c) of PS5 refers to one of the additional factors to be taken into account in the context of Regulatory Conditions as being "*the consequences for the offeror and its directors if it were to complete the offer without obtaining the authorisation or clearance*". We assume that this would encompass, amongst other things, circumstances where it would be illegal to complete the offer without clearance. In a UK context (by way of example) this would include closing an offer that is subject to mandatory filing under the proposed new national security and investment regime without approval of the Secretary of State or closing an offer in respect of which the CMA has imposed an interim measure or statutory restriction preventing completion (this will be likely to involve a significant number of transactions – see annex one to this response for details of the CMA intervention rates, "mortality" rates, and average merger review process length in the years from 2015 to date). We would not expect the Panel to require a bidder to close its offer in circumstances where to do so would result in the bidder and/or its directors breaching applicable law or regulation and we consider PS5 should be explicit on this point.

63 One of the factors referred to in paragraph 4.3(b) of PS5 (to be taken into account in the context of conditions relating to there being no Phase 2 CMA reference (or equivalent reference or process)) is the "utility" of requiring the process to be pursued where the prospect of clearance being obtained is low. Would this "utility" analysis include factors such as cost (including costs of funding and costs of pursuing the clearance)?

64 See also paragraph 26 above.

Q21 Do you have any comments on the proposed new Rule 13.5(b), with regard to the conditions and pre-conditions to which Rule 13.5(a) does not apply, or on the proposed new Rules 13.5(c) and (d), with regard to the disclosures to be made in the firm offer announcement and the offer document?

65 In order to avoid any confusion on the point, it would be helpful if R13.5(b)(vi) could, rather than just cross-referring to R12.2, specifically note that the contractual offer long-stop date is subject to a separate materiality test as set out in R12.2.

66 It was not clear to us why the wording of R13.5(b)(iv) does not mirror the wording of R13.4(b) – in particular, why R13.5(b)(iv) only refers to listing and/or admission to trading unlike R13.4(b) which also refers to issue of the securities. In our view the drafting of R13.5(b)(iv) should be amended so that it is consistent with R13.4(b). See the suggested drafting in annex two to this response.

Q22 Should the Panel be able to grant a dispensation from the restriction on a person triggering a conditional mandatory offer where the triggering share purchase would itself be subject to a condition relating to a material official authorisation or regulatory clearance, as proposed in the new Note on Rule 9.4?

67 While we agree with this in principle, paragraph 4.26 of the Consultation notes that the terms of a bid conduct agreement (if entered into) are not capable of enforcement by the Panel. Do similar concerns therefore not arise in relation to the enforcement of any term in a purchase agreement requiring Panel consent in order to invoke a condition in the agreement – including if the agreement is not governed by English law or subject to the jurisdiction of the English courts? How would the Panel propose to address this in practice?

Q23 Do you have any comments on the miscellaneous amendments proposed in Section 11 of the PCP?

68 Our only comments are in relation to the proposed changes to the rules on closing off alternative offers. Given the removal of the ability to close off alternative offers prior to the end of the offer period in a contractual offer, we wondered whether the Panel intended to revisit the language in section 9 of Appendix 7 in relation to schemes of arrangement (which we understand was originally introduced in order to replicate the protections applicable to contractual offers). In addition, in relation to contractual offers, we assume that a bidder would only be required to keep an alternative offer open for 14 days after the unconditional date – i.e. it could shut off the alternative offer from that point even it kept the main offer open. It would be helpful if the Panel could clarify that this is the case by the inclusion of a Note on new R31.2.

FOR FURTHER INFORMATION PLEASE CONTACT:

Chris Pearson (chris.pearson@nortonrosefulbright.com)

ANNEX ONE

CMA INTERVENTION RATES, DEAL MORTALITY AND MERGER REVIEW PROCESS LENGTH (2015 – 2020 YTD)

	CMA Intervention Rates & Deal Mortality		Merger Review Process Length Average *excluding abandoned* (Calendar year)	
	Phase 1 to Phase 2 referrals (% of total cases over which CMA asserted jurisdiction) *Financial year*	Phase 2 deal mortality (% of total Phase 2 outcomes that resulted in blocked, unwound, and abandoned deals) *Calendar year*	Phase 1 (weeks)	Phase 2 (weeks)
2020YTD	24%	77%	10	27
2019	22%	67%	7	27
2018	20%	33%	7	26
2017	14%	12%	9	26
2016	9%	44%	8	25
2015	18%	17%	12	24

ANNEX TWO

Proposed changes to R13 of the Code and Practice Statement No 5

R13.4(b) (marked up against existing Rule)

(b) Where the offer is for cash, or includes an element of cash, and the offeror proposes to finance the cash consideration by an issue of new securities, the offer must be made subject to any condition required, as a matter of law or regulatory requirement, in order validly to issue such securities or to have them listed or admitted to trading. Conditions which will normally be considered necessary for such purposes include:

(i) the passing of any resolution necessary to create or allot the new securities and/or to allot the new securities on a non-preemptive basis (if relevant); and

(ii) where the new securities are to be admitted to listing or to trading on any investment exchange or market, any ~~necessary~~ condition required to give effect to a legal or regulatory requirement relating to the listing and/or admission to trading ~~condition~~ of those securities (see also Rule 24.10).

[Note: Amended to mirror R13.5(b)(iv)(b)]

Such conditions must not be waivable and the Panel must be consulted in advance.

R13.5(b) (marked up against the text in Appendix A to the Consultation)

(b) The following will not be subject to Rule 13.5(a):

(i) the acceptance condition (see Rules 9.3 and 10.1);

(ii) a condition relating to the approval of a scheme of arrangement by the offeree company's shareholders or to the sanctioning of the scheme by the court;

(iii) where the offeror proposes to finance cash consideration by an issue of new securities, a condition required under Rule 13.4(b);

(iv) where securities are offered as consideration, any condition required, as a matter of law or regulatory requirement, in order validly to issue such securities or to have them listed or admitted to trading, including:

[Note: Amended to mirror the relevant words in the opening paragraph of R13.4(b)]

(a) the passing of any resolution necessary to create or allot the new securities; and

[Note: Amended to mirror R13.4(b)(i). The reference to disapplying pre-emption rights has been omitted here because, if the bidder is UK-incorporated, pre-emption rights should not arise under the CA 2006 or Listing Rules for an offer of consideration shares. The position may be different for bidders incorporated or admitted to trading outside of the UK]

(b) where the new securities are to be admitted to listing or to trading on any investment exchange or market, any condition required to give effect to a legal or regulatory requirement relating to the listing and/or admission to trading of those securities (see also Rule 24.10);

[Note: Amended to mirror R13.4(b)(ii)]

(v) a condition required to give effect to a legal or regulatory requirement, or a requirement of the offeror's articles of association (or equivalent), for the offeror's shareholders to approve the implementation of the offer;

(vi) a term relating to the long-stop date of a contractual offer (see Rule 12.1);

(vii) a condition relating to a long-stop date of a scheme of arrangement or a specific date by which the shareholder meetings or the court sanction hearing must be held (see Sections 3(b) and (c) of Appendix 7); and

(viii) any other condition or pre-condition that the Panel has agreed will not be subject to Rule 13.5(a) in the particular circumstances.

Practice Statement No 5 (marked up against the text in Appendix C to the Consultation)

1.2 In a typical offer, the conditions can be broken down into four broad categories as follows:

(a) […]

(b) conditions designed to give effect to a legal or regulatory requirement, or a requirement of the offeror's articles of association, relating to the creation, allotment, issue, listing and/or admission to trading of the consideration securities or to the approval of the implementation of the offer by the offeror's shareholders;

[Note: Paragraph 2.4(d) should be amended to mirror the final wording of R13.5(b)(iv)]