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UK Finance response to the Public Consultation by the Code Committee on Conditions to Offers and the Offer Timetable

UK Finance represents more than 250 of the leading firms providing finance, banking, markets and payments-related services in or from the UK and is the collective voice for the banking and finance industry. We act to enhance competitiveness, support customers and facilitate innovation. We aim to ensure members have access to the information and tools needed to adapt and thrive, while meeting regulatory and compliance obligations. When responding to consultations, we look to support the development of policy that works for our members and their customers and ensure proportionate and measured results.

UK Finance is grateful for the opportunity to respond to this Public Consultation document. The role of the Takeover Panel and the Takeover Code are vital for our members as they participate and advise clients active in mergers and acquisitions and other activities covered by the Takeover Code. Our Corporate Finance Committee brings together these members and we appreciate the time you have spent engaging with the Committee during the Consultation and pre-Consultation period.

In our response, we have chosen to make general comments and answer specific questions where we feel our comments are of use, rather than answer each question. We are open to further discussion on these points or any others points around the changes as may be of use to you.

General comments

UK Finance and our members would like to state that we are broadly supportive of the changes set out in the Consultation Paper. The Takeover Panel has gone through a comprehensive and open pre-Consultation process and we would like to express our gratitude at the opportunity to be involved and engaged during this period. The changes set out will help ensure that the well-established and clearly understood process for those operating in the market continues and is enhanced in the UK. We look forward to continued engagement as these changes are implemented.

Our general comment relates to announcements during a hiatus. As set out in the Consultation, Rule 17.1 requires an announcement of the level of acceptances every seven days during an offer period. If, for any reason, there is a known and prolonged period of hiatus there may not be value in making weekly announcements as these may prove to be confusing. An example of this situation would be when Day 60 has been extended until a regulatory issue required for progression is resolved or clarified. In such instances, we believe that the announcement regime

could be suspended until the regulatory decision; at which point, along with the other updates being announced, the offeror would again announce the opening acceptances position and go back to the regular announcements thereafter. This would help ensure that announcements are useful and material to participants in a deal rather than meeting a set timeline.

Feedback by question

Section 2

Section 2, Question 1: Do you have any comments on the amendments to the Code in relation to the offer timetable proposed in Section 2 of the PCP?

Under the proposals, there may be issues around the changes that, as things stand, mean an acceleration statement will waive all outstanding conditions relating to regulatory issues at the point of the statement.

If the regulatory condition(s) outstanding is sufficiently material to allow the offeree to satisfy the Panel that Day 39 should be extended, the offeror presumably cannot risk waiving that clearance, and so cannot use an acceleration statement to bring the offer period to a close. Therefore, to make the acceleration statement with conditions outstanding, the offeror must have a very high degree of confidence that the outstanding clearances are a matter of when, not if. If this is not the case, an alternative could be for an offeror to make an acceleration statement subject to the test in Rule 2.7 again.

It seems that situations could arise where it becomes clear that a material clearance may unexpectedly never be forthcoming, but equally not definitively rejected, and it would be better to allow the offer to lapse. Examples of this might be when commodity prices collapse for a target business, or to sustain competitive tension for a competing offer. In these examples, the offeree might be able ensure an offeror continues the offer unilaterally.

It seems to be envisaged in the drafting of Rule 31.5 that the Panel has the ability, in exceptional circumstances, to set aside the acceleration statement. If the logic for requiring the waiver is as expressed, we believe there should be consideration of issues wider than just regulatory conditions. Furthermore, regulators may react negatively to an offeror waiving the requirement for that regulators' approval.

One way that this could be addressed would be for the Panel to permit an extension as set out in the drafting of Rule 31.5 where the Panel has the ability in exceptional circumstances to set aside the statement.

Section 3

Section 3, Question 5: Do you have any comments on the proposals in relation to offer timetable suspensions in competitive situations?

The proposed position is that in the event of a competitive situation, and one of the competing offerors has a regulatory clearance which triggers a Day 37 freeze, the timetable of the other competing offeror should automatically be frozen. While this may seem to be a superficially appealing position it also seems to put a competing offeror at a disadvantage compared to how the rules work at the moment.

Under the current rules, an existing offeror has a choice whether to move to the timetable established by the announcement of a competing firm bid. This is a decision and does not happen automatically. Therefore, the first offeror could decide to stick to its original 60 day timetable as it may consider that its timetable differentiates its bid from the competing bid which, for example, might be facing a prolonged regulatory delay. Under the new proposal, it is suggested that the first

offeror could still keep to its original timetable, but to do so it would have to serve an acceleration notice and therefore waive at that point all of its regulatory conditions.

This outcome seems to introduce inequality into the process – a first bidder should be able to prosecute its offer on the timetable it launched with and should not be forced to waive conditions because of the regulatory position of a second bidder.

Section 4

Section 4, Question 7: Should an offeror be required to set a "long-stop date" for a contractual offer, as proposed?

Under the proposals set out for the new Rule 12, an offer will not proceed, will be withdrawn, or will lapse on the long-stop date in the event that an official authorisation or regulatory clearance condition or pre-condition is not satisfied or waived, with the consent of the Panel. The Panel will consent if the outstanding official authorisation is material, and if it is unclear what action would be required to be taken in order for authorisation or clearance to be obtained, or if it is clear taking that action would result in circumstances of material significance to the offeror (in the context of the offer).

It is our understanding that, where it is not sufficiently clear what remedial action a bidder was required to take in order to obtain an authorisation or clearance, the Panel may consent to the offer lapsing if the failure to obtain the authorisation or clearance could give rise to circumstances of material significance. This is arguably a lower bar than would be the case if the remedial action required was known. It would be helpful if the Panel could clarify its approach to ensuring that an offeror does not seek to utilise a delay in the process for obtaining a regulatory clearance to engineer an ability to walk away from an offer.

Additionally, in the situation where the Panel would consent to an offer lapsing on the long-stop date because the actions required to be taken in order for authorisation or clearance to be obtained would result in circumstances of material significance to the offeror (in the context of the offer), we believe it would be helpful if the Panel makes clear that if the offeror has defined what would be considered material in this situation, then will support its case for the Panel's consent being granted.

Section 6

Section 6, Question 12: 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?

Paragraph 6.13 explains that if the acceptances on the "acceptance condition invocation notice" date are above the condition threshold, then (a) the offer does not lapse but (b) nor is the acceptance condition satisfied at that time, as it will always be the last condition to be satisfied (except exceptionally) so the offeror is obliged to continue towards Day 60.

Situations may arise where certain shareholders of the offeree find it convenient to keep the offeror's offer "live" and prevent it from lapsing. For example, to maintain competitive tension against a competing offer; to retain optionality on the stake; to keep the target share price high to facilitate an exit at a higher price; for hedge fund hedging or even for tactical reasons.

While difficult to co-ordinate across a disparate shareholder base, a small number of large, or controlling, shareholders could choose to accept the offer the day before the "acceptance condition invocation notice" date in order to keep the offeror's offer open; and then immediately withdraw so

that the offeror is no longer able to satisfy the acceptance condition but is bound anyway to continue with the offer, and at the further risk that Day 39 gets moved without the offeror's consent. Such action, depending on the motivation, could amount to market abuse – giving a false impression of the appetite for acceptance of the offer/market for shares – but it would be difficult to prove motivation in many cases.

To minimise the risk of such manipulation, Rule 34.1 (paragraph 8.8) could be amended to provide that acceptances cannot be withdrawn, say, for 14 days after a "acceptance condition invocation notice" date, to avoid the flip flop acceptance and withdrawal, or in general, if receiving agents can manage logistically, to provide that any acceptance is binding for a set period, for example 14 days from being given.

Yours sincerely,

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