AMENDMENTS MADE TO PRACTICE STATEMENTS ON 5 JULY 2021

PRACTICE STATEMENT NO 5

RULE 13.5(a) – INVOCATION OF CONDITIONS

1. Introduction

1.1 It is standard market practice in the UK for offers (other than mandatory offers, where the provisions of Rule 9 of the Takeover Code apply) to be stated as being conditional upon the satisfaction, or waiver, of a number of conditions.

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

(a) the acceptance condition – (i.e. the minimum level of shareholder acceptance of the offer below which the offeror may decline to proceed with the offer) or, in the case of a scheme of arrangement, the shareholder approval condition and the court sanction condition;

~~• UK or European Commission competition clearances;~~

~~• other, effectively mandatory, conditions designed to give effect to some supervening regulatory requirement – for example, a listing condition on a securities exchange offer; and~~

(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 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;

(c) specific or general conditions relating to the obtaining of an official authorisation or regulatory clearance and bespoke conditions relating to the (non-)occurrence of a specific event or circumstances in relation to the offeree company; and

(d) other conditions, principally general protective conditions (including a ~~included for the benefit of the offeror in order to give it the right not to proceed with the offer in the circumstances stipulated. There is a wide range of conditions which fall within this category, although one of those frequently encountered is the~~ "material adverse change" ~~(or "**MAC**")~~ condition)~~, whereby the offeror can lapse its offer in the event of a material adverse change in the business or prospects of the offeree company in the period after announcement of the offer~~.

2. Application of Rule 13

2.1 The principal provision of the Code applicable to conditions is Rule 13.

2.2 Rule 13.1 provides that offer conditions must not normally be in subjective terms.

2.3 ~~In addition,~~ Rule 13.5(a) provides that~~, except for the acceptance condition~~:

> "**An offeror ~~should not~~ may only invoke ~~any~~ a condition or pre-condition so as to cause the offer not to proceed, to lapse or to be withdrawn with the consent of the Panel. The firm offer announcement and the offer document must each incorporate language which appropriately reflects this requirement. The Panel will normally only give its consent if the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the**

offer. This will be judged by reference to the facts of each case at the time that the relevant circumstances arise.".

~~Rule 13.2 provides further that neither a UK nor a European Commission competition condition will be subject to either Rule 13.1 or Rule 13.5(a).~~

2.4 Rule 13.5(b) provides that the following will not be subject to Rule 13.5(a):

(a) the acceptance condition;

(b) 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;

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

(d) where securities are offered as consideration, a condition required to give effect to a legal or regulatory requirement relating to the issuance, listing and/or admission to trading of those securities;

(e) 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;

(f) a term relating to the long-stop date of a contractual offer (but see the separate requirements of Rules 12.1 and 12.2);

(g) 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 (but see the separate requirements of Section 3(g) of Appendix 7); and

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

3. "Material significance"

3.1 The purpose of Rule 13.5(a) is to establish an overriding standard of materiality that must be satisfied before an offeror can rely on a condition for its benefit. The meaning of ~~then Note 2 on Rule 13 (which is now~~ Rule 13.5(a)~~)~~ was considered by the Panel on appeal during the offer for Tempus Group plc by WPP Group plc, as reported in Panel Statement 2001/15. In that case, the condition in question which the offeror sought to rely on was a ~~MAC~~ "material adverse change" condition. The Panel concluded that the necessary test of "material significance" was not met and in its decision stated that:

> "… meeting this test requires an adverse change of very considerable significance striking at the heart of the purpose of the transaction in question, analogous … to something that would justify frustration of a legal contract.".

3.2 The Panel Executive is aware that certain practitioners interpreted Panel Statement 2001/15 to mean that an offeror would need to demonstrate legal frustration in order to be able to invoke a condition to its offer ~~(other than the acceptance condition or any UK or European Commission competition condition)~~. The Executive does not consider this interpretation to be correct.

3.3 In applying Rule 13.5(a) in the light of the Panel's decision set out in Panel Statement 2001/15, the ~~Panel~~ Executive's practice is as follows:

(a)~~.~~ as set out in Rule 13.5(a), the appropriate test for the invocation of a condition is whether the relevant circumstances upon which the offeror is seeking to rely are

of material significance to it in the context of the offer. ~~– which~~ This must be judged by reference to the facts of each case at the time the relevant circumstances arise and taking account of the views of all relevant parties;

(b) in the case of a ~~MAC, or similar,~~ condition referred to in paragraph 1.2(d) above, whether the above test is satisfied will depend on the offeror demonstrating that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction; and

(c) whilst the standard required to invoke such a condition is therefore a high one, the test does not require the offeror to demonstrate frustration in the legal sense.

4. Factors to be taken into account

4.1 In ~~accordance with RS 2004/4, in~~ considering whether a particular matter should give rise to the right to invoke a condition, it is the Executive's practice to take into account all relevant factors, including ~~whether~~:

(a) whether the condition was the subject of negotiation with the offeree company;

(b) whether the condition was expressly drawn to offeree company shareholders' attention in the offer document or firm offer announcement, with a clear explanation of the circumstances which might give rise to the right to invoke it; ~~and~~

(c) whether the condition was included to take account of the particular circumstances of the offeree company ~~.~~;

(d) whether the circumstances could not have reasonably been foreseen at the time of the firm offer announcement and, if they could, the likelihood of the circumstances occurring;

(e) the actions taken by the offeror since the firm offer announcement and, in particular, since the occurrence of the circumstances on which the offeror is seeking to rely in order to invoke the condition; and

(f) the views of the board of the offeree company.

4.2 In considering whether a condition relating to the obtaining of an official authorisation or regulatory clearance may be invoked, additional factors to be taken into account will include:

(a) the significance of the authorisation or clearance to the offeror;

(b) what action, if any, the offeror would need to take in order to obtain the authorisation or clearance and the strategic consequences for the offeror if it were to take that action; and

(c) the consequences for the offeror and its directors if it were to complete the offer without obtaining the authorisation or clearance.

4.3 In the case of a condition relating to there being no Phase 2 CMA reference (or equivalent reference or process), the factors that will be taken into account will also include:

(a) whether the reference or process would be likely to result in a serious risk of material damage to the business of the offeror and/or the offeree company; and

(b) the utility of requiring the offeror and/or the offeree company to pursue the reference or process where the prospect of the clearance being obtained is low.

5. Pre-conditions

This Practice Statement applies in the same way to the invocation of pre-conditions permitted under Rule 13.~~4~~3.

~~The Executive should be consulted in cases of doubt.~~

…

28 April 2004

Last amended ~~19 September 2011~~ 5 July 2021

PRACTICE STATEMENT NO 10

CASH OFFERS FINANCED BY THE ISSUE OF OFFEROR SECURITIES

…

Conditions

Rule 13.4 provides that, where an offeror proposes to finance a cash offer (or a cash alternative to a securities exchange offer) 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 to be necessary for such purposes include:

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

- 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.

…

Cash confirmation

…

If an offer, which was to be financed by the issue of offeror securities, lapses or is withdrawn owing to a failure to fulfil a condition relating to the issue, the Executive will wish to be satisfied that Rule 2.7(a) was complied with (so that, on announcement, the offeror and its financial adviser had every reason to believe that the offer could and would be implemented) and also that Rule 13.2~~5(b)~~ had been complied with (i.e. that the offeror had used all reasonable efforts to ensure the satisfaction of the condition).

…

25 April 2005

Last amended ~~19 September 2011~~ 5 July 2021

PRACTICE STATEMENT NO 11

WORKING CAPITAL REQUIREMENTS IN CASH AND SECURITIES EXCHANGE OFFERS

…

The Executive's practice in this area is as follows:

…

- in the event that an offer lapses as a result of working capital concerns, the Executive will wish to be satisfied that the offeror and its financial adviser had, at the time of announcement of the offer, complied with Rule 2.7(a) and, following the announcement of the offer, complied with the obligation under Rule 13.2~~5(b)~~ to use all reasonable efforts to ensure the satisfaction of any conditions to which the offer was subject.

…

25 April 2005

Last amended ~~19 September 2011~~ 5 July 2021

PRACTICE STATEMENT NO 22

IRREVOCABLE COMMITMENTS, CONCERT PARTIES AND RELATED MATTERS

…

2. Concert parties and irrevocable commitments

2.1 Note 9 on the definition of "acting in concert" provides as follows:

> "***9. Irrevocable commitments***
>
> *A person will not normally be treated as acting in concert with an offeror or the offeree company by reason only of giving an irrevocable commitment. However, the Panel will consider the position of such a person in relation to the offeror or the offeree company (as the case may be) in order to determine whether ~~he~~ the person is acting in concert if … :*

…

2.5 The Executive considers that, in entering into a voting undertaking of the type described above, a shareholder is doing no more than what is logically consistent with ~~his~~ its irrevocable commitment to accept the offer, since ~~he~~ it is undertaking to vote ~~his~~ its shares in the context of that offer in a manner which is supportive of ~~his~~ its acceptance decision. As such, the Executive would not normally consider the offeror to have acquired a right to exercise or direct the exercise of the voting rights attaching to, or general control of, the relevant shares for the purposes of Note 9 on the definition of "acting in concert", provided that the voting undertaking is:

…

3. Interests in securities and irrevocable commitments

3.1 The definition of "interests in securities" provides, among other things, as follows:

> "… a person will be treated as having an interest in securities if the person:
>
> …
>
> (2) ~~he~~ has the right (whether conditional or absolute) to exercise or direct the exercise of the voting rights attaching to them or has general control of them;
>
> …
>
> (5) in the case of Rule 5 only, ~~he~~ has received an irrevocable commitment in respect of them.".

…

10 July 2008

Last amended ~~12 September 2016~~ 5 July 2021

PRACTICE STATEMENT NO 24

APPROPRIATE OFFERS AND PROPOSALS UNDER RULE 15

…

3. Independent advice and views of the offeree company board

3.1 Under Rule 15(b), the board of the offeree company must obtain competent independent advice on a Rule 15 offer or proposal and the substance of such advice must be made known to the holders of Rule 15 securities, together with the board's views on the offer or proposal. In certain circumstances, however, as indicated in Section 4 below, it may not be practicable for a Rule 15 offer or proposal to be published until after the voting equity offer becomes or is declared ~~wholly~~ unconditional, by which time the board of the offeree company will be under the control of the offeror.

…

4. Publication of a Rule 15 offer or proposal

…

4.2 The Executive will take all relevant factors into account in considering when it is practicable for a Rule 15 offer or proposal to be sent to holders of Rule 15 securities. If the Rule 15 offer or proposal is not sent to holders of Rule 15 securities at the same time as the offer document in relation to the voting equity offer, the Executive will normally expect it to be sent, at the latest, as soon as possible after the voting equity offer becomes or is declared ~~wholly~~ unconditional.

5. "Exercise and accept" proposals

…

5.2 Where holders of Rule 15 securities are able to exercise their conversion, option or subscription rights prior to or upon the voting equity offer becoming or being declared ~~wholly~~ unconditional, the Executive will normally regard a proposal that such holders exercise their rights and accept the voting equity offer (an "exercise and accept" proposal) as being appropriate for the purposes of Rule 15(a).

…

6. Rule 15 offer or proposal to be open for at least 21 days

…

6.2 The Executive notes that Rule 31.~~4~~2(b) provides, broadly, that after the voting equity offer ~~has~~ become<u>s</u> or is declared unconditional ~~as to acceptances~~, it must remain open for acceptance for not less than 14 days ~~after the date on which it would otherwise have expired~~. Notwithstanding this, if the only "appropriate" Rule 15 offer or proposal made by an offeror is an "exercise and accept" proposal, the Executive's practice is normally to require the voting equity offer to remain open for not less than 21 days after the later of:

(i) the date on which the documentation setting out the "exercise and accept" proposal is sent to the holders of the Rule 15 securities; and

(ii) the date on which the voting equity offer becomes or is declared ~~wholly~~ unconditional.

…

10 July 2008

Last amended ~~19 September 2011~~ 5 July 2021

PRACTICE STATEMENT NO 26

SHAREHOLDER ACTIVISM

…

2. Relevant provisions of the Code

2.1 Rule 9.1(a) of the Code provides that a mandatory offer must be made to all holders of any class of a company's equity share capital, and to holders of any other class of transferable securities carrying voting rights, when a person acquires an interest in shares which, taken together with shares in which persons acting in concert with ~~him~~ that person are interested, carry 30% or more of the voting rights of a company. Rule 9.1(b) provides that a mandatory offer must be made if a person, together with persons acting in concert with ~~him~~ that person, is interested in shares which carry 30% or more of the voting rights of a company (but does not hold shares carrying more than 50% of such voting rights) and the person, or any person acting in concert with ~~him~~ that person, acquires further interests in shares which increases the percentage of shares carrying voting rights in which they are interested.

2.2 Note 1 on Rule 9.1 ("Coming together to act in concert") provides that, when a ~~party~~ person has acquired an interest in shares without the knowledge of other persons with whom ~~he~~ that person subsequently comes together to cooperate as a group to obtain or consolidate control of a company, and the shares in which they are interested at the time of coming together carry 30% or more of the voting rights in that company, the Panel will not normally require a mandatory offer to be made under Rule 9.1.

2.3 Note 2 on Rule 9.1 sets out the Panel's approach to collective shareholder action. The first paragraph of the Note provides that:

(a) the Panel does not normally regard the action of shareholders voting together on a particular resolution as action which of itself indicates that such ~~parties~~ persons are acting in concert; but

(b) the Panel will normally presume shareholders who requisition or threaten to requisition the consideration of a "board control-seeking" proposal at a general meeting, together with their supporters as at the date of the requisition or threat, to be acting in concert with each other and with the proposed directors.

…

3. "Board control-seeking" proposals

…

(b) Number of directors to be appointed or replaced compared with the total size of the board

3.4 As stated in Note 2 on Rule 9.1, if it is proposed to appoint or replace only one director, the proposal will not normally be considered to be "board control-seeking". This would be the case even if the director to be appointed or replaced is the chief executive and even if the proposed new director has a relationship with one or more of the activist shareholders. However, there may be exceptions, for example, where it is proposed to replace the executive chair~~man~~ of a small board.

…

(c) Board positions held by the directors being replaced and to be held by the proposed directors

3.7 A proposal to appoint or replace two or more non-executive directors would not normally be considered to be "board control-seeking". However, a proposal to replace two or more of the chair~~man~~, chief executive and finance director would be more likely to be considered to be "board control-seeking".

…

9 September 2009

Amended 5 July 2021

PRACTICE STATEMENT NO 28

RULES 2.8 AND 35.1 – ENTERING INTO TALKS DURING A RESTRICTED PERIOD

…

4. Application to Rule 35.1

4.1 Rule 35.1 imposes substantially similar restrictions to those set out in Rule 2.8 where an offeror has announced or made an offer but that offer has not become or been declared ~~wholly~~ unconditional and has been withdrawn or has lapsed. The restrictions set out in Rule 35.1 apply for a period of 12 months from the date on which the offer is withdrawn or lapses.

…

14 November 2014

Last amended ~~8 January 2018~~ 5 July 2021

PRACTICE STATEMENT NO 29

RULE 21.2 – OFFER-RELATED ARRANGEMENTS

1. Introduction

….

1.3 This Practice Statement provides guidance on the Panel Executive's interpretation and application of Rule 21.2 in relation to:

(a) certain of the exclusions to the prohibition on offer-related arrangements provided in paragraphs (i) to (vii) of Rule 21.2(b);

(b) agreements between an offeror and the offeree company relating to the conduct, implementation and/or terms of an offer ("Bid Conduct Agreements"); ~~and~~

(c) agreements under which an offeree company may agree to pay an inducement fee to an offeror in the limited circumstances set out in Notes 1 and 2 on Rule 21.2; and

(d) "whitewash" transactions, as envisaged by Note 3 on Rule 21.2.

…

3. Commitments to provide information or assistance for the purpose of obtaining any official authorisation or regulatory clearance

(a) "Official authorisation or regulatory clearance"

3.1 Rule 21.2(b)(iii) permits an offeree company to enter into a commitment with an offeror to provide information or assistance for the purposes of obtaining any official authorisation or regulatory clearance. The Executive interprets "any official authorisation or regulatory clearance" to comprise authorisations and clearances from governmental and regulatory bodies upon receipt of which the offer is conditional~~ (for example, the consent of a competition authority)~~ and which relate to the question of whether the offeror is permitted to acquire the offeree company or one or more of its assets.

…

4. Directors' irrevocable commitments and letters of intent

…

4.3 Provisions which have previously appeared in irrevocable commitments given by offeree company shareholders who are also directors of the offeree company and which the Executive regards as being in breach of Rule 21.2 have included commitments:

…

(h) to conduct the offeree company's business in a particular manner prior to an offer becoming ~~wholly~~ unconditional.

…

7. Bid Conduct Agreements

…

7.2 It is therefore important that parties to an offer who wish to enter into a Bid Conduct Agreement, and their advisers, ensure that the agreement only contains provisions which are permitted by one of the exclusions listed in paragraphs (i) to (vii) of Rule 21.2(b). Provisions which the Executive regards as being prohibited by Rule 21.2(a), and which are not permitted by any of the exclusions in Rule 21.2(b), include, for example:

…

(b) an obligation relating to the conduct of the offeree company's business prior to an offer becoming ~~wholly~~ unconditional (or a scheme becoming effective);

…

7.4 In addition, the Executive considers that Rule 21.2 does not prohibit an offeree company from entering into an agreement, arrangement or commitment which is conditional upon the offer becoming or being declared ~~wholly~~ unconditional. This is because the Executive considers that such an agreement, arrangement or commitment would not have the effect of deterring a competing offeror.

…

8. Inducement fees payable by the offeree company to an offeror

8.1 Notwithstanding the general prohibition of offer-related arrangements, Note 1 ("*Competing offerors*") and Note 2 ("*Formal sale process*") on Rule 21.2 explain that, in certain limited circumstances, the Panel may permit an offeree company to enter into one or more inducement fee arrangements with an offeror (or offerors) provided that:

…

(b) any inducement fee is capable of becoming payable only if an offer becomes or is declared ~~wholly~~ unconditional.

…

9. "Whitewash" transactions

9.1 Note 3 ("*"Whitewash" transactions*") on Rule 21.2 explains that the prohibition on offer-related arrangements also applies in the context of a "whitewash" transaction, i.e. a transaction involving the issue of new securities as consideration for an acquisition or a cash subscription, as referred to in Note 1 of the Notes on Dispensations from Rule 9.

9.2 The Executive will, however, normally be willing to grant a dispensation from Rule 21.2 in respect of offer-related arrangements which are necessary in order to effect such a transaction. The Executive recognises, for example, that it will likely be necessary for the offeree company to enter into certain commitments in relation to the issuance of the new securities and the terms of the sale and purchase of any assets. It is not the intention of the Executive to prohibit such transactions or to prevent them from becoming legally effective.

9.3 When granting a dispensation from Rule 21.2 the Executive will be concerned to ensure that the transaction in question should not properly be characterised as an offer and that the primary objectives of Rule 21.2, as described in paragraph 1.2 of this Practice Statement, are not offended.

9.4 In particular, this means that any arrangements to be entered into by the offeree company in connection with the transaction should not:

(a) restrict the ability of the board of the offeree company to consider or pursue an offer, as an alternative to the transaction, should it so wish; or

(b) result in a competing offeror incurring any undue costs if it were to make a successful offer for the offeree company.

9.5 It is not the Executive's practice to review draft agreements entered into in connection with a whitewash transaction in advance of their execution in order to identify whether any provisions are not capable of benefiting from the dispensation from Rule 21.2 described above. The Executive considers that this is the responsibility of the parties to the transaction and their advisers. However, the Executive should be consulted at the earliest opportunity in all cases where there is any doubt as to whether a provision which is proposed to be included in such an agreement is capable of benefiting from such a dispensation.

9.6 In order to ensure that the parties to a whitewash transaction are able to comply with any relevant direction made by the Panel, it is best practice to include in any relevant agreement(s) the clause prescribed in paragraph 7.7 above.

~~9~~10. Consulting the Executive

~~9.1~~ The Executive should be consulted at the earliest opportunity in all cases where there is any doubt as to whether a proposed agreement, arrangement or commitment is prohibited under Rule 21.2. ~~9.2~~ In addition, the Executive should be consulted at the earliest opportunity in all cases where it is proposed that an offeree company should enter into one or more inducement fee arrangements.

8 October 2015

Last a~~A~~mended ~~12 September 2016~~ 5 July 2021

PRACTICE STATEMENT NO 30

RULE 21.3 – INFORMATION REQUIRED FOR THE PURPOSE OF OBTAINING REGULATORY CONSENTS

1. Introduction

…

1.2 The Panel Executive understands that, in certain circumstances, an offeree company may consider it necessary to provide a limited amount of commercially sensitive information ("Restricted Information") to certain lawyers or economists advising the first offeror on an "outside counsel only" basis for the purposes of enabling them to consider the need for and, where necessary, obtain ~~the consent of a competition authority or other regulatory body~~ an official authorisation or regulatory clearance, but may not wish to provide (or may be constrained by applicable law or regulation from providing) the Restricted Information directly to the first offeror or any competing offeror.

…

3. Relevant factors considered by the Executive

…

(a) Recipients of the Restricted Information

…

3.3 The Executive acknowledges that it may be necessary for the Clean Team to include lawyers or economists from firms in the jurisdictions where ~~competition authority or other regulatory consents~~ official authorisations or regulatory clearances are or may be required. However, the Executive expects the number of individuals included in the Clean Team to be kept to an absolute minimum.

…

4. Details to be provided to the Executive

4.1 The following details and confirmations should be given to the Executive in writing in order for it to consider whether to apply Rule 21.3 in the manner set out in this Practice Statement:

…

(c) confirmation from the offeror that:

…

(ii) no director or employee of the offeror will receive or have access to any Restricted Information until the offer becomes unconditional ~~in all respects~~; and

…

8 October 2015

Last a~~A~~mended ~~12 September 2016~~ 5 July 2021

PRACTICE STATEMENT NO 31

STRATEGIC REVIEWS, FORMAL SALE PROCESSES AND OTHER CIRCUMSTANCES IN WHICH A COMPANY IS SEEKING POTENTIAL OFFERORS

…

3. Formal sale processes

(a) Announcement and conduct of a formal sale process

…

3.2 Note 2 on Rule 21.2 provides that where, prior to an offeror having announced a firm intention to make an offer, the board of the offeree company announces that it is seeking one or more potential offerors by means of a formal sale process, the Panel will normally grant a dispensation from the prohibition in Rule 21.2, such that the offeree company will be permitted to enter into an inducement fee arrangement with one offeror (who has participated in that process) at the time of the announcement of its firm intention to make an offer. Any such inducement fee will be subject to the provisos set out in Note 1(a) and (b) on Rule 21.2, i.e.:

(a) the value of the inducement fee must be de minimis; and

(b) the inducement fee must be capable of becoming payable only if an offer becomes or is declared ~~wholly~~ unconditional.

…

7 July 2017

Amended 5 July 2021