The City of London Law Society

The Law Society

PCP 2022/3 The Offer Timetable in a Competitive Situation

13 January 2023

Introduction

1. The views set out in this response 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.

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Response

5. We support introducing greater clarity in relation to the timetable of competitive deals (in particular where different offer structures are being used) and we therefore welcome the Panel's consultation on this topic.

Q1 Should Note 2 on Rule 32.5 be amended as proposed?

Frustrating action

6. In relation to paragraph 2.10 of the Consultation, we do not consider that the sanction of a scheme should have the potential to constitute frustrating action for the following reasons.

7. The target company shareholders will (necessarily) have approved the scheme (by a higher majority than would be required for an approval of frustrating action under R21.1(a)) and will (by special resolution) have authorised the board to take such action as it considers appropriate to implement it.

8. In circumstances where target company shareholders have approved the scheme in the knowledge of the final price and terms of the competing offer, clearly the sanctioning of the scheme should not be regarded as frustrating action, and we do not believe the position should be any different where shareholder approval is given before the final price and terms of the competing offer are known. In this context, we would note that we are not aware of a requirement in any other R21.1 scenario for there to be finality of the offer terms before target company shareholders can validly approve, and the directors validly implement, a transaction that falls within R21.1.

9. Once the scheme has been approved by shareholders, in our view it is also analogous to part implementation under R21.1(c)(v) as all the terms of the "contract" have been agreed and it would therefore seem inconsistent to treat it as frustrating action.

10. In addition to the approval of the scheme, we would also note that there are further protections for target company shareholders, including:

    - The directors of the target company will have to take account of their fiduciary duties

(including, in the case of a UK company, their statutory duty to act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole) when determining whether to apply to seek the Court's sanction of the scheme in circumstances where a competing offer has been made.

- The Court ultimately has discretion as to whether or not to sanction the scheme and in this context will have regard to any intervening developments (including the emergence of a competing bid) following the shareholder meetings which may mean that shareholders would not have approved the scheme had they been aware of that new fact or development at the time of voting. Furthermore, counsel to the target company will have a duty to draw the attention of the Court to any such new fact or development. Further, target company shareholders are able to attend the sanction hearing and make submissions to the Court either in person or through their own counsel should they seek to oppose the sanction of the scheme.

11. For completeness, in the event the Panel does not agree with the points made above and considers there is a residual possibility that proceeding to seek sanction of a scheme theoretically constitutes frustrating action we assume that the Panel (a) would not object to the inclusion (in the relevant shareholder resolutions relating to the scheme) of language directing (as opposed to authorising) the target company directors to proceed with the sanction of the scheme following its approval notwithstanding the emergence of any alternative proposals and (b) if such language were included (and appropriately drawn to the attention of target company shareholders), the Panel would not consider the inclusion of such language as being prohibited by R21.2 or proceeding to sanction of the scheme in those circumstances to be capable of constituting frustrating action given such action would have been explicitly approved by the target company's shareholders already and that any such direction given by way of special resolution would be binding on the directors of the target company in accordance with its terms. We also consider it should be unobjectionable for a target board to state in the scheme circular (or a supplement issued prior to the date of the shareholder meetings) that in the absence of an offer being made by such date which (after taking advice from the Rule 3 adviser) it considered superior, it intended to proceed to seek the Court's sanction of the scheme, and that should not constitute frustrating action as shareholders would have voted for the scheme in the knowledge of that disclosure.

Mini long-stop dates

12. How would the Panel approach mini long-stop dates in a competitive scenario where the Panel resets the timetable in accordance with revised N2 on R32.5 - would the "use it or lose it" approach be dealt with differently?

13. If not, this could leave the bidder proceeding by way of a scheme in a potentially difficult position if the re-set date for the sanction hearing is later than the relevant mini long-stop date. In those circumstances, we think that the bidder proceeding by way of a scheme should, with the Panel's consent, be permitted to set a new mini long-stop date relating to the sanction hearing without the need for agreement from the target company (or, if it wished, invoke the condition). Assuming the Panel agrees with this view, it would be helpful if it could set out its likely practice in responding to any such request to set a new mini long-stop date or to invoke the condition.

14. In addition, in relation to the mini long-stop date for the shareholder votes, if both bidders are proceeding by way of scheme, and bidder 2 does not emerge until after the bidder 1 scheme document has been published, then bidder 1 will have only a few weeks to decide whether to waive the shareholder vote mini-long-stop date. In contrast, and assuming either or both bidders need to obtain regulatory clearances, bidder 2 will get the chance to set a vote mini long-stop date by reference to whenever the shareholder votes are actually expected to be held. Should bidder 1 therefore have the ability for it to re-set its shareholder vote mini long-stop date to reflect the new timetable with Panel consent and without target company agreement?

15. From a target company perspective, the possibility of bidder 1 invoking its mini long stop date following adjournment of the shareholder vote to accommodate bidder 2's timetable is a matter which the target company board should be entitled to take into account in deciding whether to press

on with the scheme vote and subsequent sanction on the original timetable (weighed against the potential risks associated with bidder 2's regulatory clearance requirements). This further supports our view that such a course of action should not be regarded as frustrating action where appropriately authorised by the target company shareholders.

Posting deadlines

16. In a competing scheme scenario, would the Panel continue to require the scheme document for bidder 2 to be published within 28 days of its firm announcement?

Holding an auction before the satisfaction/waiver of condition relating to a regulatory clearance

17. The commentary in the Consultation (paragraph 2.5) recognises that, if all the parties agree that an auction is to be held before satisfaction or waiver of a condition relating to a regulatory clearance, the Panel will normally agree to this. However, absent such agreement, the impact of the proposed changes is that parallel regulatory reviews of the same transaction may be required before the auction can be held. This contrasts with the Panel's practice of permitting the holding of an auction on competing bids involving a scheme, prior to the satisfaction or waiver of a condition relating to a regulatory clearance, such that only a single bidder has to obtain its clearance before the shareholder vote. There seem to be two potential drawbacks.

18. First, requiring participation in parallel regulatory reviews of the same transaction places a significant cost and time burden on the target, and increases deal uncertainty. In many cases, regulatory clearances may be material but there is a low likelihood of failure to obtain them, such that holding the auction before they have been obtained should not unduly prejudice the target or shareholders of the target.

19. Secondly, some regulators cannot, or are reluctant to, review more than one filing for merger control or foreign investment/national security clearance in relation to the same transaction, either because the relevant regime does not accommodate parallel reviews and/or because the regulator does not want to expend resources reviewing transactions that are not certain to proceed. For example, in China, SAMR (and its predecessor MOFCOM) will only accept a filing for review without executed transaction documents in exceptional circumstances (i.e. where it is absolutely necessary on the basis that the laws or rules of another jurisdiction require a filing to be made without an executed transaction document). It is in SAMR's discretion whether such circumstances exist and SAMR has previously agreed on a case by case basis (rather than a matter of policy) to run its process on the basis of a 2.7 announcement. However, as a discretionary matter, there is no guarantee that they will continue to do so in every case.

20. Consequently, it seems preferable for the Code to recognise that there may be instances (such as those outlined above) in which it will remain desirable to retain the flexibility to hold the auction at an earlier stage, without unanimous consent of target and bidders. Similar issues also pertain to the treatment of bids involving only competing contractual offers, although such fact patterns are seemingly rare.

Q2 Should: (a) Note 1 on Rule 31.3; (b) the Note on Rule 31.4; and (c) the definition of "Day 46" in Appendix 8, be amended as proposed and the new Note on Section 7 of Appendix 7 be introduced as proposed?

21. We do not have any comments on these proposed amendments.