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

Sent via email: supportgroup@thetakeoverpanel.org.uk

13 January 2023

Dear John,

**UK Finance response to the public consultations - PCP2022/3 and PCP2022/4**

UK Finance is grateful for the opportunity to respond to public consultation papers PCP 2022/3: The Offer Timetable in a Competitive Situation and PCP2022/4: Miscellaneous Code Amendments.

UK Finance is the collective voice for the banking and finance industry. Representing more than 300 firms across the industry, we seek to enhance competitiveness, support customers and facilitate innovation.

The role of the Takeover Panel (the 'Panel') and the Takeover Code (the 'Code') are vital for our members as they participate and advise clients active in mergers and acquisitions, and other activities covered by the Code. Our Corporate Finance Committee brings together these members, and we appreciate the time you have spent engaging with the Committee regarding various Code amendments including the current two consultations.

Please find attached our responses to the two consultations.

As ever, we remain at your disposal should you wish to discuss further. We look forward to continued engagement with the Panel on Code related matters.

Yours sincerely,

Avanthi Weerasinghe
Principal, Capital Markets & Wholesale Policy
UK Finance

**UK Finance response to the public consultation - PCP 2022/3 - The Offer Timetable in a Competitive Situation**

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

Timing of resolution of competitive situations involving schemes of arrangement.

We believe further consideration should be given to the consequences of adopting the default timetable for the resolution of competitive situations involving offers proceeding by way of scheme of arrangement proposed in paragraphs 2.3-2.6 of the PCP.

This appears to the Committee to be driven by an assumption by the Code Committee that in all offers, regardless of method of implementation, an offeror should have the right to satisfy or waive any anti-trust or regulatory conditions before being required to consider its final offer, in the context of an auction process.

We recognise that in the context of a hostile offer (where there may well be no facilitation by an offeree in respect of the regulatory clearance process or other diligence provided) that there is a strong argument for D46 falling after any D37 freeze. However, in the context of multiple offerors seeking to proceed by way of (a recommended) scheme we consider that implicit within the recommendation by the offeree and the financial level of the offeror's offer is a well negotiated anti-trust and regulatory analysis. Accordingly, we think the assumption above regarding an offeror needing the clarity on its antitrust outcome is more arguable and/or marginal and therefore the disadvantages of this proposed default position should be carefully considered by the Code Committee.

Disadvantages would include:

- for transactions where the offeror requires shareholder approval, a significant increase in execution risk for offeree shareholders as the offeror would, we believe, be less inclined to agree to early shareholder vote – essentially giving the offeror an option on the offer until the end of the regulatory clearance process;

- risk of significant and real business damage, distraction and cost through a requirement to take multiple parties through global anti-trust and regulatory clearances;

- risk of significant and real business damage through business uncertainty – in the context of UK public M&A very few deals lapse on regulatory issues meaning that even in the long period when the regulatory processes are ongoing there is relatively high degree of confidence in the outcome and an ability to plan and retain people. In contrast, having multiple possible owners for a protracted period would be harmful to a business;

- potential for increased churn in the offeree share register.

- offerors (both PE backed offerors and strategic offerors) being potentially less willing to put forward offers due to the prolonged uncertainty relating to the outcome of the shareholder vote.

We note that the Code Committee may contend that it is within the parties' ability to agree a different timetable. However, our view is that the establishment of a default by the Panel, will in the context of a competitive process, make it much more challenging for the offeree to agree an early auction process than would be the case at present – where Panel endorsed market practice provides strong guidance.

We would suggest that all the recent run of auction procedures have been resolved by an early auction process which has worked satisfactorily from all parties' perspective. Individual committee members are unaware of a situation where an offeror has argued for a later auction date in order to satisfy or waive its regulatory conditions in order to be in a position to increase its offer.

Our contention therefore is that the resolution of competitive situations for offers being implemented by scheme of arrangement works well at present and the Panel Executive should support an offeree in reaching an agreement of a date by reference to the court timetable. We recognise the issue that arises where there is no court timetable established and/or no documents posted and again we believe these issues require further consideration rather than the imposition of a default. Committee members note an offeror could always elect to switch to an offer which would have the consequence of moving the auction to the back end of its regulatory timetable if it did not agree with the position taken by the offeree.

Rule 21.1 – if the 'faster' offeror is proceeding by way of a scheme of arrangement

Committee members also considered that the Code Committee could usefully set out further guidance on the suggestion that a second shareholder vote could be required in the event an offeree sought to sanction a scheme of arrangement in respect of an offer where there was a competing offeror. This seemed inconsistent with the concept of part implementation in Rule 21.1 of the Code and risks unintended consequences in terms of vote timing similar to those set out above. Further guidance from the Code Committee on this point would be helpful as to the circumstances where it might arise and the factors which would be taken into account.

**Q2: Should:**

**(a) Note 1 on Rule 31.3 be amended as proposed?**

Yes.

**(b) the Note on Rule 31.4 be amended as proposed?**

Yes.

**(c) the definition of "Day 46" in Appendix 8, be amended as proposed?**

Yes.

**(d) the new Note on Section 7 of Appendix 7 be introduced as proposed?**

Yes.