

AMENDMENTS MADE TO PRACTICE STATEMENT NO 5 (RULE 13.5 – INVOKING CONDITIONS AND PRE-CONDITIONS) ON 27 OCTOBER 2023

References to sections and paragraphs are references to Practice Statement No 5, as amended by the Panel Executive on 27 October 2023, unless otherwise stated. References to the “**2021 Practice Statement**” are to Practice Statement No 5 as at 5 July 2021, a copy of which is set out in the Appendix for ease of reference.

1. Section 1 – Introduction

- 1.1 Section 1 provides a new introduction to Practice Statement No 5, which includes an overview of the contents of the other sections of the Practice Statement.

2. Section 2 – Conditions to offers and invoking conditions

- 2.1 Section 2 includes an overview of Rule 13.1 and Rule 13.5(a).
- 2.2 Section 2 also includes a revised breakdown of the different categories of condition (previously in paragraph 1.2 of the 2021 Practice Statement). The amended categories:
- (a) include a new category of conditions in relation to long-stop dates and so-called “mini-long-stop dates” (Category 3, in paragraph 2.3(c)); and
 - (b) split into separate categories:
 - (i) bespoke conditions relating to the (non-)occurrence of a specific event or circumstances in relation to the offeree company (Category 4, in paragraph 2.3(d)); and
 - (ii) specific or general conditions relating to the obtaining of an official authorisation or regulatory clearance (including conditions relating to there being no “phase 2” reference or similar process) (Category 5, in paragraph 2.3(e)).
- 2.3 Paragraphs 2.4 to 2.6 explain the application of Rule 13.5(a) to the different categories of conditions. Paragraph 2.6 includes the guidance published in paragraph 9.31 of [PCP 2020/1](#) (*Conditions to offers and the offer timetable*) in relation to the types of condition which the Panel may, in accordance with Rule 13.5(b)(viii), agree will not be subject to Rule 13.5(a) in the particular circumstances.

3. Section 3 – The Executive’s approach to the invocation of conditions

(a) Introduction

3.1 Paragraphs 3.1 to 3.3 provide an overview of the Executive’s approach when considering whether to permit the invocation of a condition.

(b) Factors to be taken into account

(i) All relevant conditions

3.2 The factors to be taken into account for all relevant conditions, as listed in paragraph 3.5 of Practice Statement No 5, are broadly the same as those listed in paragraph 4.1 of the 2021 Practice Statement, with the following changes:

(a) in paragraph 3.5(d) (previously paragraph 4.1(d) of the 2021 Practice Statement), minor language changes have been made, as follows:

“whether the circumstances that have arisen could ~~not~~ have reasonably been foreseen at the time of the firm offer announcement and, if they could, the likelihood of the circumstances arising-occurring.”;

(b) in paragraph 3.5(e), examples of actions which will not be supportive of invocation have been included (based on paragraph 9.49 of [PCP 2020/1](#)); and

(c) in paragraph 3.5(f), an explanation has been added that the Executive will be more likely to consent to a request by an offeror to invoke a condition if the offeree board agrees that this is the appropriate course of action (see paragraph 9.50 of [PCP 2020/1](#)).

(ii) General protective conditions, including a material adverse change condition

3.3 Paragraphs 3.6 to 3.8 are the same in substance as paragraphs 3.1 and 3.3 of the 2021 Practice Statement.

(iii) Phase 2 Reference Conditions

3.4 Paragraph 3.9 clarifies that the Executive’s approach in this area applies to phase 2 references by the Competition and Markets Authority and/or “phase 2” or similar “in-depth” reviews by another antitrust or other governmental or regulatory body in relation to the obtaining of a material official authorisation or regulatory clearance. Previously, paragraph 4.3 of the 2021 Practice Statement referred to a “Phase 2 CMA reference (or equivalent reference or process)”.

3.5 The factor listed in paragraph 3.10(a) (previously paragraph 4.3(a) of the 2021 Practice Statement) has been amended. Rather than considering “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”, paragraph 3.10(a) states that the Executive will take into account “the potential impact of the reference or process on the business of the offeror and/or the offeree company, including the management time, costs and other burdens involved in pursuing it”. This reflects paragraph 9.20 of [RS 2020/1](#), which confirmed that the Executive would take into account the costs of a phase 2 reference.

- 3.6 In relation to the factor listed in paragraph 3.10(b) (previously paragraph 4.3(b) of the 2021 Practice Statement), the new wording “because of the low probability either of obtaining clearance at all or of obtaining clearance before the long-stop date” reflects paragraphs 9.21 and 9.22 of [RS 2020/1](#).

- 3.7 Paragraphs 3.11 to 3.13 contain new guidance on the Executive’s approach to Phase 2 Reference Conditions.

(iv) Regulatory clearance conditions

- 3.8 Paragraph 3.14 is the same in substance as paragraph 4.2 of the 2021 Practice Statement.

4. Section 4 – Timetable suspensions

- 4.1 Section 4 summarises the relevant provisions of the Code relating to the suspension of the offer timetable when one or more conditions relating to an official authorisation or regulatory clearance have not been satisfied or waived by 5.00 pm on the second day prior to Day 39.

5. Section 5 – Long-stop dates

- 5.1 Section 5 summarises the relevant provisions of the Code relating to long-stop dates of contractual offers and schemes of arrangement and provides guidance on the Executive’s approach in this area.

- 5.2 In line with paragraph 4.13 of [RS 2020/1](#), paragraphs 5.3 and 5.7 explain that the Executive expects that if, on the long-stop date (and subject to the acceptance condition not being satisfied in the case of a contractual offer), a review by a regulatory body in relation to a material official authorisation or regulatory clearance has not concluded, the offeror will normally be able to lapse its offer. This is on the basis that the action (if any) that needs to be taken to obtain the authorisation or clearance will not normally be sufficiently clear.

- 5.3 Paragraph 5.4 explains that, for the purposes of Rule 12.3, the Executive will consent to the extension of a long-stop date without the agreement of the offeree company only in

limited circumstances, such as to allow an offeror to align its long-stop date with that of a competing offeror (see paragraphs 4.28 to 4.32 of [RS 2020/1](#)).

6. Section 6 – Pre-conditions

6.1 Section 6 is the same as section 5 of the 2021 Practice Statement.

7. Section 7 – Agreements relating to the invocation of conditions to an offer

7.1 Section 7 cross-refers to section 3 of Practice Statement No 29 (Rule 21.2 – Offer-related arrangements).

27 October 2023

Appendix**2021 Practice Statement**

See over

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;
 - (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 "material adverse change" condition).

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 Rule 13.5(a) provides that:

"An offeror may only invoke 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

PRACTICE STATEMENT NO 5 *CONTINUED*

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.”.

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 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

PRACTICE STATEMENT NO 5 CONTINUED

question which the offeror sought to rely on was a “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. 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 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. 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 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 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:

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

PRACTICE STATEMENT NO 5 *CONTINUED*

- (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;
 - (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.

PRACTICE STATEMENT NO 5 CONTINUED**5. Pre-conditions**

This Practice Statement applies in the same way to the invocation of pre-conditions permitted under Rule 13.3.

Practice Statements are issued by the Panel Executive to provide informal guidance to companies involved in takeovers and practitioners as to how the Executive normally interprets and applies relevant provisions of the Takeover Code in certain circumstances. Practice Statements do not form part of the Code. Accordingly, they are not binding on the Executive or the Panel and are not a substitute for consulting the Executive to establish how the Code applies in a particular case. All Practice Statements issued by the Executive are available on the Panel's website at www.thetakeoverpanel.org.uk.

28 April 2004

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