

UK Takeover Panel Publishes New Edition of the Takeover Code

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Introduction

On 12 September 2016, the UK Takeover Panel published the twelfth edition of the Takeover Code, replacing in its entirety the previous edition published in September 2011 in the wake of Kraft's takeover of Cadbury.

Over the last five years the Code and the Panel's Practice Statements have been amended on a number of occasions. Whilst not as far-reaching as the amendments that were introduced in September 2011, amendments to the eleventh edition of the Code have focused on:

- profit forecasts and quantified financial benefits statements ([Client Memorandum on RS 2012/1](#));
- pension scheme trustee issues;
- companies that are subject to the Code ([Client Newsflash on RS 2012/3](#));
- changes in the UK regulatory regime including the creation of the Financial Conduct Authority (FCA), the Prudential Regulatory Authority (PRA) and the Competition and Markets Authority (CMA);
- post offer undertakings and intention statements ([Client Memorandum on RS 2014/2](#));
- offer related arrangements and equality of information to competing offerors ([Client Memorandum on PS 29 and PS 30](#));
- the treatment of dividends, restriction and suspension of voting rights and the definition of "acting in concert" ([Client Memorandum on RS 2015/1](#), [RS 2015/2](#) and [RS 2015/3](#)),

and have also included a number of miscellaneous changes to reflect customary Panel practice and interpretation of the Code ([Client Memorandum on RS 2014/1](#)).

The new twelfth edition of the Code includes the final text of the amendments that came into effect on 12 September 2016 relating to the communication of and distribution of information during an offer. The Panel published a consultation paper (PCP 2016/1) on the proposed changes in February 2016 ([Client Memorandum on PCP 2016/1](#)) and confirmed the proposed adoption of the changes, subject to certain modifications, in a response statement (RS 2016/1) published in July 2016. The key elements of the new rules are summarised below.

Equality of information to shareholders

Following the Panel's February 2016 consultation, the Code now provides that:

- Where material new information or significant new opinions relating to an offer or a party to an offer are published by the bidder or the target, such information or opinions must be announced via a regulatory information service (RIS) at the same time.

- Similarly, this is the case where such information or opinions are provided to any shareholder (or other person interested in relevant securities) of the bidder or the target, a holder of publicly-traded debt securities acting in its capacity as such, any investment manager, adviser or analyst – each a ‘relevant person’ – or the media.
- Any presentation or other document relating to an offer or a party to an offer provided to, or used in any meeting with, a relevant person should be published on a website promptly after it is so provided or used.
- Any written communication relating to an offer or the financial performance of a party to an offer provided to the media must be published on a website promptly following its publication by the media.

In PCP 2016/1, the Panel recognised that there are certain circumstances where it would be appropriate for information or opinions to be provided in confidence by a party to an offer to a relevant person. The Code now provides that:

- Before the start of an offer period, material new information or significant new opinions relating to an offer or a party to an offer may be provided in confidence by the bidder or the target to a relevant person. However, an announcement is required when discussions relating to a possible offer are extended to include more than a very restricted number of people.
- During the offer period – but before the announcement of a firm or revised offer – the Panel may consent to the provision of such information or opinions in confidence to one or more relevant person.
- Any such information or opinion provided to a relevant person in such circumstances must be published in – or by no later than the date of – the announcement of the firm or revised offer. However, where the information or opinion is provided by the target and the target board is not recommending the offer, such information or opinion is to be published in (or by no later than the date of) the first substantive announcement made by the board in response to the announcement of the hostile offer.
- Any presentation or other document provided to a relevant person in such circumstances must be published on a website promptly after the announcement of the firm or revised offer. However, where such document is provided by the target and the target board is not recommending the offer, such information is to be published on a website promptly after the first substantive announcement made by the board in response to the announcement of the hostile offer.

Advertisements and use of videos and social media

The rules on the publication of advertisements have been amended in the Code.

Specifically, the Panel has:

- provided an exception from the need to obtain the Panel's consent to the publication of corporate image advertisements by an offeror or target company in the case of a recommended firm offer where there is no competitive situation;
- deleted certain exceptions to the prohibition on publishing advertisements during the course of an offer; and
- removed the previous Code requirement that an advertisement published during the course of an offer must include a statement by the relevant directors accepting responsibility for the information in such advertisement.

The Code also provides that videos, webcasts and audio-only communications published by the bidder or the target which include information or opinions relating to an offer or to the financial performance of a party to an offer must comprise only a director or senior executive reading from a script or participating in a scripted interview. Any such video, webcasts and communications may be published only with the Panel's consent and must be published on a website.

In addition, the Code now states that any information or opinions relating to an offer published by the bidder or the target via social media should be limited to the information and opinions which have been published via an RIS announcement or on its website. Such information or opinions must be prepared with the highest standards of care and accuracy and must be adequately and fairly presented.

Chaperoning meetings and communications with shareholders and others

The Panel has amended the Code requirements that meetings (whether physical or virtual) between the bidder or the target and a relevant person must be attended by the financial adviser or corporate broker to the bidder or the target (as appropriate) and that such adviser or broker must confirm in writing to the Panel that no material new information was provided and no new significant new opinions were expressed during such meeting.

Specifically, the Code now provides that:

- for meetings that take place between a financial adviser or a corporate broker to the bidder or the target and any shareholder, investment manager, investment adviser or investment analyst (where no-one else is present), there is no need for the adviser or broker to provide any written confirmation to the Panel; and
- for meetings that take place between an adviser to the bidder or the target (other than a financial adviser or a corporate broker) and any "sell-side" investment analyst (where no-one else is present), there is no need for a financial adviser or corporate broker to attend such meetings. However, a senior adviser who must be appropriately briefed by a financial adviser must provide the relevant written confirmations to the Panel.

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