

UK Takeover Code – Dividends, Acting in Concert and Restrictions and Suspensions of Voting Rights

October 30, 2015

Introduction

The UK Takeover Panel has recently confirmed a number of amendments to the UK Takeover Code in three Response Statements to its public consultations earlier this year.

On 23 October 2015, the Panel published:

- **Response Statement 2015/1** to its May 2015 consultation on the treatment of dividends (**PCP 2015/1**);
- **Response Statement 2015/2** to its July 2015 consultation on additional presumptions to the definition of “acting in concert” (**PCP 2015/2**); and
- **Response Statement 2015/3** to its July 2015 consultation on the use of restrictions and suspensions of voting rights to avoid the normal application of Rule 9 (**PCP 2015/3**).

The amendments to the Code set out in these Response Statements will take effect on 23 November 2015.

Dividends (RS 2015/1)

The Panel confirmed in RS 2015/1 that it has adopted the amendments proposed in PCP 2015/1, the purpose of which are to clarify the application of existing Code provisions and to ensure greater alignment of the Code with the Panel's existing practice.

Right to reduce offer consideration if a dividend is paid

Rule 2.5(a) of the Code provides that if a bidder makes a “possible offer” announcement which includes the terms on which an offer might be made for a target company, the bidder is bound by those terms if a firm offer is subsequently made unless it specifically reserves the right not to be bound in specific or exceptional circumstances. In particular, Rule 2.5(a)(i) provides that where a “possible offer” announcement includes any indication of offer price, any offer subsequently made by the bidder will be required to be made on the same or better terms.

Following its May 2015 consultation, the Panel has concluded that the Code should require a bidder in a Rule 2.5(a)(i) statement, a “firm offer” announcement and an offer document, to state that it will have the right to reduce the offer consideration by the amount of any dividend made by the target company, save where it expressly chooses to confirm in the relevant document that target shareholders will be entitled to receive and retain any such dividend in addition to the offer consideration. In addition, the Panel has decided that it must be a term of the offer that if the bidder exercises the right to reduce the offer consideration by the amount of any such dividend that has not been paid, the target shareholders will be entitled to receive that dividend.

In relation to these amendments, the Panel has noted that:

- Dividends would include final or interim dividends already announced or declared (or that may be announced or declared during the course of an offer), as well as dividends, which, at completion of the offer have not yet been paid but which remain payable to the target's shareholders.

- A declared dividend may not be approved by the target's shareholders or it may be cancelled by the target. In this situation, the Panel stated that the bidder should have the option, but not an obligation, to increase the offer consideration. However, if the bidder had purchased shares "cum dividend", then upon the dividend not being approved or being cancelled, the bidder would be required to increase its offer to ensure that accepting shareholders received the same value as those investors who had already sold shares to the bidder.
- The amendments also apply to any other distributions made by a target company. The Panel will have to be consulted where the offer consideration is to be reduced by the value of a non-cash distribution.

Effect of a dividend where the bidder has made a "no increase statement"

Rules 2.5(a)(ii) and 32.2 provide that if a bidder's "possible offer" announcement, its "firm offer" announcement or any subsequent statement refers to the fact that the relevant terms of an offer would not be increased or are final, the bidder would not be allowed subsequently to make an offer on better terms unless it specifically reserves the right not to be so bound by such "final" terms in specific or exceptional circumstances.

Historically, where a target company paid a dividend (or other distribution) after such announcement had been made by a bidder, the Panel would, as a matter of practice, have required the bidder to reduce the offer consideration by the relevant dividend amount so that the overall value receivable by the target's shareholders would remain the same in the absence of any specific reservations. The amendments to the Code will introduce new notes to Rules 2.5 and 32.2 to codify this practice. In addition, the Panel has noted that in this situation, such reduction would need to be announced as soon as practicable by the bidder via RIS and it may require the bidder to send a copy of such announcement directly to the target shareholders.

Impact of dividends on a minimum offer price established by share purchases

In general, Rules 6, 9.5 and 11.1 provide that in certain circumstances, the offer price for a public takeover must be equal to or more than the highest price paid by the bidder for any shares in the target company during the offer period and certain other specified periods (e.g. for Rule 9 mandatory offers, during the 12 months prior to the announcement of the offer). The Panel has made certain clarificatory amendments to the existing notes to these rules to clarify the impact of dividends on any such minimum offer price.

Restrictions and Suspensions of Voting Rights (RS 2015/2)

RS 2015/2 sets out the Panel's amendments to the definition of "Voting Rights" in the Code in relation to restrictions and suspensions of voting rights and other related amendments. These changes codify the Panel's existing practice in relation to the treatment of shares subject to such restrictions and eliminate the scope for a company to issue restricted shares as a means of avoiding the normal application of Rule 9 (including the requirement for a whitewash).

"Voting Rights" is currently defined in the Code as "all the voting rights attributable to the share capital of a company which are currently exercisable at a general meeting". This definition will be amended by the Panel to provide that, other than treasury shares, shares which are subject to a restriction on the exercise of voting rights, or to a suspension of voting rights, should nonetheless be regarded for the purposes of the Code as having voting rights which are currently exercisable at a general meeting. It is important to note that these amendments have no impact on the treatment under the Code of a class of shares which does not carry voting rights in any circumstances.

The Panel noted that there may be a small number of companies that have previously issued suspended voting shares and that such companies should consult the Panel to obtain a ruling regarding the application of the Code to such companies.

Additional Presumptions to the Definition of Acting in Concert (RS 2015/3)

Under the Code, persons who are or who are presumed to be acting in concert are treated as a single person such that, for example, their interests in shares must be aggregated when considering the application of the Rule 9.1 mandatory offer requirement. Similarly, dealings by persons who are acting in concert with the bidder or with the target company are treated under the Code as equivalent to dealings by the bidder or the target company (or its directors) and as such are relevant when considering the application of those Code provisions regulating dealings in securities.

The Panel noted that it has been established practice to presume certain persons to be acting in concert with each other even though they are not covered by the existing presumptions in the Code definition. RS 2015/3 codifies the Panel's existing practice by introducing new presumptions into the definition of "acting in concert" for the following categories of persons:

- a person, the person's close relatives, and related trust;
- the close relatives of a founder of a company to which the Code applies, their close relatives, and related trusts; and
- shareholders in a private company who sell their shares for the issue of new shares in a company to which the Code applies, or who, following the re-registration of that company as a public company become shareholders in a company to which the Code applies.

In addition, the Panel will introduce a new definition of "close relatives" which would normally (as a matter of presumption) include: (i) the person's spouse, civil partner or cohabitant; (ii) the person's children, parents, brothers, sisters, grandchildren and grandparents, and those of any person described in (i); and the spouse, civil partner or cohabitant of any person described in (ii).

The Panel has noted that the presumptions set out above are capable of being rebutted in any particular case. In particular, in relation to the presumption relating to private company shareholders, the Panel has noted that this presumption may be rebutted where such shareholders do not have a common interest, are acting independently of each other and will continue to do so. This would also be the case where such shareholders are independent institutional shareholders, as opposed to, individuals who founded or who otherwise became members of the private company.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Will Pearce	+44 20 7418 1448	will.pearce@davispolk.com
Simon Witty	+44 20 7418 1015	simon.witty@davispolk.com
William Tong	+44 20 7418 1089	william.tong@davispolk.com

© 2015 Davis Polk & Wardwell London LLP | 5 Aldermanbury Square | London EC2V 7HR

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's [privacy policy](#) for further details.

Davis Polk & Wardwell London LLP is a limited liability partnership formed under the laws of the State of New York, USA and is authorised and regulated by the Solicitors Regulation Authority with registration number 566321.