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UK Takeovers: Recap of recent Code developments

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The update recaps certain changes to the Takeover Code and relevant Takeover Panel and industry guidance issued since publication of the 14th edition of the Takeover Code six months ago.

On December 11, 2023, the Takeover Panel (the Panel) published the 14th edition of the Takeover Code (the Code) updated to reflect, among other things, changes to the restrictions on frustrating action in Rule 21 (read our client update summarising the changes made to the Code). Since then, and in keeping with its practice of revisiting the Code and providing guidance in light of evolving market practice, the Panel has commenced a public consultation on narrowing the scope of companies that are subject to the Code, updated a practice statement on conducting private sales processes and published bulletins reminding market participants of the Panel's approach to certain aspects of the Code.

Public Consultation Paper 2024/1: Proposal to narrow the scope of companies subject to the Code

On April 24, 2024, the Panel published consultation PCP 2024/1 in which it proposes to narrow the scope of companies to which the Code applies. The proposed amendments (discussed in this client update) are intended to refocus the application of the Code on those companies which expect to be subject to UK takeover regulation and to provide clarity and certainty about whether a company is subject to the Panel's jurisdiction.

The Panel has proposed to remove the 'residency test', which currently determines the application of the Code by reference to the location of a company's central management and control, in favour of focusing regulation on companies with registered offices in the UK, the Channel Islands or the Isle of Man which are listed on a UK regulated market, a UK multilateral trading facility or a stock exchange in the Channels Islands or the Isle of Man.

Practice Statement 31: Conducting a private sales process

On April 30, 2024, the Panel published amendments to Practice Statement 31 recognising that a company may run different types of sales processes – including a formal sales process (FSP), private sales process, strategic review and public search for potential offerors – and adopting a new practice in respect of private sale processes.

Whilst noting that the FSP remains a valid option for a company given the various benefits under the Code (including the ability of an offeree to offer an inducement fee and to require potential offerors not to request access to information provided to others), in a new section 4 of Practice Statement 31, the Panel formally acknowledges the concept of a private sale process comprising discussions between a company and more than one potential offeror regarding the possibility of a change of control of the company and confirms that it will normally grant dispensations from Rules 2.4(a) and (b) where a company is genuinely initiating a private sales process.

Broadly, Rules 2.4(a) and (b) provide that an announcement is required when a board is seeking one or more potential offerors and the company is the subject of rumour and speculation or there is an untoward movement in the company's share price or the number of potential offerors approached is to be increased to include more than a very restricted number of people (typically limited to six in total). Such announcement must identify any potential offeror with whom the company is in talks.

Practice Statement 31 now provides that where a company initiates discussions on a private basis with more than one potential offeror, whilst the company will continue to be subject to the obligation to make an announcement in the usual way, the Panel will normally grant a dispensation from the requirement to identify a potential offeror unless any potential offeror has been specifically identified in any rumour or speculation.

A company seeking dispensation from the obligation to identify any potential offeror from any announcement must consult with the Panel before initiating its sale process.

New section 4 of Practice Statement 31 confirms that unless a company converts a private sale process into a FSP (whether voluntarily or at the time an announcement is required under the Code), a potential offeror participating in a private sale process:

- will be subject to a 'put up or shut up deadline' if it is identified in any announcement released by the company; and
- will not be able to enter into an inducement fee arrangement with the company at the time of any announcement of a firm intention to make an offer.

Panel Bulletins

In the last six months, the Panel has published two new bulletins to remind practitioners and market participants of the operation of specific provisions of the Code in the light of certain issues of which the Panel had become aware. The new bulletins are summarised below and can be found on the Panel website, together with copies of previously published bulletins 1 to 5.

Panel Bulletin 6: Equality of information and representative directors (January 2024)

Bulletin 6 reminds offerees of the importance of Rule 20.1 (which ensures equality of information between offeree shareholders in respect of an offer) where a director of the offeree (a 'representative director') has been appointed by a shareholder in the offeree, and the offeree provides information to this representative director, who relays such information to the appointing shareholder.

Accordingly, the bulletin:

- notes that the advisers to the offeree should highlight to the offeree board and the representative director(s) as soon as possible the potential application of Rule 20.1, including with respect to sharing information in the ordinary course in accordance with past practice;
- recommends that Rule 20.1 should be considered before any information relating to an offer is provided by a representative director to an appointing shareholder; and
- recommends that the offeree should consult the Panel Executive to discuss the application of Rule 20.1 in respect of information provided to representative directors about an offer, in particular whether it may be appropriate for the Panel Executive to consent to a derogation from Rule 20.1.

Panel Bulletin 7: Offeror intention statements (May 2024)

Bulletin 7 reminds offerors of the importance of disclosing their intentions with regard to the business, employees and pension schemes of the offeree. Such disclosures enable shareholders to reach a properly informed decision on the takeover bid, assist the offeree board in giving its opinion on an offer, and facilitate the giving of informed opinions under Rule 25.9 by the offeree's employee representatives and pension scheme trustees.

The bulletin also notes that the Panel will reject the following common arguments that offerors put forward for why their intention statements are sufficient (on the basis that an offeror will almost always have formulated specific intentions on

such matters ahead of making a bid):

- the offeror's uncertainty about expected synergies;
- the offeror's only intention is to conduct a strategic review, following which it will properly formulate its intentions regarding the offeree's business;
- the non-necessity of disclosing headcount reductions which the offeror deems immaterial; and
- the fact that the offeror's post-intention statements are in 'standard form' or are similar to statements made by other offerors for different offeree companies.

Other relevant updates

On March 4, 2024, the City of London Law Society (the CLLS) published a revised version of its Conditions to and Certain Further Terms of the Offer, dated February 1, 2024 (the CLLS Offer Terms).

The illustrative CLLS Offer Terms are widely adopted by the market as the starting point for a takeover offer's general terms and conditions.

The revisions to the CLLS Offer Terms follow the Panel's revisions to Practice Statement 5 to reflect its approach to the interpretation and innovation of conditions to an offer. Specifically, the CLLS Offer Terms now include an example sweeper condition to address the scenario where a CMA Phase 2 clearance condition (or equivalent for a different jurisdiction) is waived following a Phase 2 investigation commencing, but Phase 2 clearance is then not received.

In addition, the revised CLLS Offer Terms helpfully now also include example conditions for the EU Foreign Subsidies Regulation and the UK's National Security and Investment Act.

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

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