

UK Takeovers: Panel confirms proposed changes to Rule 21 restrictions on frustrating action

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Rule 21 of the Takeover Code regulates the actions a target can and cannot take in order to ensure offers or possible offers for it are not frustrated. In keeping with its practice of revisiting the Takeover Code in light of evolving market practice, the Takeover Panel consulted on proposed changes to Rule 21 in May 2023 (PCP 2023/1), and last week confirmed amendments that will take effect from December 11, 2023 (RS 2023/1).

Rule 21.1: increased flexibility for a target to operate during an offer or possible offer

The restriction

- Rule 21.1 of the Takeover Code (Code) continues to seek to prevent a target taking actions that might frustrate an offer. In short, it provides that during a “relevant period” a target may not take a “restricted action” or any other action which may result in the frustration of an offer or possible offer, without the consent of the Takeover Panel (Panel) or shareholder approval.

The “relevant period”

- The “relevant period” lasts from when the target receives an approach or when an offer period starts (whichever is earlier) until the end of the offer period or, if no offer period begins, the seventh day following the date on which the target unequivocally rejects the latest approach (subject to specific rules for competitive and formal sales processes).

The restricted actions

- The Panel has sought to keep Rule 21.1 within its intended purpose and not prohibit actions that are unlikely to frustrate an offer or hinder a target in its ordinary course of business (particularly a target whose business involves buying and selling assets). Accordingly, the Code now provides that in order to be a restricted action:
 - i. any disposition or acquisition of assets by a target must be of a material amount **and** outside of the ordinary course of its business;
 - ii. any entry into, amendment or termination of a contract by a target must be in respect of a material contract **and** outside of the ordinary course of its business; and
 - iii. any issue of shares or convertibles, grant of options or awards, or redemption or buy-back of shares or convertibles by a target must be outside of the ordinary course of its business.

- Note that no materiality test is applied to changes in a target's share capital (see limb (iii) above), and changes of **any** amount outside of the ordinary course of its business are restricted.
 - In determining if grants made under incentive arrangements are ordinary course, the Panel will look at the target's normal practice under established schemes, prior public disclosure of its proposed practice in respect of new schemes, and whether grants are being made in connection with a genuine promotion or hire. The Panel will normally consider issues of new shares to satisfy the exercise of options or awards as in the ordinary course (although any decision by a target to accelerate vesting of options or awards may change this).
 - Any target share buybacks or redemptions will need to be in line with defined limits announced or established before the relevant period in order for them to be considered ordinary course.
- The circumstances in which the Panel will normally consent to an action being taken by a target remain substantially the same as before (i.e., the action is conditional on the offer being withdrawn or lapsing, the bidder consents to the action, holders of >50% of voting rights in the target state in writing that they approve of the action, or the action is taken pursuant to a contract entered into, or the action has been partially implemented, before the relevant period).

Reverse takeovers

- Rule 21.1 now applies to a bidder in a reverse takeover as if the bidder were a target. Previously, it was necessary to impose restrictions equivalent to Rule 21.1 on the bidder via contract, alongside a dispensation from the offer related arrangement provisions of the Code.

Sanctioning a scheme in a competitive situation

- The Panel will consent to Rule 21.1(a) not applying, other than in exceptional circumstances (e.g., the target is acting in a clearly unreasonable manner, but not, of themselves, that the sanction of the lower offer is being sought or that the competing bidder has only had limited time to consider its offer), where the target seeks to sanction a scheme in a competitive situation.

Guidance from and consultation with the Panel

- The Panel has amended and supplemented the Notes to Rule 21.1, including on how it will assess whether a disposal, acquisition or contract is material and/or ordinary course, and/or whether a change in a target's share capital is ordinary course. The Panel will also introduce a new Practice Statement 34 setting out how it will interpret and apply Rule 21.1 in practice.
- A target should still consult the Panel if any action it is considering may be restricted, even if the target itself is of the view that the relevant action is ordinary course.

Rule 21.3: removal of the requirement for a competing bidder to make specific information requests for target information provided to another bidder

- Rule 21.3 seeks to ensure that a target provides each competing bidder with the same information. Prior to the RS 2023/1 amendments, a bidder could not ask a target to provide it with all information it had provided to a competing bidder in general terms, which resulted in a practice of long, complex, specific daily information request lists having to be produced by a bidder and responded to by a target.
- As amended, Rule 21.3 now permits a bidder to ask for such information in general terms and requires that the target company provide all information provided to another bidder both at the time of, and in the seven days following, the request (which will remove the need for a daily request).

The full consultation paper and the response statement can be found here: [PCP 2023/1](#), [RS 2023/1](#).

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.

Will Pearce

+44 20 7418 1448
will.pearce@davispolk.com

Joseph Scrace

+44 20 7418 1314
joseph.scrace@davispolk.com

Gilbert Lim

+44 20 7418 1063
gilbert.lim@davispolk.com

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