

UK TAKEOVER CODE UPDATE

Panel publishes Consultation Paper 2017/1: Asset sales in competition with an offer and other matters

19 July 2017

On 12 July 2017, the UK Takeover Panel published Panel Consultation Paper 2017/1 (the PCP), which proposes amendments to the UK Takeover Code in relation to asset sales by a target company in competition with, or as an alternative to, a takeover offer (and certain other miscellaneous amendments). The PCP invites comments by Friday, 22 September 2017. Comments may be sent by email to: supportgroup@thetakeoverpanel.org.uk or in writing to: The Secretary to the Code Committee, The Takeover Panel, 10 Paternoster Square, London EC4M 7DY. Responses will be published on the Panel's website (www.thetakeoverpanel.org.uk) unless the respondent specifically requests otherwise.

If you have any questions concerning the Takeover Panel's proposed changes to the Takeover Code, or the procedure for submitting comments to the Panel, please reach out to your regular firm contacts or:

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The full text of PCP 2017/1 can be accessed via this [link](#).

The full text of the Takeover Code can be accessed via this [link](#).



BACKGROUND

The bulk of the PCP sets out the Panel's proposals to amend the rules of the Code in order to address situations in which a target proposes a sale of its assets in competition with or as an alternative to a takeover bid. These proposals are in large part a reaction to two transactions that took place in Q4 2016 (*Harbourvest's bid for SVG Capital* and *Constellation Software's bid for Bond International Software*), which highlighted (in the case of *SVG Capital*) the availability of asset sales as a means by which bidders and targets might circumvent the Code restrictions that apply following a "no increase" statement and (in the case of *Bond International*) the potential advantages that a recommended asset purchaser might enjoy versus a hostile takeover bidder as a result of the application of the Code to takeover bids, but not generally to asset sales.

A "*no increase*" statement is a statement by a bidder that it will not increase its offer price above the current price, or that its current price is "final". When a bidder makes a "no increase" statement, it is restricted under the Code from increasing its bid and, if its bid fails, from announcing a new bid within three months, even with the approval of the target board (other than in certain limited circumstances).

However, the Code does not currently restrict a bidder that has made a "no increase" statement from subsequently agreeing with the target board to acquire all or substantially all of the target's assets at a "see-through" price above the takeover bid price (i.e. a price that will result in a distribution to target shareholders at a price per share above the bid price). Some commentators and market participants (and, evidently, the Panel's Code Committee) regard this as an unacceptable loophole in the Code.

Similarly, historically the Panel has taken a somewhat "hands-off" approach in relation to asset transactions competing with a takeover bid, only taking jurisdiction over competing takeover bids for the target's shares and (to a limited extent) other transactions that might

frustrate an ongoing bid or possible bid. The result is that, where a hostile bidder faces off against a recommended asset purchaser, the asset purchaser has fewer regulatory hurdles to clear and, as such, has a distinct advantage (for example, the Code does not currently require the target board to obtain independent advice on the financial terms of the asset transaction and to publish the substance of that advice – unlike for the takeover bid).

The PCP marks a departure from the Panel's traditional approach to asset transactions competing with a bid or as an alternative to a bid, and seeks (1) to close the loopholes in the current rules where a bidder has made certain public statements regarding its bid (including a "no increase" statement) and (2) to level the playing field between takeover bidders and competing asset purchasers.

Many market participants will regard these proposals as a necessary attempt by the Panel to correct loopholes and imbalances that have the potential to create market uncertainty and to prejudice target shareholders in competitive situations, but some may take the view that the Panel is overreaching its traditional and natural jurisdiction and unjustifiably limiting the range of options available to a target board looking to maximize value for its shareholders. As such, the public responses to the PCP (and the Panel's reactions) are likely to make interesting reading.

ASSET SALES

The Panel proposes to make the following changes to the Code:

- Changes to prevent a takeover bidder from circumventing the rules applicable to "no increase" statements and the other price-setting rules of the Code by purchasing (or announcing an intention to purchase) *assets that are significant in relation to the target* as an alternative to its bid. Significance will be assessed using consideration, assets and profits ratios with a threshold of 50%, which some respondents may consider to be too low. The rules affected are *Rule 2.5(a)* (*Terms in possible offer*

announcements), *Rule 2.8* (*Statements of no intention to bid*), *Rule 12.2* (*Competition reference periods*), *Rule 32.2* (*No increase statements*) and *Rule 35.1* (*Delay of 12 months*).

- Changes to *Rule 21.1*, which restricts the target board from entering into transactions that may frustrate a takeover bid without target shareholder approval. The changes include (1) requiring the target board to obtain independent advice on the financial terms of any competing transaction and to publish the substance of that advice and (2) requiring the target board to publish a circular containing specified information regarding any competing transaction.
- Changes to bring into the Panel's *quantified financial benefits statements* regime any statements that the target board makes regarding the financial advantages of an asset transaction that is competing with a takeover bid (*i.e.*, requiring that statements that quantify the financial benefits of the asset transaction are prepared in accordance with *Rule 28* and are supported by statements from the target's financial adviser and reporting accountants).
- Introducing a *new Rule 4.7* to restrict a recommended asset purchaser from acquiring target shares in the market during a bid, unless the target board has publicly announced the cash sum expected to be returned to target shareholders as a result of the asset purchase (and only then at prices below the per share equivalent of that sum).
- Changes to afford a competing asset purchaser equivalent status to a takeover bidder under *Rule 21.3* (*i.e.*, requiring a target to provide to a party that is interested in purchasing substantially all of the target's assets, on request, any diligence information that the target has already provided to any potential takeover bidders).

OTHER MATTERS

In addition to the proposed changes relating to asset transactions, the PCP also proposes the following miscellaneous amendments to the Code.

Rule 2.8 statements

A "Rule 2.8 statement" is a statement that a named person does not intend to make a bid for a Code company. Rule 2.8 statements are typically made following a leak of a person's interest in a potential bid (if the Panel requires an announcement), or after an earlier possible offer announcement (a so-called "*Rule 2.4* announcement") that names the potential bidder and commences the 28-day put up or shut up period under *Rule 2.6* in respect of that bidder.

A person that makes a Rule 2.8 statement is restricted under the Code from announcing a bid for the target (and from taking certain other actions) for a period of six months. However, these restrictions automatically fall away in certain circumstances (*e.g.*, if the target consents or if a third party announces a bid).

The Panel is proposing to amend Rule 2.8 so that the restrictions on the bidder do not fall away automatically, but only fall away if, in the Rule 2.8 statement itself, the bidder expressly reserved the right to set aside the statement in certain circumstances and those circumstances have materialized. The list of circumstances that a bidder will be permitted to include in its Rule 2.8 statement mirror the circumstances that currently cause the statement to fall away automatically.

This change is intended to improve transparency for market participants and also to allow bidders to make a "hard" Rule 2.8 statement (*i.e.*, one that does not automatically fall away) if they wish to (this option is not provided for under the current rules).

Social Media

In September 2016, the Panel updated the Code to regulate more explicitly the use of social media by bidders and targets during the course of a bid. However, in the PCP, the Panel acknowledges that its changes went too far in relation to ordinary course, non-bid-related communications by bidders and targets via social media such as Twitter and Facebook. The Panel therefore proposes to limit the restrictions in [Rule 20.4](#) to information about the bid (not the parties to the bid).

Similarly, the Panel proposes to make it explicit in Rule 20.4 that parties to a bid may use social media to post videos relating to the bid that have already been approved by the Panel and published in accordance with [Rule 20.3](#) and explicit in [Rule 19.1](#) that financial advisers are responsible for guiding their clients – and their clients’ PR advisers – regarding information published on social media during a bid.

“Accelerated whitewashes”

Finally, the PCP proposes to codify the Panel Executive’s long-standing practice of granting a dispensation from the [Rule 9](#) mandatory offer requirement where, as a result of an issuance of new securities in a Code company, a subscriber’s holding of voting rights would increase through 30% (or between 30% and 50%), provided that independent shareholders holding more than 50% of the votes capable of being cast on a “whitewash” resolution at a general meeting (i.e., a resolution to waive the mandatory bid requirement) confirm in writing that they would vote in favour of such a resolution if it were put to them (the so-called “*accelerated whitewash*” procedure).

The accelerated whitewash procedure is particularly useful for smaller Code companies for whom the cost of a formal “whitewash” procedure could be disproportionate to the value of the relevant transaction.

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