

UK Takeover Panel Proposes Significant Changes to the Offer Timetable and the Treatment of Conditions

Skadden

10 / 29 / 20

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Scott C. Hopkins

Partner / London
44.20.7519.7187
scott.hopkins@skadden.com

Craig Kelly

Associate / London
44.20.7519.7260
craig.kelly@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

40 Bank St., Canary Wharf
London, E14 5DS, UK
44.20.7519.7000

Introduction

On 27 October 2020, the UK Takeover Panel (the Panel) published Public Consultation Paper 2020/1 (the PCP), which proposes significant changes to the UK Takeover Code (the Code) with regard to the offer timetable and the treatment of conditions to offers.

The PCP followed an informal pre-consultation process held earlier in 2020, and the Panel's Code Committee has adopted a majority of the proposals from this pre-consultation.

The amendments proposed by the PCP would, if adopted, result in important changes to the way public bids are conducted in the UK, in particular contractual (tender) offers. The consultation period for the PCP is open until 15 January 2021, and the Panel expects to publish a response statement in spring 2021, with changes to the Code expected to be implemented three months later.

In brief, the PCP proposes:

- amending the offer timetable to simplify it overall and to accommodate the fact that offers are generally taking longer due to regulatory approval processes;
- removing the historic anomaly in the Code whereby the ability to invoke UK and European Commission (EC) antitrust conditions is not subject to the material significance requirement; and
- making certain other changes to the offer regime.

Suspending the Offer Timetable

The most significant changes proposed by the PCP relate to the offer timetable. Their purpose is to allow the Code to better accommodate the lengthy regulatory approval processes to which offers are often subject. The first change extends the range of circumstances under which the offer timetable can be suspended pending receipt of an official authorisation or regulatory clearance.

Currently, the Code requires a bidder to satisfy its acceptance condition by the 60th day following publication of its offer document (Day 60) and all other conditions within 21 days of satisfying its acceptance condition (Day 81).

For UK and EC antitrust conditions, if there is a significant delay in determining whether a phase 2 reference will be made, then the Panel will normally consent to an extension of Day 60 by effectively suspending the timetable at Day 39.

For any other regulatory condition, the Code does not currently provide the Panel with the ability to impose such a suspension, so the bidder is required to satisfy all conditions by Day 81. This means the bidder will typically seek an extension to this deadline after its offer has become unconditional as to acceptances.

The PCP proposes to remove the special treatment currently afforded to UK and EC antitrust conditions so that all conditions relating to official authorisations and regulatory clearances are treated consistently. Therefore the PCP proposes that if one or more conditions relating to an official authorisation or regulatory clearance has not been satisfied or waived by Day 39, then the Panel should be able to suspend the timetable at the joint request of the parties or, if only one party makes the request, if the authorisation or clearance is "material."

UK Takeover Panel Proposes Significant Changes to the Offer Timetable and the Treatment of Conditions

In assessing materiality, the Panel will need to be satisfied that failure to obtain the relevant authorisation or clearance could give rise to circumstances that are of material significance to the bidder in the context of the offer (the material significance requirement). The material significance requirement is a very high threshold and judged by reference to the facts of the case at the time the relevant circumstances arise. Factors taken into account by the Panel when deciding whether a relevant condition can be invoked include the significance of the authorisation or clearance to the bidder, what action the bidder would need to take to obtain it (and the strategic consequences for the bidder of taking such action), and the consequences for the bidder and its directors if it were to complete the offer without obtaining the authorisation or clearance.

If the timetable is suspended, the suspension could be brought to an end in three ways. First, the last remaining regulatory condition could be satisfied or waived, in which case the timetable would resume on a new Day 32 (28 days prior to the new Day 60). Second, the parties could agree to end the suspension.

Third, the bidder could make an “acceleration statement,” which is a new concept under the Code and which would effectively replace the existing concept of a “no extension statement.” The PCP proposes that one consequence of extending the ability to suspend the timetable is that the bidder should no longer require the additional 21 days after Day 60 to satisfy or waive its remaining conditions. Instead, the bidder would satisfy all of its conditions by a single date known as the “unconditional date.” Further, the acceptance condition could only be satisfied once all other conditions have been satisfied or waived. Day 60 would be the default “unconditional date” under the Code, but a bidder may choose to specify an earlier unconditional date in its offer document or otherwise stipulate an earlier date by making an acceleration statement. An acceleration statement would need to specify the new unconditional date, which would need to be at least 14 days after the date of the acceleration statement. Importantly, if a bidder makes an acceleration statement during the time when the timetable is suspended, then the bidder would be required to waive any unsatisfied conditions.

One effect of the proposed changes is that they would remove the offer timetable as a tool for bidders to pressure a regulator to clear an offer. Currently, bidders can inform regulators that a strict timetable applies to the offer and therefore authorities must make their determination by the relevant deadline. Under the new proposals, the possibility to suspend the offer timetable pending receipt of an official authorisation or regulatory clearance may raise concerns about the suspension being open-ended. The remedy to end the suspension would be for the bidder to make an acceleration statement, requiring it to waive any unsatisfied conditions and risk being forced to close the offer without

having obtained the relevant clearance. The alternative would be for the bidder to lapse its offer on a long-stop date.

Long-stop Date Requirement

In light of the proposed changes to timetable suspensions, the PCP recognises bidders’ concerns about the prospect of a never-ending timetable, particularly where bidders are unwilling to waive the relevant condition or where financing is only available until a specified date.

Therefore, the PCP proposes that bidders be required to set a long-stop date, which would be the latest date by which all conditions (including the acceptance condition) would be required to be satisfied or waived. If any condition is not then satisfied or waived, the bidder would be able to lapse its offer if it satisfies the Panel that the relevant condition is material and that the remedial action required to satisfy the condition could be material.

For recommended offers, the bidder and target would agree to the long-stop date between themselves; however, for a hostile offer, the bidder would be required to consult the Panel to determine an appropriate date based on which clearance the bidder reasonably expects to take the longest.

Schemes of Arrangement

If a scheme structure is used, notwithstanding that the target controls the scheme, it is proposed that the Code should oblige the bidder, once all relevant conditions have been satisfied or waived, to take the necessary procedural steps for the scheme to become effective. These changes relate to the requirement that the bidder confirms that all conditions have been satisfied or waived prior to the court sanction hearing in relation to the scheme and the bidder undertakes to be bound by the scheme. Bid conduct agreements typically include these obligations, but the changes would empower the Panel to enforce them and prevent a situation whereby a bidder may seek to rely upon a long-stop date to lapse its offer where only an immaterial condition is outstanding.

Equal Treatment of Conditions and Pre-conditions

The PCP proposes that all official authorisations or regulatory clearances should be treated consistently in order to remove the current special treatment afforded to UK and EC antitrust conditions as compared with other regulatory approvals.

In addition to the proposal described above permitting the suspension of the offer timetable for all official authorisations and regulatory clearances (not just those relating to a phase 2 reference by the UK Competition and Markets Authority (CMA) or the EC), several changes seek to achieve consistency of treatment.

UK Takeover Panel Proposes Significant Changes to the Offer Timetable and the Treatment of Conditions

Currently, in order to invoke a condition relating to a UK or EC antitrust clearance, a bidder does not need to satisfy the material significance requirement. However, for all other conditions relating to material authorisations and regulatory clearances, a bidder must satisfy the material significance requirement in order to invoke the relevant condition.

The PCP recognises that this is an anomaly that exists for historic reasons and is no longer justifiable, particularly following the United Kingdom's withdrawal from the European Union. Therefore, the PCP proposes subjecting all such conditions to the same material significance requirement.

In addition, the Code currently requires a bidder to include a term that its offer must lapse in the event of a phase 2 CMA or EC reference. If clearance is then received following phase 2 review, the bidder may (but is not obliged to) make a new offer for the target (including at a lower price than the original offer). Other antitrust approvals do not require inclusion of a mandatory lapsing term, which, again, exists for historic reasons. Therefore, the PCP proposes removing this requirement to ensure a consistent approach.

Although these changes will ensure equal treatment, they will make it much more difficult for bidders to lapse their offers by invoking a UK or EC antitrust condition (due to the need to satisfy the material significance requirement) or by relying on the automatic lapsing following a phase 2 CMA or EC reference.

In the same spirit as the proposed changes to the treatment of conditions, the PCP proposes that all pre-conditions (that are conditions to the making of the offer) relating to official authorisations or regulatory clearances should also be treated consistently.

The Panel proposes subjecting the invocation of all pre-conditions to the same material significance requirement and removing the special treatment currently afforded to UK or EC antitrust pre-conditions.

Making a pre-conditional offer is currently permitted following consultation with the Panel and where the pre-condition relates to a phase 2 CMA or EC reference. Pre-conditions relating to another material official authorisation or regulatory clearance also require Panel consultation and are only permitted where the offer is recommended or the Panel is satisfied that it is likely to prove impossible to obtain the relevant clearance within the offer timetable.

However, in line with the approach above regarding conditions, the PCP proposes to remove this special treatment for UK and EC antitrust pre-conditions, allowing a bidder to announce a pre-con-

ditional offer that is subject to satisfying a pre-condition relating to an official authorisation or regulatory clearance (including from the CMA or the EC) provided that the target consents or the Panel is satisfied that the authorisation or clearance is material.

Acceptance Condition Invocation Notices

As a result of the proposed changes to the offer timetable requiring the acceptance condition to be the last condition to be satisfied, the concept of closing dates under the Code would become redundant. However, circumstances may arise where a bidder who has received insufficient acceptances seeks to lapse its offer prior to the unconditional date.

The PCP proposes that if a bidder wishes to do so, then it should be required to publish an "acceptance condition invocation notice" at least 14 days before the proposed date of lapsing so that target shareholders are aware of the bidder's intention and have sufficient time to accept the offer if they wish.

If on the proposed lapsing date the acceptance condition is not satisfied, the offer would lapse. However, if sufficient acceptances have been received, the offer would remain open (as under the proposals, the acceptance condition may only be satisfied once all other conditions have been satisfied or waived).

Announcement of Acceptance Levels

Currently, the requirement for a bidder to announce its level of acceptances is primarily driven by the concept of closing dates. As these are proposed to be removed, the PCP proposes that bidders make regular updates of acceptance levels. These would be required on the day after Day 21 and on a weekly basis thereafter until the week of the unconditional date (where they would be required to be made on a daily basis). They would also be required if an offer becomes or is declared unconditional or lapses, when an acceptance condition invocation notice expires or if the acceptance levels cross certain other specified levels.

Withdrawal Rights

The PCP proposes making withdrawal rights for shareholders available throughout the offer, meaning shareholders who have accepted the offer would be free to change their minds and withdraw their acceptance at any time until the offer becomes wholly unconditional or lapses. Currently, shareholders must wait until Day 42 (21 days after a bidder's first closing date) to withdraw.

This proposal would be consistent with the US tender offer rules, which in certain circumstances may apply to offers under the Code if the target company has a sufficiently sized US shareholder base.

UK Takeover Panel Proposes Significant Changes to the Offer Timetable and the Treatment of Conditions

Mandatory Offers

Typically, if a bidder triggers a mandatory offer by acquiring or consolidating control of a company, the only condition permitted is a 50% acceptance condition. The Code also currently provides that a bidder must not trigger a mandatory offer that is conditional or dependent on an approval, consent or other arrangement. The Panel may permit a dispensation in exceptional circumstances, such as where an official authorisation or regulatory clearance is required. In such circumstances, the offer document is only published if the authorisation or clearance is obtained, and, if approval is not obtained, the Panel would likely require the bidder to sell down to below the mandatory offer-triggering threshold.

The PCP proposes that where a mandatory offer would require a material authorisation or clearance, the triggering acquisition should be conditional upon the authorisation or clearance being obtained. Invoking the condition would also be subject to the material significance requirement. This would require the parties to enter into a conditional share purchase agreement (which would trigger the requirement to make a mandatory offer due to

an interest in the relevant shares having been acquired), but the making of the mandatory offer would be subject to a pre-condition that the relevant authorisation or clearance is obtained.

This approach would result in the bidder not acquiring control of the relevant company prior to receipt of the relevant authorisation or clearance and avoid some potentially undesirable outcomes if the relevant authorisation or clearance is not obtained (including the disposal of the shares). Put another way, it ensures a binary result whereby either the authorisation or clearance is obtained and control is acquired (and the mandatory offer is required to be made), or the authorisation or clearance is not obtained and control is not acquired (and the mandatory offer is not required to be made).

This approach from the Panel reflects the first ever pre-conditional mandatory offer, announced by Fortiana Holdings Limited for Highland Gold Mining Limited in July 2020.¹

¹ Skadden advised Fortiana Holdings Limited.