ICAEW
REPRESENTATION 09/21

PCP 2020_1 CONDITIONS TO OFFERS AND THE OFFER TIMETABLE

Issued 19 January 2021

ICAEW welcomes the opportunity to comment on the consultation paper, *PCP 2020_1 Conditions to offers and the offer timetable,* published by the Takeover Panel on 27 October 2020, a copy of which is available from this link.

We are broadly supportive of the amendments in PCP 2020_1. However, since the new National Security and Investment (NSI) regime introduced mandatory notification of certain deals, it is not clear where such notification should feature in relation to the offer timetable.

Regarding implementation of the changes, it will be preferable for the market to first be clear on how the proposed offer timetable will interact with mandatory notifications under the NSI regime and offers that are called in.

If guidance or other changes are deemed necessary to specifically provide for the NSI regime in the offer timetable, it would be more efficient to introduce these at the same time as the ones proposed in PCP 2020_1.

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KEY POINTS

1. We are broadly supportive of the amendments in PCP 2020_1. However, since the new National Security and Investment (NSI) regime introduced mandatory notification of certain deals, it is not clear where such notification should feature in relation to the offer timetable. Although it is not for the Panel to state when a mandatory notification should be submitted, the Panel may nonetheless wish to issue guidance on the inter-relationship of the NSI regime with public M&A transactions. While the Panel's expectations of offerors in mandatory notification scenarios progressing promptly with notification and keeping the Panel updated should be no different than the obligation on bidders to secure satisfaction or waiver of conditions to a bid in a timely fashion, specific guidance may yet be considered necessary for offers which are called in under the NSI regime.

2. Regarding the implementation of the changes in the PCP, it will be preferable for the market to first be clear on how the proposed offer timetable will interact with mandatory notifications under the NSI regime - or if a new, specific regime might be proposed and consulted on for mandatory NSI notifications or offers that have been called in. It would also be desirable to understand if the Panel will permit NSI-related preconditions. As the NSI regime has retrospective effect, if further adjustments to the Code are considered necessary, it may be more efficient to introduce them at the same time as ones proposed in PCP 2020/1. Subject to this, we support the Code Committee's intention that the amendments to the Code should come into effect approximately three months after the publication of the Response Statement in relation to firm offers announced after that time.

ANSWERS TO SPECIFIC QUESTIONS

Q1 Do you have any comments on the amendments to the Code in relation to the offer timetable proposed in Section 2 of the PCP?

3. Our comments on the amendments are captured in our response to specific questions.

4. While not the subject of commentary in the PCP, or of a consultation question, some of our members have queried if the amendments would result in changes to some of the Executive's practices. One example would be the approach to withdrawal rights on cross-border bids that are subject to US SEC rules and the Code. Any specific guidance or steer on this would be helpful.

Q2 Should the Panel have the ability to suspend an offer timetable if a condition relating to an official authorisation or regulatory clearance has not been satisfied or waived by the second day prior to Day 39, as proposed?

5. Yes, the Panel should have that ability.

6. However, is the Panel able to provide further guidance on what types of conditions would fall within the scope of 'official authorisations or regulatory clearances'? Would clearance from the Pensions Regulator, for example, fall within scope?

Q3 Should an offer timetable which has been suspended under the proposed new Rule 31.4(a) normally resume on the 28th day prior to Day 60 when the last relevant condition is satisfied or waived?

7. Yes, the offer timetable should normally resume as proposed.

Q4 Do you have any comments on the proposals in relation to a suspended offer timetable resuming with the consent of the offeree company?

8. We have no specific comments on the proposals.

9. It would be helpful if the Panel were to provide guidance for determining if an official authorisation or regulatory clearance is material.

Q5 Do you have any comments on the proposals in relation to offer timetable suspensions in competitive situations?

10. We have no specific comments on the proposals.

Q6 Should an offeror continue to be able to announce an offer subject to pre-conditions in accordance with Rules 13.3 and 13.4?

11. Yes, we agree that they should.

Q7 Should an offeror be required to set a "long-stop date" for a contractual offer, as proposed?

12. We are broadly supportive of this requirement for a recommended contractual offer although, for a hostile offer involving clearances, it may be more challenging to determine whether a unilateral long-stop date is 'reasonable' will be heightened. It would be helpful, however, if the Panel could provide guidance on what it expects from an offeror to demonstrate that it has arrived at a 'reasonable' assessment of the timing for satisfaction of clearance. For example, will the Panel expect confirmation from legal counsel? Will the offeror need to have consulted relevant regulators? And how might this work for new agencies, for example, in relation to the NSI regime?

13. We envisage there will be a number of situations where regulatory timetables are opaque and may need either further guidance or some leniency in the application of the 'reasonable' test. Take, for example, the NSI regime - additional complexity will arise from the interaction of the offer timetable with the assessment and clearance process envisaged in the NSI Bill. Given the prospects of long timings and the implications of proceeding without first obtaining necessary approval, additional guidance on reasonable timing may be necessary for transactions that are subject to notification under the NSI Bill.

14. Section 4(b) and Rule 12.1 only cover the acceptance and official authorisation / regulatory clearance conditions. We assume that an offeror would not be required to waive all other conditions at the long stop date, even where it might be possible to invoke a separate condition.

15. In addition, although we understand the Panel will look at deals on a case-by-case basis at the time of the events, it would be helpful to have further guidance on what the Panel would consider to be 'sufficiently clear' and how the Panel might deal with circumstances where the actions required to be taken are 'sufficiently clear' but the implementation of such actions would fall beyond the long stop date. Would the Panel require the offeror to extend the long stop date where it did not want to do so? What if the offeror wanted to extend but the target was not supportive, would the Panel permit the offeror to extend beyond the long stop date against a target's wishes.

Q8 Should there be a requirement for an offeror to take the procedural steps necessary for a scheme of arrangement to become effective, as proposed?

16. Yes, however we felt that this was already an obligation on the offeror and question the need for new Section 3(g) of Appendix 7 and the new Note on Section 3.

Q9 Should the requirement for an offer to include a "mandatory lapsing term" if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated be removed from the Code?

17. Yes, we agree that it should.

Q10 Should the exemption from the "material significance" requirement in Rule 13.5(a) for CMA and European Commission clearance conditions and pre-conditions be removed?

18. We agree that the requirement should be removed, although precedent may need to be taken into account, and some forbearance needed, for example, if anti-trust competition becomes more complex following Brexit and multiple clearances are required and/or assessments take longer.

Q11 Should a pre-condition relating to a clearance from the CMA or the European Commission be treated in the same way as a pre-condition relating to any other official authorisation or regulatory clearance?

19. We agree with this approach, but we consider that it may need to be revisited for mandatory notification cases under the National Security and Investment Bill.

Q12 Should an offeror be required to serve an "acceptance condition invocation notice" in the form proposed if it wishes to lapse its offer on the acceptance condition prior to the unconditional date?

20. Yes, we agree that the offeror should. However, we assume it must be possible but it is not clear if the Panel would permit more than one such notice being served?

21. Also, we assume that the offeror would be able to waive down its acceptance threshold in the usual way subsequently, if the acceptance condition is met at the test date and the offer does not lapse?

Q13 Do you have any comments on the proposals relating to the removal from the Code of references to "closing dates"?

22. We have no comments.

Q14 Should an offeror be required to make announcements as to acceptance levels as proposed in the amended Rule 17.1?

23. The rules on acceptance announcements and withdrawal rights will likely create complexity for certificated shareholders or those with holdings via nominees. They will not have the flexibility of institutional shareholders so guidance is needed on the logistics for retail shareholders to exercise their rights.

24. In relation to the proposals, it would also be helpful if the Code Committee can provide the following clarifications:

    - Does the Panel need to be consulted on 'momentum' announcements?
    - What would the Panel's position be on a 'qualified' waiver of outstanding conditions?

Q15 Should there be a single latest date (i.e. Day 60) for the satisfaction of (a) the acceptance condition and (b) the other conditions to an offer?

25. Yes, we agree.

Q16 Should the Code provide that the acceptance condition must not be capable of being satisfied until all of the other conditions have been satisfied or waived, subject to the ability of the Panel to grant dispensation where this is not possible?

26. Yes, we agree.

Q17 Do you have any comments on the proposals in relation to the period for which an offer must remain open for acceptance and the closing of the offer?

27. We have no comments.

Q18 Should Rule 13.6 in relation to invoking offeree protection conditions be deleted as proposed?

28. We do not think that the grounds for deleting Rule 13.6 are sufficiently explained in the PCP. In particular, allowing an offeree company to invoke an offeree protection condition does not seem to be equivalent to shareholders exercising their withdrawal rights. Can the Panel provide further explanation for the proposed approach?

Q19 Do you have any comments on the proposed amendments to the Code in relation to withdrawal rights?

29. We broadly agree with the proposed amendments.

30. It will be important that ICSA and receiving agents are satisfied that their systems are capable of dealing with the changes.

Q20 Do you have any comments on the proposed amendments to Rule 13.5(a) with regard to the invocation of conditions and pre-conditions?

31. We have no comments regarding Rule 13.5(a).

32. With respect to new para 4.3 on revised Practice Statement No 5, for many midcap deals a Phase 2 CMA reference is very likely to be material and items such as advisory costs, delay and offeror/ offeree management time could be expressly referenced here.

Q21 Do you have any comments on the proposed new Rule 13.5(b), with regard to the conditions and pre-conditions to which Rule 13.5(a) does not apply, or on the proposed new Rules 13.5(c) and (d), with regard to the disclosures to be made in the firm offer announcement and the offer document?

33. We think that proposed new Rule 13.5(b) should explicitly set out all the instances in which Rule 13.5(a) does not apply, instead of capturing these via Rule 13.5(b)(viii).

34. In addition, we think the position regarding long stop dates should be clarified to reflect the requirement to meet the Rule 12.2 tests.

35. Although not the subject of a question in the PCP, where closing an offer would result in a breach of law by the bidder, we believe that the Panel should not require the offeror to close where there is genuine risk of criminal prosecution. It would be helpful if the Panel was able

to confirm its agreement with this position in the new Practice Statement 5 or explain if otherwise.

Q22 Should the Panel be able to grant a dispensation from the restriction on a person triggering a conditional mandatory offer where the triggering share purchase would itself be subject to a condition relating to a material official authorisation or regulatory clearance, as proposed in the new Note on Rule 9.4?

36. Yes, the Panel should be able to grant such a dispensation, in particular where relevant clearance has a suspensory effect/ could result in illegality or the transaction being void.

Q23 Do you have any comments on the miscellaneous amendments proposed in Section 11 of the PCP?

37. We broadly agree with the miscellaneous amendments. However, in relation to shortening the period of return of documents of title (paras 11.12-11.13), would the Code Committee consider offering some flexibility given the experience during the pandemic when various postal services were shut, and the return of documents (by post and air courier) was taking much longer than usual and sometimes was not possible at all.