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## WHITE PAPER

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### UK Takeover Panel's Code Committee Proposes Changes to Treatment of Offer Conditions and Offer Timetable

The Code Committee ("Code Committee") of the UK Takeover Panel ("Panel") has published a consultation paper proposing a number of amendments to the City Code on Takeovers and Mergers ("Code") which, if adopted, will mark a significant departure from the current rules. The Code Committee is inviting responses to the consultation paper by 15 January 2021 and expects to publish the final amendments to the Code in spring 2021.

## EXECUTIVE SUMMARY

The main objectives of the proposed changes are to:

- simplify the offer timetable and amend it to accommodate regulatory approval processes which are now more complex and of longer duration than was the case when the current timetable was originally devised;
- remove the historic distinction between the treatment of UK and European Commission competition conditions and all other conditions relating to official authorisations and regulatory clearances; and
- make certain other changes to the existing Code timetable, in particular for contractual takeover offers.

The main changes being proposed are as follows:

- offer conditions relating to the UK Competition and Markets Authority (“CMA”) or the European Commission (“EC”) *not* commencing a Phase 2 competition review to be subject to the “material significance” requirement before they may be invoked (i.e., those conditions will be treated consistently with conditions relating to other regulatory approvals and authorisations);
- abolition of requirement for offers to contain a term that they will lapse if there is a CMA or EC Phase 2 competition review before a given date;
- introduction of a single “unconditional date” for the satisfaction of all offer conditions to contractual takeover offers. This will be set at the 60th day after posting the initial offer document, subject to acceleration or extension;
- acceptance condition for contractual takeover offers to be the final condition to be satisfied and to be capable of satisfaction only after all other conditions have been satisfied or waived; and
- withdrawal rights to be available for offeree company shareholders from the outset of a contractual takeover offer until it becomes or is declared wholly unconditional.

## CONSISTENT TREATMENT FOR ALL REGULATORY CONDITIONS

At present, UK and EC antitrust clearance conditions are treated differently from other offer conditions relating to official authorisations and regulatory clearances (“Regulatory Conditions”), and the Code Committee is proposing that all Regulatory Conditions should be treated in a consistent manner.

### Material Significance Requirement to Apply CMA and EC Regulatory Conditions

At present, an offeror may invoke a condition that no CMA Phase 2 reference or EC Phase 2 proceedings (“Phase 2 Referral”) will be initiated *without* having to satisfy the so-called “material significance” requirement. However, if the offeror wishes to lapse the offer on any other Regulatory Condition (e.g., U.S. Hart-Scott-Rodino or CFIUS clearance), the material significance requirement must be satisfied.

As was demonstrated when WPP plc sought to invoke the no material adverse change condition to its offer for Tempus Group Plc, an extremely high hurdle is imposed in order to satisfy this requirement: it requires the offeror to demonstrate that the circumstances giving rise to the invocation of the condition are of “material significance to the offeror in the context of the offer”. The Code Committee is proposing to abolish this distinction and put Phase 2 Referral conditions on the same footing as other Regulatory Conditions. Corresponding changes would be made to the regime governing pre-conditions.

This change will mean the removal of a protection which has been relied upon by offerors for decades, although rarely invoked, namely that when launching an offer, they would have the right, no questions asked, to terminate the offer in the event of a possibly protracted and costly Phase 2 Referral which, although not satisfying the material significance requirement, might nonetheless be very detrimental to their own, or the target’s, business.

### Suspension of Offer Timetable

Currently, if, by Day 39 of a contractual takeover offer, there has not been a decision as to whether a Phase 2 Referral will be initiated, the offeror or the offeree can request that the offer timetable be suspended pending the decision. This is to

prevent the offer lapsing on Day 81 of the offer (being the date by which all conditions must normally be satisfied).

Also, the Code currently requires the offer to include a term (“Phase 2 Referral Term”) that if a Phase 2 Referral is made before (i) the earlier of Day 21 and the date on which the acceptance condition is satisfied (in the case of a contractual takeover offer), or (ii) the shareholder meetings (in the case of a scheme of arrangement), the offer must lapse. If the offer is subsequently cleared at the end of the Phase 2 Referral, the offeror will be exempt from the normal prohibition on making a new offer within 12 months of the lapsing of a previous offer and may make a new offer which does not have to be on the same terms as the previous offer. No equivalent provisions exist for other Regulatory Conditions.

The Code Committee is therefore proposing to:

- remove the requirement for an offer to contain a Phase 2 Referral Term; and
- extend the right to request a suspension of the contractual offer timetable to *any* Regulatory Condition. However, if only one of the parties to the offer wishes to suspend the timetable, the Regulatory Condition in question must relate to a “material” authorisation or clearance.

In assessing materiality, the Panel will apply the “material significance” requirement.

The suspension of the offer timetable could be halted:

- by agreement between the parties;
- if the relevant Regulatory Condition is either satisfied or waived (in which case the timetable would resume 28 days before a new “Day 60”, being the deadline for all conditions to be satisfied), or is not satisfied (in which case the offer would, subject to the material significance requirement, lapse); or
- by the offeror making an “acceleration statement”. This is explained in more detail below under the heading “*Day 60 to be the Unconditional Date*”. Making such a statement

would involve the offeror waiving all Regulatory Conditions that had not yet been satisfied and accepting the risk of having to close the offer without having obtained the relevant authorisations or clearances;

- if the offer lapsed before its long stop date (the new requirement for a contractual takeover to have a long stop date is explained in more detail under the heading “*Requirement to Set a Long Stop Date*” below) either because the acceptance condition was not satisfied, or with the Panel’s consent because a “material” Regulatory Condition was not been satisfied by then.

## TREATMENT OF OTHER OFFER CONDITIONS

The following changes have also been proposed:

### Consent of Panel to Invoke Conditions

The Code would clarify that the consent of the Panel is required for an offeror to invoke a condition or pre-condition, and language to reflect this will need to be included in the firm offer announcement and offer or scheme document.

### When the Panel Will Judge if the Material Significance Requirement Has Been Met

The Code would also codify the Panel Executive’s current practice that the Panel will judge whether the material significance requirement has been met by reference to the facts of each case at the time the relevant circumstances arise and not before.

### Code to Include List of Conditions that Are Not Subject to Material Significance Requirement

The Code would include a list of conditions to which the material significance requirement would not apply, including, among others: (i) the acceptance condition for a contractual takeover offer and offeree shareholder approval and court sanction of a scheme of arrangement; (ii) a listing condition in the case of a securities exchange offer in which listed consideration securities are offered; and (iii) offeror shareholder approval of the offer where that is a legal or regulatory requirement or a requirement of an offeror’s articles of association or similar document.

## Offeror to Be Obligated to Take Procedural Steps Necessary for Scheme to Become Effective

In the case of a scheme of arrangement, the Code would require that an offeror must take the “procedural steps” necessary for the scheme to become effective, namely, to waive the unsatisfied conditions before the court sanction hearing and to undertake to the court to be bound by the scheme. There is currently no express obligation on the offeror to do this, and therefore an offeror which no longer wishes a scheme to become effective but is unable to invoke a condition to the offer could in theory seek to lapse an offer by not taking these procedural steps. An exception to this new obligation would apply if:

- a condition relating to a “material” official authorisation or regulatory clearance is outstanding and either it is not clear what action would be required to be taken in order for the authorisation or clearance to be obtained or, if it is clear, the taking of that action would mean that the material significance requirement might be satisfied; or
- in the case of any other condition, where the Panel agreed that the material significance requirement had been satisfied.

## Regulatory Conditions to Rule 9 Offers to Be Permitted

Currently, except with the consent of the Panel, a mandatory offer under Rule 9.1 of the Code (“Rule 9 Offer”) may not be made if the making of or implementation of that offer would be subject to any condition or consent. It is proposed to amend the Code so that the Panel can grant a dispensation from this restriction where:

- the condition or consent relates to a “material” authorisation or regulatory clearance;
- the share purchase triggering the Rule 9 Offer is itself subject to a condition relating to that material authorisation or regulatory clearance in identical terms to the condition or pre-condition to the offer; and
- the invocation of that condition to the share purchase agreement (and the condition or pre-condition to the offer) is subject to the consent of the Panel, applying the material significance requirement.

## OFFER TIMETABLE

A number of changes are being proposed which are intended to simplify the current Code timetable for a contractual takeover offer (as opposed to a scheme of arrangement offer), because that timetable:

- was designed principally with hostile or competitive offers in mind, and many of its provisions are not relevant for a recommended contractual takeover offer; and
- is often incompatible with and unable to accommodate the potentially lengthy timeframes required to satisfy the growing list of Regulatory Conditions to which many offers are now subject.

At present, the acceptance condition to a contractual takeover offer must be satisfied by the 60th day following posting of the initial offer document. Any other conditions must be satisfied by the earlier of 21 days after the satisfaction of the acceptance condition and 81 days after the posting of the initial offer document. The Code Committee is proposing to amend this as follows.

## Introduction of Single Unconditional Date

There would be no distinction between the dates for satisfying the acceptance condition and all other conditions. Instead, there would be a single date (“Day 60”) for the satisfaction or waiver of *all* conditions, being the 60th day following the date on which the initial offer document is published or a later date set by the Panel pursuant to an extension of the offer timetable.

## Impact on Other Key Dates

Other key dates in the timetable, including Day 39 (the last date for the offeree to publish material new confirmation), Day 46 (the last day for the offeror to publish a revised offer document) and Day 53 (the last day for a competing offeror to clarify its position), would be fixed by counting backward from Day 60. In other words, contrary to the current regime, those dates would not be fixed by reference to the date on which the initial offer document is published. Consequently, if Day 60 is extended, those other dates would also automatically be extended.

### **Day 60 to Be the Unconditional Date**

The date by which all conditions would need to be satisfied or waived (the “unconditional date”) would be Day 60 unless the offeror makes an “acceleration statement”, either in its initial offer document or subsequently, bringing forward that date. If Day 60 is extended, the unconditional date would automatically be extended. If an acceleration statement is made, an offeror would have to waive any Regulatory Conditions. If the acceleration statement is made in the initial offer document, no such conditions to the offer could be included.

### **Requirement to Set a Long Stop Date**

For a contractual takeover offer, an offeror would be required to set a long stop date, similar to the long stop date typically included in a scheme of arrangement, by which time, in the event of a suspension of the offer timetable, all conditions would need to be satisfied or waived. The offeror and offeree in a recommended offer would be free to agree this date, but it would need to be agreed with the Panel in the case of a unilateral offer. Any announcement of a pre-conditional offer would also need to specify a long stop date by which any pre-conditions must be satisfied or waived. If, by the long stop date, the acceptance condition is not satisfied, the offer will lapse. If it is satisfied, but a Regulatory Condition is not satisfied, the offeror would be able to lapse the offer only if the Panel agrees that the condition is a “material” Regulatory Condition. If it does not, the offeror will have to waive the condition and close the offer.

### **Acceptance Condition to Be Last Condition to Be Satisfied**

Subject to limited exceptions (e.g., if a securities exchange offer contains a listing condition in relation to consideration securities), the acceptance condition would be capable of being satisfied only after all of the other conditions to the offer had been satisfied or waived.

### **Invocation of Acceptance Condition**

If an offeror wishes to lapse the offer on the acceptance condition before the unconditional date, it would be required to give an “acceptance condition invocation notice” to offeree shareholders on at least 14 days’ prior notice. This would give

shareholders who had until then been “sitting on the fence” but who now wished to accept the offer time to submit their acceptances. There would no longer be intermediate closing dates for an offer ahead of the unconditional date.

### **Withdrawal Rights to Run for Duration of Offer**

Offeree shareholders who have accepted an offer would have the right to withdraw their acceptance at any time before the satisfaction of the acceptance condition. At present, once a shareholder has submitted an acceptance, it may not, subject to limited exceptions, withdraw its acceptance unless the acceptance condition has not been satisfied within 42 days after the posting of the initial offer document. If the acceptance condition is satisfied by that date, the shareholder is locked in until the other offer conditions have been satisfied. Normally, the Code requires this to take no more than 21 days. However, if there is a Regulatory Condition which will take longer to satisfy, and the offeree company agrees, the 21 days can be extended with the result that shareholders could be locked in, and unable to trade their shares, for a protracted period, which the Code Committee considers is detrimental to the interests of offeree shareholders.

### **Shutting Off of Alternative Offers and Mix-and-Match Elections**

Alternative offers would no longer be capable of being shut off before the end of the offer period and would need to remain open until at least 14 days after the offer becomes or is declared unconditional. Mix-and-match elections could be shut off only when an offer becomes or is declared unconditional.

### **Offer to Remain Open for Acceptances**

A contractual takeover offer would need to remain open until: (i) the later of Day 21 and the date on which the offer becomes or is declared unconditional or lapses; and (ii) at least 14 days after it becomes or is declared unconditional.

### **Announcement of Acceptance Levels**

Announcements of acceptance levels in a contractual takeover offer would need to be made more frequently after Day 21 than is currently the case.

## LAWYER CONTACTS

### **Leon N. Ferera**

London

+44.20.7039.5213

[Inferera@jonesday.com](mailto:Inferera@jonesday.com)

*(Former secondee to the Takeover Panel/Secretary to the Code Committee)*

### **William E.H. McDonald**

London

+44.20.7039.5150

[wmcDonald@jonesday.com](mailto:wmcDonald@jonesday.com)

*(Former secondee to the Takeover Panel)*

### **Matt Evans**

London

+44.20.7039.5180

[mevans@jonesday.com](mailto:mevans@jonesday.com)

### **Vica Irani**

London

+44.20.7039.5237

[virani@jonesday.com](mailto:virani@jonesday.com)

*Nalothiya Nambirajah, an associate in the London Office, assisted in the preparation of this White Paper.*

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