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UK Public M&A – Recent Guidance and Best Practice Note from the UK Takeover Panel Executive

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The amended guidance sets out a new practice that has been adopted by the Panel Executive in respect of private sale processes initiated by potential target companies which are in scope of the UK public takeovers rules, and the practice note reminds practitioners on the approach to compliance that the Panel Executive takes on disclosures relating to intentions of a bidder with respect to target company's employees and business.

The Executive organ of the UK regulatory body which oversees public M&A and related transactions, The Panel on Takeovers and Mergers (the "**Panel Executive**"), recently published an updated version of the Panel Executive's informal guidance on "Formal sale processes, private sale processes, strategic reviews and public searches for potential offerors" which is set out in Practice Statement 31[1]. The amended guidance, which we explain in further detail in section A, sets out a ***new practice*** that has been adopted by the Panel Executive ***in respect of private sale processes initiated by potential target companies*** which are in scope of the UK public takeovers rules as set out in the City Code on Takeovers and Mergers (the "**Takeover Code**").The Panel Executive considers that the requirement to "out", *i.e.* name a potential bidder with which a target company is in talks or from which an approach has been received in the context of a private sale process, may operate in an appropriate manner, and the updated guidance note sets out the circumstances in which the Panel Executive may grant dispensations from the Takeover Code requirements[2] to identify a potential bidder. This is a welcome development by potential bidders of UK target companies.

In another recent development[3], the Panel Executive has issued new Panel Bulletin 7 on "Offeror intention statements" which sets out a ***reminder*** to market participants ***as to how the Takeover Code provisions***[4], ***which require disclosure of a bidder's intentions with regard to the business, employees and pensions schemes of a target company, operate in practice***. Disclosure of these matters for bidders can be particularly challenging in circumstances where a bidder has not been fully able to crystallize its analysis and plans for the target business (pre acquiring full control), and whilst the Panel Executive is cognizant of these challenges, it has provided examples of certain approaches by bidders to addressing these Takeover Code requirements which it considers falls short of compliance with the requirements of the rule, and these are set out in further detail in section B.

Finally, the Panel on Takeovers and Mergers also has updated the ***document fees and charges*** that it charges as follows: (i) to reinstate the level of documentary fees for offer documents to the pre-August 2021 levels[5]; (ii) rebalance the fees charged on so-called "Rule 9" waiver circulars to lower the charges for smaller value transactions, increase the charges for larger value transactions and introduce a new top band; and (iii) increase by 25% the fees charged for granting exempt principal trader, exempt fund manager and recognised intermediary status[6].

A. LET'S KEEP THINGS QUIET

1. On April 30, 2024, the Panel Executive published an updated version of Practice Statement 31 which sets out new guidance on the Panel's interpretation and application of its rules relating to the (i) requirement to publicly identify (*i.e.* name) possible bidders; (ii) requirement to set a "put up or shut up" deadline on possible bidders; (iii) general prohibition on inducement fees in favour of bidders; and (iv) ability of a target company to impose special conditions or restrictions on a bidder wishing to gain access to Target company information, in the context of different types of sales processes or situations involving UK target companies.
2. By way of summary explanation of these rules:
    a. **Public identification of bidders**

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Under the Code:

- When a company (or major shareholder) is seeking a purchaser for 30%+ of the voting rights of the company OR when the company is seeking more than one bidder, a public announcement will be required either: (1) if rumour or speculation arises or there is an untoward movement in the share price of the company[7]; or (2) the number of bidders being approached is more than a "very restricted number" (generally considered to be six)[8].
- A company will enter into an "offer period" (and consequently be publicly listed on the Panel's website[9] as being in play) when the company announces it is seeking potential bidders or a purchaser is being sought for 30%+ of its voting rights[10].
- Generally, the announcement by the company which commences the offer period must identify the potential bidder that the company is in talks with or from which an approach has been received (and not rejected)[11].
- If the company subsequently chooses to announce the existence of a new potential bidder (and before it is in receipt of a firm intention offer), it must identify (*i.e.* name) that potential bidder[12].

b. **"Put up or shut up" deadline imposition on possible bidders**

- An identified potential bidder must either announce a firm intention to make an offer (*i.e.* 'put up') or announce that it does not intend to make an offer (*i.e.* 'shut up') by 5.00 pm on the 28th day following the date of the announcement in which it is first identified[13].
- This rule does not apply if another bidder has announced a firm intention to make an offer for the company.

c. **Prohibition on inducement or 'break up' fees**

- Since 2011, the Code has included a general prohibition on target companies granting inducement fees and other so-called "offer related" arrangements in favour of a bidder or persons acting in concert with a bidder when the company is in an offer period or when an offer is reasonably contemplated[14].

d. **Equality of information to all bona fide potential bidders and permissible terms of access**

- Target companies are required, if requested, to provide a bidder or bona fide potential bidder with information that it has provided to another bidder or potential bidder[15] – the so called equality of information rule.
- This requirement normally only applies when there is a public announcement of a (potential) bidder to which information has been provided or the requesting bidder has been informed authoritatively of the existence of another potential bidder[16].
- The Target company is only permitted to impose certain limited conditions (generally relating to confidentiality and non-solicit provisions) on the person requesting information access and the conditions cannot be more onerous than those imposed on another (potential) bidder[17].

3. The Code and the updated guidance in Practice 31 specifically address the application of the rules summarized in section 2 above, in the context of the following type of sales processes or situations:
    - **A formal sale process ("FSP")** – being a process by which a UK Code company puts itself up for sale through a process commencing with a public announcement that it is commencing a "formal sale process" and thus effectively initiate a public auction of itself.
    - **A strategic review process** – a situation in which a company has publicly announced that it is undertaking a strategic review of its business, which refers to an offer or bid for the company as a possible outcome.
    - **A public search for potential buyers or bidders** – where a company announces for example that it is seeking "potential offerors" or "seeking purchasers".
    - **A private sale process** – where a company wishes to initiate discussions on a private basis with more than one potential buyer (but not more than a "very restricted number" of buyers) and chooses not to announce those discussions.
4. The Panel introduced the concept of a FSP procedure in 2011 to aid companies desirous of achieving an exit for shareholders (expected in many cases to be used in distress or similar situations) to implement a process to garner bidder interest by offering dispensations from certain onerous Code rules applicable to bidders (the "**FSP dispensations**"). Specifically, the FSP dispensations allow for relief from: (i) the requirement to identify potential bidders (see 2a above); (ii) the requirement to set a "put up and shut up" deadline on a potential bidder (see 2b above); (iii) the general prohibition on offering an inducement fee to

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a potential bidder (see 2c above). The Code requires parties to consult with the Executive if a company wishes to seek any of the FSP Dispensations. Practice Statement 31 provides guidance that the Panel Executive will normally grant these FSP Dispensations where it is satisfied that a board is genuinely putting the company up for sale through a formal and public process.

5. Practice Statement 31 clarifies that the Panel Executive also would normally grant the dispensation from identifying a potential bidder in the context of strategic reviews (and provided of course that any (potential) bidder that the company is in talks with or from which an approach has been received, has not been specifically identified in any rumour or speculation).
6. The key change in updated Practice Statement 31 is confirmation that it is the Panel Executive's normal practice to grant a dispensation (if requested by a target company) to publicly identify a potential bidder also in the situation where it is satisfied that the company is genuinely initiating a private sale process. Even if the company subsequently chooses to announce that it had commenced a private sale process[18], it will not be required to identify any (potential) bidders it is in talks with or from which an approach has been received. The discretion remains with the company as to whether to rely on the dispensation and/or to identify a potential bidder that it is in talks with.
7. This new clarificatory guidance from the Panel Executive is, as noted, a welcome and helpful approach as it gives potential bidders greater comfort about the risk of being prematurely outed or named by a target company which is a key concern for bidders particularly in early stages of considering a potential bid and/or prior to the time when it is fully ready to launch a firm offer announcement. This may in turn encourage greater participation by bidders in these types of processes.
8. Of final note, it is important to clarify the status of a Panel Executive Practice Statement[19] such as the Practice Statement 31 discussed above. Whilst Practice Statements are stated to be informal guidance issued by the Executive body of the Takeover Panel (which is distinct from the legislative and adjudicative arm of the Panel), in practice, UK public M&A practitioners will be well aware of the need to pay due and careful attention to the content of these Practice Statements as these provide critical guidance which will be applied and accepted in the majority of live public M&A transactions regulated by the Panel.

WHAT DOES GOOD LOOK LIKE?

1. On May 15, 2024, the Panel Executive published Panel Bulletin 7 on "Offeror Intention Statements" which serves as reminder to practitioners and market participants of the operation of specific provisions of the Takeover Code following observations of the Panel Executive. These bulletins do not entail any changes to the interpretation of the Code[20].
2. The Code requires bidders to disclose in their offer document[21], amongst other things, its intentions with regard to the business, employees and pension schemes operated by the target company. In particular, the Code requires that the bidder explains:
    a. its intentions with regard to the future business of the target company and intentions for any R&D functions of the Target
    b. its intentions with regard to the continued employment of employees and management of the target group including any material change to the Ts&Cs of employment and roles/ functions
    c. its strategic plans for the target company and the likely repercussions on employment, locations of places of business including the headquarters
    d. its intentions with regard to contributions to the target company pension schemes, including arrangements to fund any scheme deficit
    e. its intentions with regard to redeployment of the fixed assets of the target company
    f. its intentions with regard to the maintenance of any existing trading facilities for the relevant securities of the target, *i.e.* any plans to delist.
3. Whilst some aspects of the above mandated disclosure requirements are readily capable of compliance by a bidder *(e.g.* intentions with respect to (de)listing or general intentions regarding to the business of the target and its strategic plans for the target – the latter likely being foundational items to developing the financial model and pricing on the bid), the ability and feasibility of developing firm intentions with respect to some of the other disclosure items noted above can be a challenge particularly when a bidder may have had limited access to target due diligence information and/or is in a competitive situation or otherwise where timing is tight (*e.g.* due to imposition of a 'put up shut up' deadline).
4. The Panel, however, has in recent years tightened up its approach on these disclosures – denouncing the practice of "boilerplate" disclosures by bidders, requiring further detail on bidder's intentions with respect to the target's business, setting out the standards it expects to be applied by bidders when making these disclosures[22], and introducing (in 2014) a new framework to monitor any "post-offer intention statements" made by a bidder[23]. The Panel has emphasised the importance of

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these statements – not only for target companies when formulating their views on the merit of a potential bid but also for other stakeholder (such as employees and pension scheme beneficiaries, both of whom have locus under the Code to have their views and opinions on a bid disclosed and published by the bidder).

5. In Panel Bulletin 7, the Panel Executive has gone on to elaborate on how it approaches compliance with these disclosure requirements. In particular, the Panel Executive has noted that over time, bidders have tried to navigate around the disclosure requirements mandated by Rule 24.2(a) as set out in paragraph 2 above by making arguments such as (i) it has not formulated intentions on employees or locations of business as it is uncertain about expected synergies arising from the acquisition/ combination; (ii) if there is to be any reduction in headcount it expects this not to be material and thus does not consider this merits disclosure; (iii) the bidder has not as yet completed its strategic review and its only post-offer intention in the 12-month period is to conduct such a review; or (iv) the proposed post-offer intention disclosures are aligned with other "boilerplate" or standard disclosures and thus suffices. In this new bulletin, the Panel Executive has stated that "none of these arguments … provides an acceptable basis for formulating statements of intention". This is a clear warning shot across the bow from the Panel Executive of which the market should take note.

IT'S TIME TO UP THE ANTE

On April 18, 2024, the Panel published a statement setting out new fees and charges that it will be applying from June/July 2024 in relation to takeover transactions, whitewash transactions and approval of certain exempt status potentially available for certain financial institutions[24].

The updated fees and charges bring about the following changes: (i) to reinstate the level of documentary fees for offer documents to the pre-August 2021 levels[25]; (ii) rebalance the fees charged on so-called "Rule 9" waiver circulars[26] to lower the charges for smaller value transactions, increase the charges for larger value transactions, and introduce a new top band of a £50,000 charge for offers with a value of over £250 million; (iii) increase by 25% the fees charged to lower the charges for smaller value transactions and increase a new top band; and (iv) increase by 25% the fees charge for granting exempt principal trader, exempt fund manager and recognised intermediary status[27] to £7,000 per entity.

These revised charges will apply from 1 June 2024 (in the case of (i) and (ii)) or from 1 July 2024 in the case of (iii). In reinstating its fees to pre August 2021 levels, the Panel noted the reduction in its revenues due to lower levels of market activity since that time, and, as noted in our last alert on changes to the scope of the Takeover Code, we may see some further reduction in revenues over time due to the narrowing of the types of companies which will fall within the remit of the Code.

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[1] The updated version of Practice Statement 31 (previously entitled "Strategic reviews, formal sale processes and other circumstances in which a company is seeking potential offerors") was published on 30 April 2024.

[2] These are set out in Rules 2.4(a) and (b) of the Takeover Code and are discussed in further detail in this alert.

[3] Practice Bulletin 7 was published on 15 May 2024.

[4] These are set out in Rules 2.7(c)(viii), Note 1 on Rule 2.7 and Rule 24.2 of the Takeover Code and are discussed in further detail in this alert.

[5] In August 2021, the Panel has reduced charges payable on offer documents by approximately 25%.

[6] These fees were last revised in 2015.

[7] Rule 2.2.(f)(i).

[8] Rule 2.2(f)(ii).

[9] Companies in an offer period are listed on the Panel's Disclosure Table.

[10] Definition of "offer period".

[11] Rule 2.4(a).

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[12] Rule 2.4(b).

[13] Rule 2.6(a).

[14] Rule 21.2(a).

[15] Rule 21.3(a).

[16] Rule 21.3(b).

[17] Note 1 on Rule 21.3(a).

[18] From that point onwards, the company would be treated as having commenced a public search for possible bidders.

[19] There are currently 17 live Practice Statements being applied by the Panel Executive.

[20] The Panel commenced the practice of issuing Panel Bulletins in 2021 and since then have issued 7 such bulletins including the one under discussion in this alert.

[21] Rule 24.2(a).

[22] Rule 19.8(a) requires statements of intention relating to the post-offer period to be: (i) accurate statements of that party's intentions at the time it is made; and (ii) made on reasonable grounds.

[23] Rule 19.8(b) requires a bidder to consult with the Panel if it intends to depart from its statement of intention in the 12 months post bid and Rule 19.8(c) requires a bidder to confirm in writing to the Panel at the end of the 12-month period post bid that it has fulfilled its post-offer statement(s) of intention.

[24] In summary, these exemptions afford dispensations from certain disclosure requirements and dealing restrictions.

[25] In August 2021, the Panel has reduced charges payable on offer documents by approximately 25%.

[26] These are circulars convening shareholder meetings to consider and approve the requirement on a party to make a mandatory or "Rule 9" offer where such a requirement has been triggered under the Code.

[27] These fees were last revised in 2015.

The following Gibson Dunn lawyer prepared this update: Selina Sagayam.

If you have any questions on the impact of the proposed changes, including application of the transitional arrangements, or are seeking advice on assessing and implementing alternative arrangements for companies which will come out of scope of the Code, we are happy to assist.

For questions about this alert or other UK public M&A or capital market queries, contact the Gibson Dunn lawyer with whom you usually work, the author of this alert or these public listed company and capital markets contacts in London:

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