

January 9, 2018

RECENT DEVELOPMENTS IN UK PUBLIC TAKEOVER REGULATION - A BRIEF SUMMARY OF RECENT RULE CHANGES AND THE LANDMARK DECISION IN *THE PANEL ON TAKEOVERS AND MERGERS V KING*

To Our Clients and Friends:

Enforcement of Panel Rulings

A few weeks ago, the Court of Session in Edinburgh (the *Court*)[1] delivered its landmark judgement in the case of *The Panel on Takeovers and Mergers v David Cunningham King*[2] – the first case in which the UK Takeover Panel (the *Panel*) applied to court for an enforcement order pursuant to its rights under the Companies Act 2006 (the *Act*). On 13 March 2017, the Takeover Appeal Board (*TAB*) published its decision that Mr. King had acted in concert with other persons to acquire more than 30% of the voting rights in Rangers Football Club (*Rangers*) and in consequence had incurred an obligation under the Code to make a mandatory offer at a price of 20 pence per Rangers share for all the shares not already held by King and his concert parties. TAB directed that King make this mandatory offer by 12 April 2017. As previously written about[3], King failed to comply with the direction of TAB and on 13 April, the Panel commenced proceedings in the Court seeking an order requiring Mr. King to comply with its rulings. The Court acknowledged that whilst "in nearly all cases, if asked by the Panel to enforce its decision by granting an order", it would do so, nonetheless it confirmed that there may be rare cases where it may not do so and that the wording of the legislation allowed for this inherent discretion to refuse to grant an order. The Court went on to find in favour of the Panel, helpfully noting "the Panel is the body which is charged with the duty of evaluating the evidence and making findings of fact" – the court is not acting in this context as a court of appeal.

Earlier this week, a number of changes to the City Code on Takeovers and Mergers (the *Code*) were introduced.

Significant Asset Sales in Competition with Offers

The first set of changes, which the Panel consulted on earlier last year, principally relate to the situation where a target company is considering a "significant" asset sale with a view to distribution of the company's cash balances including the asset sale proceeds to its shareholders, in competition to an offer or possible offer[4]. The Panel has introduced a set of changes to: (i) prevent asset buyers in such cases from circumventing certain provisions of the Code; and (ii) ensure that shareholders have the benefit of competent independent advice and comprehensive information from the target company board on the competing asset sale. We have previously commented on some of the proposed changes put forward by the Panel[5]. The key change following the consultation process[6] is that the Panel has raised the threshold for asset sales which would normally be regarded as significant from 50% to 75% having

regard to relative values ascribed to consideration, assets and profits. The first set of rule changes also cover the use and supervision (by financial advisers) of social media for the publication of information by parties to an offer.

Bidder Statements of Intention and Code Timetable Changes

The second set of changes which the Panel consulted on in autumn 2017^[7] principally related to: (i) the enhanced scope and timing of statements of intention by bidders in relation to a target company; and (ii) a new rule prohibiting bidders from publishing their offer document in the first 14 days from publication of the announcement of the firm intention to make an offer, other than with the consent of the target board. Following the recent Code changes, bidders will now be required to make statements of intention with regard to the target's: (a) research and development functions (if any); (b) material changes to the balance of skills and functions of the target company's employees and management; and (c) location of the target company's headquarters and headquarter functions – first in the firm intention offer announcement and also in its offer document. These changes present yet another challenge for bidders or possible bidders of UK Code companies. First, bidders will now in practice be required to undertake more comprehensive diligence and analysis at a much earlier stage by bidders with respect to the new matters outlined above. Whilst the Panel conceded following feedback during the consultation process^[8] that there may be circumstances where the bidders intentions may change during an offer and that in such circumstances the bidder would be required to announce any new intentions promptly, the Panel pushed back against the ability of a bidder to satisfy these new intention statement requirements by stating that it would undertake a review of the target's business following an offer. Second is the new important change to the takeover timetable and offer document posting date. In practice, the change means that a hostile bidder will no longer be able to launch and close a so-called "bullet offer" – that is, a bid where the firm intention offer and offer document are announced and posted on the same day with a view to closing the offer on the 1st closing date (21 days later). The tide has turned yet again against bidders of UK companies.

[1] The Court of Session is Scotland's supreme civil court which is divided into the Outer House and Inner House. This case was heard at first instance by one Lord Ordinary sitting in the Outer House.

[2] Panel on Takeovers and Mergers v King [2017] CSOH 156

[3] <https://www.gibsondunn.com/uk-public-ma-learnings-from-some-recent-contested-cases-before-the-uk-takeover-panel/>

[4] Panel Consultation Paper: "Asset Sales and Other Matters" - PCP 2017/1 - http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/07/PCP.192957_1.pdf

[5] <https://www.gibsondunn.com/uk-public-ma-when-is-a-final-offer-not-final-part-2/>

[6] See Response Statement - RS 2017/1 - <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/12/RS2017-1.pdf>

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[7] Panel Consultation Paper: "Statements of Intention and Related Matters" - PCP 2017/2 - <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/09/PCP-re-statements-of-intention-September-2017.pdf>

[8] See Response Statement – RS 2017/2 - <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/12/FinalRS2017-2.pdf>



If you require further information on the Code changes outlined above or guidance on these recent developments, please contact the author of this note, Selina Sagayam (ssagayam@gibsondunn.com), the Gibson Dunn lawyer with whom you normally work, or the following partners in the firm's London office. We would be pleased to assist you.

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