

March 31, 2021

# Changes to UK Takeover Code

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## Most Significant Changes in a Decade Made as Regulatory Scrutiny of M&A Intensifies Worldwide

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### SUMMARY

On March 31, 2021, the UK's Panel on Takeovers and Mergers (the "**Panel**") published the results of a consultation that started in October 2020 to review the City Code on Takeovers and Mergers (the "**Code**"). The consultation related in particular to the rules governing offer conditions and the offer timetable.

In its original consultation paper, the Panel acknowledged that when the Code's offer timetable rules were originally introduced, an antitrust clearance from the UK Competition and Markets Authority ("**CMA**") or the European Commission "was the principal, and sometimes only," regulatory clearance required by bidders. The regulatory landscape has evolved drastically since then, with increasingly international, rigorous and lengthy antitrust reviews and an ever-growing number of new foreign direct investment screening regimes worldwide (including in the UK itself). This trend has already affected the conduct of UK takeover bids, and looks set to continue to do so in the coming years. While the timetable for offers effected by way of a scheme of arrangement already allowed a degree of flexibility to deal with these regimes, the timetable for a contractual offer had previously been much more rigid.

In this context, the proposed changes to the Code go some way towards future-proofing the UK takeover regime and should generally be welcomed by bidders and shareholders of UK public companies alike. Most significantly, under the proposed changes, a bidder using a contractual offer will be very unlikely to face the invidious choice of waiving material regulatory clearances or risk its bid being timed out. Additionally, in most circumstances, target shareholders will be able to delay committing to a bid that is made as a contractual offer until they know the outcome of, and the consequences of obtaining, any regulatory clearances.

In summary, the proposed changes:

- remove the special treatment historically given to CMA and European Commission clearance conditions by treating all regulatory conditions in the same way;

- allow for a suspension of the timetable of a contractual offer during which all regulatory clearances can be obtained;
- codify the factors the Panel will have regard to when considering whether conditions or pre-conditions can be invoked for both schemes of arrangement and contractual offers;
- require bidders to specify a long stop date by which the acceptance condition and any other conditions to a contractual offer must be satisfied or waived;
- end the distinction between the deadlines for satisfying a contractual offer's acceptance condition and other conditions by implementing a single 'unconditional date' by which all contractual offer conditions must be satisfied or waived; and
- permit target shareholders to withdraw acceptances from the outset of a contractual offer until this unconditional date.

The consultation period ended on January 15, 2021 and the Panel's Code Committee on March 31, 2021 published a Response Statement containing the results of the consultation and the text of the amendments to the Code. The amended provisions of the Code will apply to firm offers announced on or after July 5, 2021. Any ongoing firm offers which straddle that date, and any offers announced on or after that date which compete with such ongoing offers, will continue to be subject to the unamended provisions of the Code.

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### **THE CONTEXT—EVER-INCREASING REGULATORY SCRUTINY WORLDWIDE**

Complex cross-border transactions often go hand in hand with lengthy and burdensome antitrust reviews. In the EU, an in-depth Phase 2 review can take up to 160 working days (approx. 8 months), not including pre-notification (which usually takes many months in complex cases) or any 'stop-the-clock' timeline suspensions. In practice, complex reviews often run for over a year from pre-notification. The situation is similar in the US, where a 'second request' frequently takes several months. In the UK, the maximum review period is even longer at 50 calendar weeks plus 40 working days (approx. 14 months), excluding pre-notification and any timeline suspensions. In addition, cross-border transactions frequently require antitrust approvals in many other jurisdictions. In 2020, we noticed increasingly rigorous reviews in jurisdictions including Brazil, Mexico, Chile, Ukraine, Turkey and Russia, among others.

There is no sign that scrutiny from antitrust regulators in Europe, the US and the rest of the world will abate. On the contrary, authorities are scrutinising transactions to an even greater degree, sometimes resulting in considerably longer timelines to closing and complex (and sometimes futile) remedies discussions.

In addition, as of January 1, 2021, the CMA in the UK is no longer barred from investigating transactions meeting its jurisdictional thresholds alongside any parallel investigation by the European Commission. Indeed, the CMA expects a significant proportion of mergers now falling within its jurisdiction to be subject to a parallel investigation by the European Commission, resulting in an estimated increase of 50% in the number of merger cases before the CMA. Parallel jurisdiction by the CMA will inevitably impact transaction timelines, with the statutory review period being longer in the UK than in the EU.

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Fuelled both by (a) general concerns that companies may be easy targets for foreign takeovers during the Covid-19 pandemic and (b) in Europe, the entry into force of the EU's Foreign Direct Investment Regulation on October 11, 2020, there has been a significant increase in the number of new foreign direct investment (“**FDI**”) screening regimes, both in Europe and around the world. (See S&C's client memo on the EU regulation [here](#).)

In the last year alone, new measures were introduced in Slovenia, the Czech Republic (draft bill to come into force on May 1, 2021), Poland, the Netherlands (draft bill) and Malta, while other EU Member States have significantly tightened their FDI regimes (including France—see S&C's client memo on FDI regimes in the EU [here](#)). Currently, only six EU Member States have neither any FDI regime in place nor proposals to put one in place. The timeline for an investigation on FDI grounds in the EU varies by jurisdiction, and it is often difficult to precisely predict how long a review will take, given the discretion afforded to national governments in assessing individual transactions and the often only limited (or no) *de minimis* exemptions for foreign investors. In Italy, for example, the government's ‘Golden Powers’ allow it to review transactions in a vast number of sectors, irrespective of whether or not the parties have notified the transaction, with a statutory review timeline of (a notional) 45 days, which may be suspended (and thus extended) at the sole discretion of the Italian government.

Outside the EU, one of the most significant examples of a government tightening its FDI controls in response to the Covid-19 pandemic is Australia, where in March 2020 the Foreign Investment Review Board (“**FIRB**”) temporarily reduced the monetary notification threshold for inbound investment to zero, leading to transactions with as little nexus ‘down under’ as a dormant Australian shell company being required to be conditional on prior FIRB approval (although the monetary notification thresholds have now been reinstated as of January 1, 2021).

In the UK, a brand-new FDI regime is expected to come into force within the next few months. The new regime will include a mandatory notification obligation for transactions in designated sensitive sectors, long government review timelines of up to 105 working days (or longer, if agreed—though most are expected to be shorter) and significant sanctions for non-compliance. There will be no safe harbours, and no minimum revenue or turnover thresholds. The regime will be administered by a newly formed Investment Security Unit and will operate independently of the antitrust regime administered by the CMA. (See S&C's client memo on the potential new FDI regime in the UK [here](#).)

Many of the changes to the Code are being made against this background of more, and more complex, regulatory oversight in relation to acquisitions worldwide, as well as against the background of the end of the Brexit transition period.

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## THE CHANGES

As indicated in the following sections of this briefing, certain of the changes to the Code will apply to takeovers structured as contractual offers, some will apply to takeovers structured as schemes of arrangement and some will apply to both. The changes relating to the takeover timetable affect

contractual offers only. The Appendix to this note shows the new timetable for contractual offers generally, as well as the effect on the timetable if there has been either an acceleration statement or a timetable suspension (as discussed in Sections I.B and I.C below, respectively).

A contractual offer involves the bidder making an offer directly to the target's shareholders to buy their shares and can be used to implement both hostile and recommended takeovers. A scheme of arrangement, on the other hand, is a statutory, court-supervised process proposed by the target company and voted upon by its shareholders: as a result, schemes are generally only used to implement recommended takeovers. Most recommended takeovers are structured as schemes of arrangement because it is generally considered as an easier route to obtaining 100% of the shares of the target, which can be obtained with the support of 75% by value (and a majority in number) of target shareholders present and voting at the target shareholder meeting to approve the scheme and because there is greater flexibility in the timetable for a scheme of arrangement. For 100% control to be obtained by way of contractual offer, holders of at least 90% of the shares subject to the offer must accept the offer. In addition, up until now, the timetable for a contractual offer has been more rigid than for a scheme of arrangement.

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### I. CHANGES AFFECTING CONTRACTUAL OFFERS

#### A. SINGLE UNCONDITIONAL DATE; WITHDRAWAL RIGHTS

At present, the parties to a contractual offer have 21 days from the date on which a sufficient number of shareholders have accepted the offer (when the offer is declared as unconditional as to acceptances) to satisfy or waive the other conditions to the offer—including any regulatory clearances. The last date for a contractual offer to be declared unconditional as to acceptances is 60 days after the publication of the offer document ("**Day 60**"), meaning that the last date for all conditions to be satisfied or waived is currently 81 days ("**Day 81**") after the publication of the offer document. Both of these dates can be extended with the consent of the Panel; however, the Panel generally prefers not to extend Day 81 as accepting target shareholders have not historically been able to withdraw their acceptances once the offer has been declared unconditional as to acceptances.

This distinction between a date for the acceptance condition to be satisfied and a date for all other conditions to be satisfied in a contractual offer will now be abolished. There will instead be a single 'unconditional date' by which all conditions must be satisfied (other than any technical conditions which cannot be satisfied before the acceptance condition, such as the listing of consideration securities). In addition, the acceptance condition will not be capable of final satisfaction until all conditions that are capable of being satisfied before it (such as regulatory conditions) are satisfied or waived.

This means that where a regulatory clearance remains outstanding during the latter stages of the timetable for a contractual offer, target shareholders will no longer need to decide on the merits of a bid before knowing whether that clearance will be obtained (or waived). Moreover, target shareholders will be able to withdraw their acceptances from the outset of the offer until all such conditions are satisfied

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or waived, rather than (i) having to wait until the later stages of the timetable before being able to exercise withdrawal rights and (ii) being locked-in once the acceptance condition is satisfied. The unconditional date will be either (i) the 60th day from the publication of the offer document (i.e., Day 60) or (ii) if the offer timetable is suspended (see Section I.C below), the 28th day from the resumption of the offer timetable. In addition, each of (a) the last day by which the target may publish material new information (currently the 39th day after publication of the offer document), the last day on which the bidder can revise its offer (currently the 46th day after publication of the offer document) and the last day by which any competing bidder must clarify whether it will make a bid (currently the 53rd day after publication of the offer document) will be determined by counting back from the unconditional date, rather than by counting forward from the date of the publication of the offer document. They will now be the 21st, 14th and 7th day, respectively, prior to the unconditional date, but will continue to be known as Day 39, Day 46 and Day 53.

The new Day 60 will be able to be extended in broadly the same circumstances as the current Day 60 (for example, where the target board consents), with a 'new' rule allowing for suspension of the offer timetable where regulatory clearances have not been obtained by its latter stages, as described in Section I.C below.

Please see the revised timetable for contractual offers in the Appendix for further details.

### **B. ACCELERATION STATEMENTS AND ACCEPTANCE CONDITION INVOCATION NOTICES**

Once a contractual offer is launched, a bidder may set a series of closing dates to test whether the acceptance condition is satisfied. If the acceptance condition is not met, a bidder may lapse the offer (or, if it is met, can declare the offer unconditional as to acceptances). If a bidder wants to move forward and close its offer before Day 60, the bidder can issue a 'no extension statement' effectively informing target shareholders to accept the offer ahead of the relevant closing date. The revised Code will, however, abolish the concept of closing dates and replace them with two new tools which bidders may use to manage the offer timetable: acceptance condition invocation notices and acceleration statements.

If a bidder wants to test the acceptance condition before Day 60 (without waiving any other conditions to the offer), it will now need to publish an irrevocable 'acceptance condition invocation notice'. This will specify the date on which the acceptance condition will be tested (which must be at least 14 days after the date of the notice and at least 21 days after the publication of the offer document) and the required threshold of acceptances (which cannot subsequently be changed).

If the specified threshold of acceptances is not met, the offer will lapse. If the threshold is met but other conditions are outstanding, the offer will neither lapse nor become unconditional at that time but will continue, and the bidder would still have until Day 60 to satisfy or waive those conditions. Given this, we expect that an acceptance condition invocation notice will most likely be used by a bidder that wishes to lapse its offer for failure to meet the acceptance condition prior to the final deadline on Day 60.

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An acceleration statement may be used to bring forward the unconditional date (i.e., Day 60) to an earlier date. Day 60 can be brought forward to no earlier than the 21<sup>st</sup> day following publication of the offer document. In addition, in order to give target shareholders sufficient notice of the new Day 60, the bidder will need to publish the acceleration statement not less than 14 days before Day 60 as so brought forward. Subject to these limitations, a bidder may make an acceleration statement to expedite its bid at any time during the offer period (including when the offer timetable has been suspended—see Section I.C below). (Where an acceleration statement is made to end a timetable suspension, there is an additional requirement that the new Day 60 cannot fall more than 27 days after the resumption of the offer timetable.)

If an acceleration statement is made before Day 39 of the offer timetable, Day 39 will be disapplied and so the target board will not be restricted from announcing any new material information after Day 39. If an acceleration statement is made at any time, Day 53 will be disapplied such that competing bidders will not be required to clarify their intentions by Day 53. In addition, the bidder will be unable to revise its offer after the 14<sup>th</sup> day prior to the new unconditional date (i.e., Day 46 will be reset in line with the accelerated Day 60). However, all conditions must be tested on this accelerated Day 60, and so the price for accelerating Day 60 is that the bidder must waive all unsatisfied conditions relating to an official authorisation or regulatory clearance on the day it makes the acceleration statement. Therefore, acceleration statements will most likely be used by a bidder who is prepared to close and does not want to wait until the original Day 60 for its offer to become unconditional.

Currently, acceptance levels for a contractual offer are only required to be announced on a 'closing date', on any day on which the offer is revised or extended, or on the day on which the offer becomes or is declared unconditional as to acceptances. Given the introduction of these two new tools and the abolition of closing dates, there will now be a requirement for acceptance levels to be announced more frequently throughout a contractual offer, namely:

- on the 21<sup>st</sup> day following the publication of the offer document and at least weekly thereafter (except during a timetable suspension—see Section I.C below);
- on the day on which an offer is revised;
- on the day on which an acceptance condition invocation notice expires;
- on the day on which an offer becomes or is declared unconditional or lapses;
- each time the number of acceptances increases or decreases to, or through, any of the following levels:
  - the threshold at which the acceptance condition is then set;
  - 75% of the voting rights of the target;
  - the minimum threshold to which the acceptance condition can be reduced according to its terms (usually 50% plus one share); and
- daily in the week leading up to and including the unconditional date (i.e., Day 60, as may be adjusted) or the long-stop date.

### C. TIMETABLE SUSPENSION FOR OFFICIAL AUTHORISATIONS AND REGULATORY CLEARANCES

The Panel is currently normally willing to extend Day 60 if the parties agree or (among other reasons) if there is a significant delay in the decision on whether there is to be a Phase 2 CMA reference or the initiation of Phase 2 European Commission proceedings. However, unless the parties agree, the Panel would not currently be willing to extend Day 60 for any other significant regulatory proceedings.

However, because the European Commission no longer acts as a domestic competition regulatory authority in the UK, the Panel has concluded “it would not be logical, or appropriate, for the Code to continue to have special requirements relating to clearances from the European Commission”.

Therefore, in line with the general removal from the Code of express references to the CMA and European Commission, the timetable suspension rule is being expanded. The Code will now specifically provide for a suspension of the offer timetable on the 37<sup>th</sup> day following publication of the offer document (“**Day 37**”) where one or more regulatory clearances remain outstanding on such date. Such a suspension must be requested from the Panel on or before Day 37.

The Panel will normally consent to a request for a suspension of the offer timetable that is made by the bidder and the target jointly or by the target alone. If the request is made by the bidder alone, the Panel will only suspend the offer timetable if it is satisfied that any outstanding regulatory clearance is ‘material’—i.e., that failing to obtain the clearance *could* give rise to circumstances that are of material significance to the bidder in the context of the offer. (In more limited circumstances, the Panel may also permit suspensions at later stages of the offer timetable.)

Importantly, a determination by the Panel that a regulatory clearance is sufficiently material to allow suspension of the timetable is not a determination that failure to obtain the relevant regulatory clearance will allow the bidder to lapse its offer. Any such suspension of the offer timetable will not affect the offer’s long-stop date (see Section I.D below).

A suspension of the offer timetable will end in one of the following three ways:

- automatically, following the satisfaction or waiver of the last condition relating to a material official authorisation or regulatory clearance (with the day on which the suspension ends and the offer timetable restarts being known as “Day 32” to ensure that there is sufficient time for the target to prepare to announce any material information, which it must announce before Day 39 so that target shareholders have 21 days to absorb such information before Day 60);
- by the agreement of the bidder and the target (with the day on which the suspension ends and the offer timetable restarts being Day 32, as in (i) above); or
- by the bidder making an ‘acceleration statement’ (see Section I.B above).

### D. CONTRACTUAL OFFERS MUST INCLUDE A LONG-STOP DATE

In order to prevent contractual offers from remaining open indefinitely if the timetable is suspended (see Section I.C above), contractual offers will need to include a long-stop date by which the acceptance

condition and all conditions relating to official authorisations or regulatory clearances must be satisfied or waived.

In recommended bids, the bidder and target are expected to agree the long-stop date. In a hostile situation, the long-stop date must fall on or after the date by which the bidder reasonably expects to obtain the 'slowest' material official authorisation or regulatory clearance. The bidder and target would need to agree to any extension of the long-stop date.

A contractual offer would lapse if the acceptance condition is not satisfied on the long stop date. If, on a contractual offer's long-stop date, the bidder has received sufficient acceptances to satisfy the acceptance condition but any other condition remains outstanding and is not waived, the bidder will need the Panel's consent to lapse the offer (as it does currently at Day 81)—see Section III.C below for further details on when the Panel will allow a bidder to lapse an offer if a condition or pre-condition is not satisfied. If the Panel's consent is not granted, the bidder will normally be expected to immediately waive the outstanding condition(s) and declare the offer unconditional.

The same rule will apply to pre-conditional offers (see Section III.B below).

### **E. MANDATORY OFFERS MAY BE CONDITIONAL OR PRE-CONDITIONAL ON REGULATORY CLEARANCES**

The Code requires any acquirer of interests in shares that carry 30% or more of the voting rights of a company subject to the Code to make a so-called 'mandatory offer' for all the other shares in that company. Historically, the sole condition to which mandatory offers may be subject has been a (bare majority) acceptance condition, while it was also a required term of all offers, including mandatory offers, that they would lapse following a Phase 2 CMA reference or the initiation of Phase 2 European Commission proceedings. The new rules have removed this requirement (see Section III.A below). Accordingly, the Code has prohibited acquisitions of shares which would give rise to a requirement to make a mandatory offer if the making or implementation of the offer would be subject to any other condition or consent.

The revised Code will permit acquisitions of shares which would give rise to a mandatory offer which could be subject to a regulatory condition or pre-condition only if: (i) the condition or consent relates to a 'material' official authorisation or regulatory clearance (see Section I.C above); (ii) the triggering share purchase is itself subject to a condition relating to that material official authorisation or regulatory clearance in identical terms to the condition or pre-condition to the mandatory offer; and (iii) the invocation of the condition or pre-condition is subject to the consent of the Panel, applying the material significance requirement (see Section III.C below).

However, mandatory offers are extremely rare, and we would not expect this 'relaxation' of the rule surrounding mandatory offers to increase their use. A non-mandatory offer will still be the easiest way to seek to acquire a company which is subject to the Code.



## II. CHANGES AFFECTING SCHEMES OF ARRANGEMENT ONLY

To address concerns that bidders could exploit the procedural requirements of schemes of arrangement to avoid seeing them through to their conclusion, the revised Code will require bidders: (i) to confirm prior to the court sanction hearing (effectively at a time controlled by the target) that all conditions capable of satisfaction prior to such time have been satisfied or waived; and (ii) to undertake at the court sanction hearing to be bound by the scheme. If a bidder does not wish to give the confirmation in (i), it will need to apply to the Panel to invoke a condition to the scheme, which will be subject to the 'material significance' requirement (see Section III.C below).

Because well-advised targets have in any case typically required bidders to comply with these procedural requirements in a bid conduct agreement, the main effect of this amendment will simply be to make non-compliance justiciable by the Panel, though it does tilt the balance of control in scheme structures even further in favour of target boards.

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## III. CHANGES AFFECTING BOTH CONTRACTUAL OFFERS AND SCHEMES OF ARRANGEMENT

### A. MANDATORY LAPSING TERM

Under the current rules, it is a requirement that all contractual offers or schemes of arrangement lapse if a Phase 2 CMA reference is made or Phase 2 European Commission proceedings are initiated. There is no similar requirement for any other regulatory clearance.

The revised Code now removes the requirement for a contractual offer or scheme to lapse in the event of a Phase 2 CMA reference or Phase 2 European Commission proceedings.

### B. PRE-CONDITIONAL OFFERS

Currently pre-conditional offers can feature pre-conditions in relation to: (i) there being no Phase 2 CMA reference or initiation of Phase 2 European Commission proceedings; (ii) the offer being cleared at the end of any Phase 2 CMA reference or Phase 2 European Commission proceeding; or (iii) any other material official authorisations or regulatory clearances provided that either the offer is recommended by the target board or the Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the Code timetable.

These rules are now being simplified such that pre-conditions relating to any official authorisation or regulatory clearance can be included if either: (i) the target agrees to the pre-condition; or (ii) the authorisation or clearance is 'material' (see Section I.C above). This means that CMA and European Commission pre-conditions will only be permissible if the Panel is satisfied that they are 'material' in the context of the particular bid. However, it will potentially be easier, in cases where a contractual offer is to be used, to include pre-conditions relating to other regulatory clearances, given that there is no longer

any need to demonstrate that the timetable for these clearances would not be compatible with the offer timetable.

Like normal contractual offers (see Section I.D above), pre-conditional offers will also need to include a long-stop date for the satisfaction or waiver of all pre-conditions, irrespective of whether the bidder intends to implement the offer by way of a contractual offer or a scheme of arrangement. Similarly, the Panel's consent would be required for a bidder not to make an offer were a pre-condition not satisfied or waived prior to the long-stop date.

### **C. INVOKING CONDITIONS AND PRE-CONDITIONS; THE MATERIAL SIGNIFICANCE REQUIREMENT**

The Panel is well known for strictly regulating when bidders can invoke conditions (other than as to acceptances or mandatory legal or regulatory conditions such as listing requirements or shareholder approvals) so as to lapse offers or invoke pre-conditions to withdraw from pre-conditional offers. In summary, conditions or pre-conditions relating to official authorisations or regulatory clearances (other than those relating to the CMA or European Commission) can only currently be invoked if the Panel determines that the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the bidder in the context of the offer. (This is known as the material significance requirement.) Where the condition or pre-condition is a more general bidder protection condition (such as a material adverse change condition), the Panel will also need to be satisfied that the relevant circumstances are of very considerable significance striking at the heart of the purpose of the transaction.

The revised Code (in particular the revised Rule 13.5 and a revised Practice Statement No. 5) sets out in greater detail which sort of conditions and pre-conditions are subject to the material significance requirement. It also stipulates that the parties to an offer will be required to state in the main offer documentation which specific conditions or pre-conditions they believe are materially significant in this way.

While the material significance requirement has historically not applied when invoking conditions or pre-conditions relating to the CMA or the European Commission, this exception will be abolished when the changes to the Code enter into force, consistent with the abolition of the mandatory lapsing term described in Section III.A above. These changes align the treatment of CMA and European Commission clearances with other official authorisations and regulatory clearances.

The revised Code also supplements the list of factors, set out in the Panel's Practice Statement No. 5, to which the Panel will have regard when considering whether the material significance requirement is met in a given case. The current list comprises whether the condition was: (i) the subject of negotiation with the target; (ii) expressly drawn to the attention of target shareholders in the offer documentation; and (iii) included to take account of the particular circumstances of the target. To these will be added, for all conditions: (iv) whether the circumstances the bidder is seeking to rely on in order to invoke the condition could not have reasonably been foreseen at the time of the firm offer announcement and, if

they could, the likelihood of the circumstances occurring; (v) the actions taken by the bidder since the firm offer announcement and, in particular, since the occurrence of the circumstances the bidder is seeking to rely on in order to invoke the condition; and (vi) the views of the board of the target company.

The expanded list specifies additional factors for conditions relating to official authorisations or regulatory clearances, namely: (i) the significance of the authorisation or clearance to the bidder; (ii) what action, if any, the bidder would need to take to obtain authorisation or clearance and the strategic consequences for the bidder if it were to take that action; and (iii) the consequence for the bidder and its directors were it to complete the offer without obtaining the authorisation or clearance. For conditions relating to there being no Phase 2 CMA reference (or an equivalent reference or process), the Panel will also take into account: (i) whether the reference or process would be likely to result in a serious risk of material damage to the business of the bidder and/or the target; and (ii) the utility of requiring the bidder and/or the target to pursue the reference or process where the prospect of the clearance being obtained is low. The Panel has not provided any guidance on whether the initiation of Phase 2 European Commission proceedings will be considered equivalent to a Phase 2 CMA reference, but this seems likely to be the case.

Although the expansion of the list provides clarity, it represents a codification of the Panel's practice rather than a departure from it.

A question remains as to whether this codification signals a relaxation of the Panel's historical reticence to let bidders invoke conditions and pre-conditions. While this would sit well alongside the Panel's acknowledgement that "there has been a proliferation of official authorisations and regulatory clearances required from various regulatory authorities around the world, such that any large and/or cross-border offer is likely to be subject to a number of conditions", the consultation paper and response statement issued by the Panel offer little insight and market participants will need to wait and see how the Panel's practice develops. It will also be interesting to observe whether parties start including in offer documentation more extensive disclosure of the circumstances in which certain conditions may be invoked, given that they will need to specify which conditions are subject to the material significance requirement in any case.

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## APPENDIX – REVISED TIMETABLE FOR CONTRACTUAL OFFERS

<b>DAY - 28 TO DAY -14</b>	Bidder announces firm intention to make an offer.
<b>DAY 0</b>	Bidder publishes offer document. <sup>1</sup>
<b>DAY 7</b>	First date on which bidder can make acceleration statement.
<b>DAY 14</b>	Last date for target board to publish response to offer document.
<b>DAY 21</b>	First date on which bidder can test acceptance condition and earliest date to which bidder can accelerate the unconditional date. <sup>2</sup>
<b>DAY 37</b>	<b>POSSIBLE TIMETABLE SUSPENSION SUSPENSION ENDS EITHER (I) AUTOMATICALLY ONCE ALL 'MATERIAL' REGULATORY CLEARANCES OBTAINED OR WAIVED, (II) BY AGREEMENT OF BIDDER AND TARGET, OR (III) BY BIDDER ISSUING AN ACCELERATION STATEMENT</b>

**IF NO SUSPENSION**

**IF SUSPENSION ENDS**

**DAY 32**

Timetable resumes.<sup>3</sup>

<b>DAY 39</b>	Last date for target to publish material new information.
<b>DAY 45</b>	Last date on which bidder can make acceleration statement. <sup>4</sup>
<b>DAY 46</b>	Last date for bidder to publish revised offer document.
<b>DAY 53</b>	Last date for any competing bidder to announce a firm intention to make an offer.
<b>DAY 60</b>	Latest unconditional date. <sup>5</sup>

<sup>1</sup> Bidder can only publish the offer document within 14 days of announcing a firm intention to make an offer with the consent of the target board.

<sup>2</sup> To test the acceptance condition on, or bring forward Day 60 to, Day 21, bidder must publish an acceptance condition invocation notice or acceleration statement no later than Day 7. If an acceleration statement is made at any time: (i) the new Day 60 must be not less than 14 days following the date of the statement, (ii) Day 46 will be reset in line with the new Day 60 and (iii) Day 53 will not apply. In addition, if an acceleration statement is made before Day 39, Day 39 will not apply.

<sup>3</sup> As Day 60 will usually be reset as the 28<sup>th</sup> day following the resumption of the timetable, the timetable will resume on Day 32 and Days 39, 46 and 53 will be reset accordingly (unless the timetable suspension is ended by bidder issuing an acceleration statement, in which case the rest of the timetable will be shortened—see footnote 2). Day 60 must be prior to the long-stop date.

<sup>4</sup> An acceleration statement made on Day 45 would bring forward Day 60 to Day 59.

<sup>5</sup> Bidder will also be required to include a long-stop date (although this will likely only become relevant if there is a timetable suspension).

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