Quoted Companies Alliance

6 Kinghorn Street
London EC1A 7HW

T +44 (0)20 7600 3745
mail@theqca.com

www.theqca.com

The Secretary to the Code Committee
The Takeover Panel
One Angel Court
London
EC2R 7HJ

supportgroup@thetakeoverpanel.org.uk

Friday 15 January 2021

Dear Code Committee members,

Public Consultation by the Code Committee: Conditions to Offers and the Offer Timetable

We welcome the opportunity to respond to your consultation on conditions to offers and the offer timetable.

The Quoted Companies Alliance *Legal Expert Group* has examined the proposals and advised on this response from the viewpoint of small and mid-sized quoted companies. A list of Expert Group members can be found in Appendix A.

We are broadly supportive of the proposed changes to the Takeover Code. In particular, we consider the changes to the timetable to be a simplification of the current regime and we welcome the proposed application of withdrawal rights to the entirety of the offer period. Likewise, the decision to bring to an end the existing distinction between competition clearance conditions and other regulatory authorisations and clearances represents a pragmatic and logical evolution of the Code.

If you would like to discuss our response in more detail, we would be happy to arrange a meeting.

Yours sincerely,

Mark Taylor
Partner, London Corporate Head
Dorsey & Whitney LLP

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?

We believe that the proposed amendments to the Code timetable so as to work backwards from Day 60, as opposed to working forwards from the date of posting of the Offer Document, represent a welcome simplification to the timetable and, when coupled with the new proposals for acceleration of Day 60, early invocation of the acceptance condition and timetable suspension, will operate for the benefit of the offeror and offeree.

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?

We believe that the ability to suspend the timetable, together with the setting of a long-stop date at the outset, represents a pragmatic and logical evolution of the Code. The existing distinction between competition clearances and other official authorisations and regulatory clearances is an artificial one and the proposal very sensibly focusses on the materiality of the authorisation/clearance. In practice, the Panel may face challenges in determining materiality in those cases where one party objects to the suspension. Whilst the clarifications provided by the proposed revisions to Practice Statement 5 provide useful guidance, we anticipate that there will be cases where the Panel's determination will be strongly contested and we believe that, in due course, it will be necessary to publish further information to refine the statements contained in that Practice Statement.

The new requirement to include a long-stop date in contractual offers is also a welcome protection against the risk of an offeree being under duress for a potentially indefinite period of time pending the granting or refusal of required authorisations/clearances.

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?

We believe that this is a well-considered amendment and the additional seven-day grace period, which allows for the publication of new information, will be welcomed by offerees. This is particularly helpful where the timing of obtaining the relevant authorisation/clearance has not been signalled in advance.

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

A number of the provisions contained in the proposals will be less relevant where takeover offers are agreed, which is most often the case. We support the principle that the Panel should not generally interfere with timetable variations which are mutually agreed between the offeror and the offeree. We include the ability for the offeror and the offeree to agree extensions to the long-stop date within this principle.

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

We are in favour of the approach proposed which provides a practical route for bringing the underlying competitive situation to a more rapid conclusion.

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?

We see no objection to the continuance of the pre-conditional offer concept provided that pre-conditional offers are themselves subject to the new long-stop requirement, as is currently proposed in the consultation.

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

We believe that the introduction of the long-stop date for a contractual offer, as proposed in the consultation paper, is an integral feature of the new regime. In its absence, an offer timetable could become open-ended where a suspension has been granted to accommodate conditions relating to authorisations/clearances. We agree that the requirement for a long-stop is entirely aligned with General Principal 6.

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?

We support the principle that the use of a scheme of arrangement should not provide an offeror with any means of lapsing an offer which, had that offer been conducted by way of a contractual bid, would not have arisen. We note, however, that the new provision is unlikely to change the existing practice of obtaining contractual undertakings to this effect at the outset of the offer.

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?

We believe this to be an appropriate evolution of the Code for the reasons stated in our response to Q2.

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?

Yes. This is a natural consequence of the broader changes to the treatment of regulatory authorisations/clearances.

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?

Yes. This is a natural consequence of the broader changes to the treatment of regulatory authorisations/clearances.

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?

We believe that the proposals set out in the consultation represent a fair balance of the interests between an offeror in bringing an offer to an early conclusion, on the one hand, and the preservation of General Principal 2 (through the 14-day notice requirement), on the other hand.

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

We agree with the proposal to remove the concept of "closing dates", and we welcome the corresponding introduction of a requirement for an offeror to announce acceptance levels at specified points in time.

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

Yes, as outlined in our response to Q13. This is information which is of direct relevance to decisions by shareholders in the offeree as to whether to accept the offer, reject the offer or withdraw acceptances previously made.

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?

We believe that the "all or nothing" principle is an essential feature of the proposal and we support it.

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?

Yes. This is an important development and, coupled with the ongoing ability for shareholders to withdraw acceptances at any time up to the unconditional date, it provides some protection to them from market movements in the interim period. See also our answer to Q15.

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?

We believe that, as is currently the case, a default period of 60 days is reasonable and consistent with General Principle 6.

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

We consider that the adoption of the proposals tabled in the consultation renders Rule 13.6 superfluous and we therefore agree with its deletion.

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

We are in favour of the proposal to allow offeree company shareholders to withdraw acceptances at any time from the inception of the offer until the satisfaction of the acceptance condition. Whilst this will not necessarily be welcomed by offerors, it provides welcome flexibility for offeree shareholders. We believe that it brings the Code in line with other takeover regimes throughout the world. We note that under the "all or nothing" principle, the acceptance condition will always be the last condition to be satisfied and therefore recommend that consideration is given to whether the reference to the acceptance condition in the proposed amendment to Rule 34.1 should, in fact, be to all conditions to the offer.

On first review, the reference to the acceptance condition in that Rule appears to be inconsistent with the concept of an "acceptance condition invocation notice" because where the acceptance condition is satisfied following the issue of an acceptance condition invocation notice but other conditions remain outstanding.

Offeree shareholders will nonetheless be able to continue to exercise their withdrawal rights until the unconditional date.

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?

We agree with the proposal to bring conditions relating to authorisations/regulatory clearances into the same regime as MAC conditions. However, as mentioned earlier, in the context of Q2, we anticipate that the Panel will face challenges in making its determination of materiality as this may require the review of substantial volumes of information and reference to specialist advice. In view of this – and having regard to the increasing incidence of regulatory clearances in offers – we believe it likely that the Panel will require additional resource to enable it to perform its functions in making such determinations, and to deal with appeals against those determinations.

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?

We have no comments here.

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?

We welcome the additional clarity here.

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

We have nothing to add.

Appendix A

The Quoted Companies Alliance *Legal Expert Group*

Mark Taylor (Chair)	Dorsey and Whitney
Maegen Morrison (Deputy Chair)	Hogan Lovells International LLP
Stephen Hamilton (Deputy Chair)	Mills & Reeve LLP
Danette Antao	Hogan Lovells International LLP
Paul Arathoon	Charles Russell Speechlys LLP
Naomi Bellingham	Practical Law Company Limited
Ross Bryson	Mishcon De Reya
Andrew Chadwick	Clyde & Co LLP
Philippa Chatterton	CMS
Paul Cliff	Gateley
Sarah Dick	Stifel
Tunji Emanuel	LexisNexis
Kate Francis	Dorsey and Whitney
Claudia Gizejewski	LexisNexis
Francine Godrich	Focusrite Plc
Sarah Hassan	Practical Law Company Limited
David Hicks	Charles Russell Speechlys LLP
Kate Higgins	Mishcon De Reya
Alex Iapichino	Majestic Wine Plc
Nichols Jennings	Locke Lord LLP
Martin Kay	Blake Morgan
Jonathan King	Osborne Clarke
Nicola Mallet	Lewis Silkin
Nicholas McVeigh	Mishcon De Reya
Catherine Moss	Shakespeare Martineau LLP
Hilary Owens Gray	Practical Law Company Limited
Kieran Rayani	Stifel
Jaspal Sekhon	Hill Dickinson LLP
Donald Stewart	Kepstorn
Gary Thorpe	Clyde & Co LLP
Robert Wieder	Faegre Drinker LLP