

UK TAKEOVER CODE UPDATE

Panel publishes Practice Statement 31: Strategic reviews and formal sale processes

On 7 July 2017, the UK Takeover Panel published Practice Statement No 31, which describes the way in which the Panel Executive normally interprets and applies certain aspects of the Takeover Code when a company wishes to seek bidders for itself, typically via an announcement of a formal sale process or a strategic review that may result in a sale. The publication of PS31 indicates that the Executive intends to be more prescriptive about the application of the Code to auctions conducted by the target company. The key rules of the Code affected by PS31 are Rule 2 (*secrecy and announcements*), Rule 21.2 (*deal protection measures*) and Rule 21.3 (*equality of information between bidders*).

RELEVANT RULES OF THE CODE

Rule 2.4: When a target company makes an announcement that commences an offer period, Rule 2.4 requires the target to publicly identify every potential bidder with whom it is in discussions (or from whom it has received an approach that it has not rejected unequivocally).

Rule 2.6(a): Any potential bidder identified publicly must, within 28 days of being identified, announce a firm bid or announce that it does not intend to make a bid (subject to any extensions agreed between the target and the Panel) (the so-called *PUSU deadline*).

Rule 21.2: Targets and their concert parties must not enter into any offer-related arrangements (*e.g.*, break fees and other deal protection measures) with any potential bidder when a bid is active or contemplated.

Rule 21.3: Any information given by the target to any potential bidder must, on request, be given to each other bona fide potential bidder (even unwelcome potential bidders).

If you have any questions concerning this memo, please reach out to your regular firm contacts or:

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The full text of Practice Statement No 31 can be accessed via this [link](#).

The full text of the Takeover Code can be accessed via this [link](#).



FORMAL SALE PROCESSES

The Panel introduced the current PUSU, bidding-naming and anti-break fee rules into the Code in September 2011 in order to strengthen the position of targets and increase the protection for targets against protracted “virtual bid” periods. At the same time, the Panel introduced dispensations from those rules to allow a target that wishes to conduct an auction for its own shares by way of a formal sale process (*FSP*) to do so without the participants being required to be publicly named and being subject to a PUSU deadline, and to allow the target to agree to pay the eventual FSP “winner” a break fee in certain circumstances (the *FSP dispensations*).

PS31 describes how and when the Executive grants FSP dispensations and explains how the Executive applies and interprets certain other rules of the Code in the context of FSPs.

What must the FSP announcement include?

The Executive will want to review any announcement which commences an FSP. PS31 explains that the announcement must include: (1) the phrase “formal sale process” in the heading, (2) contact details for interested parties, (3) a description of the documentation participants will be required to sign, (4) an indicative FSP timetable (or a commitment to announce a timetable in due course), (5) confirmation of whether the target is in discussions with any potential bidders already or has received any approaches that it has not rejected unequivocally, and (6) an explanation of the FSP dispensations.

The Panel will require the target to update the market on its progress from time to time, and to make an announcement promptly if it decides to terminate the FSP for whatever reason.

Conditions imposed by the target on potential FSP participants

PS31 confirms that the Panel does not restrict targets from imposing conditions on potential FSP participants (*e.g.*, a standstill), save that targets must not require potential participants to waive any provisions of the Code (*e.g.*, the rules against frustrating action by the target). The only exception to this proviso is that the target may require potential participants to undertake not to request information to which they would otherwise be entitled under Rule 21.3, provided that the undertaking falls away when the offer period ends or if a third party announces a firm offer.

Equality of information between potential bidders

Section 4 of PS31 incorporates the old Practice Statement No 3 (Controlled Auctions), which has now been withdrawn.

It reiterates that, following the FSP announcement, any information passed to any potential bidder (whether an FSP participant or not) must, on request, be passed to each other bona fide potential bidder under Rule 21.3 (whether an FSP participant or not). As explained above, it is open to the target to require FSP participants to undertake not to request information under Rule 21.3 as a condition to participating in the FSP.

PS31 also reiterates that the target must not attach onerous conditions to the passing of information under Rule 21.3, but that it may attach whatever conditions it wishes to the passing of information outside of Rule 21.3 (*e.g.*, information passed to the “first” bidder). PS31 confirms that, if the target approaches a number of potential bidders at the beginning of a process (*e.g.*, a number of potential FSP participants), the Panel will treat all of those potential bidders as the “first” bidder (and the target will therefore be free to attach conditions, *e.g.*, standstills, to their receiving information) provided that the bidders agree to those conditions before any information is passed to any of them. Any potential bidder who refuses to agree to such conditions or who becomes involved in the

process later will have the benefit of Rule 21.3 and the target will therefore be restricted from attaching any onerous conditions to their receiving information that was given to the “first” bidders. In practice however, the risk of becoming subject to a PUSU deadline that does not apply to other potential bidders and of alienating the target board will likely deter most bidders from choosing to proceed outside of the FSP.

Converting private discussions into an FSP

When a target has been in private discussions with one or more potential bidders and then wishes to announce an FSP, the Executive will be concerned to ensure that the FSP is genuine and not an artifice to avoid the naming and PUSU consequences of a subsequent leak. PS31 explains that the Executive will consider all the relevant factors in deciding whether to grant the FSP dispensations (including how far the discussions have progressed and how the target plans to include new potential bidders in the FSP).

PS31 also explains that, if the Panel requires the target to make a leak announcement and the target wishes to announce an FSP simultaneously, the Panel will usually require the target to name any bidders with whom it is in discussions (or from whom it has received an approach that it has not rejected unequivocally), but it may nevertheless allow the target to announce a FSP simultaneously such that the named potential bidders will not be subject to a PUSU deadline and any subsequent FSP participants will not be subject to a PUSU deadline and will not need to be named.

The parties should consult the Executive at the earliest opportunity to maximize the likelihood of the FSP dispensations being granted and to agree the drafting of relevant announcements with the Panel.

Recent examples of FSPs

In April 2017, **Jimmy Choo plc** launched a strategic review of the options available to maximise value for its shareholders including a possible sale of Jimmy Choo, conducted within the context of an FSP. At the date of this memo, the FSP is ongoing.

In February 2017, **The Co-operative Bank plc** launched an FSP and announced that it was also considering ways to raise capital from new and existing investors as an alternative to a sale. In March 2017, Co-op announced that a number of strategic and financial parties had expressed interest in the sale process and were evaluating information on Co-op, but, three months later, Co-op confirmed that it was in advanced discussions with a group of existing investors regarding a capital raise and liability management exercise and accordingly discontinued the FSP.

In June 2014, having received an unsolicited approach from a third party to acquire one of its subsidiaries, **Waterlogic plc** announced a strategic review of its options and launched an FSP. The FSP resulted in a recommended bid by Castik Capital which completed in December 2014. The Panel granted a dispensation from Rule 21.2 to permit Waterlogic to enter into a break fee agreement (approx.1% of bid value) with Castik Capital.

STRATEGIC REVIEW ANNOUNCEMENTS

Often, when a UK public company announces that it is conducting a strategic review of its business, a sale of the company is one of the options being evaluated. A strategic review announcement may also include an announcement of an FSP under Rule 2.6. PS31 incorporates the old Practice Statement No 6 (*Strategic Review Announcements*), which has now been withdrawn, with minor amendments, to describe how the Executive applies Rule 2 in relation to strategic review announcements.

Strategic review announcements that do refer to a possible sale of the company

A strategic review announcement that refers to a sale of the company as one of the possible options being evaluated (however remote) will usually commence an offer period in respect of the target company (triggering the Rule 8 disclosure regime and various other rules of the Code). Consequently, the announcement will need to name each potential bidder with whom the target is in discussions (or from whom it has received an approach that it has not rejected unequivocally) unless the announcement also announces the commencement of an FSP and the Panel has granted the FSP dispensations.

The target must announce promptly if it concludes not to pursue a sale.

Strategic review announcements that do not refer to a possible sale of the company

A strategic review announcement that does not refer to a sale of the company as one of the possible options being evaluated will not commence an offer period. PS31 explains that, in such circumstances, the Executive will want to make enquiries of the company's advisers as to the options being considered by the board to make sure that it is appropriate for the strategic review announcement not to refer to a possible sale of the company.

If, during the strategic review, the board begins actively considering a sale of the company, the Panel will require an announcement commencing an offer period if there is any rumour or speculation about a possible bid or an untoward movement in the company's share price – such an announcement must name each potential bidder with whom the company is in discussions (or from whom it has received an approach that it has not rejected unequivocally) unless the announcement also announces the commencement of an FSP and the Panel has granted the FSP dispensations.

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