



**Cash confirmations - duration of certain funds
period
28 June 2021**



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In Response Statement 2020/1 (RS 2020/1) the Code Committee of the Takeover Panel (Panel) gave certain guidance as to factors bidders should take into account when arranging financing for an offer where there is a question outstanding on the long-stop date as to whether the bidder will be permitted to lapse its offer. This document has been drafted by a Joint Working Party of the Company Law Committees of the City of London Law Society (CLLS) and the Law Society of England and Wales (the Law Society) (the Joint Working Party). The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to takeovers. This document represents the Joint Working Party's explanation of the ways in which, in its view, the requirements of the City Code on Takeovers and Mergers (Code) may be satisfied as from the date the changes to the Code specified in RS 2020/1 come into effect (5 July 2021), taking into account the guidance in RS 2020/1, but it is not prescriptive. It is not intended to be, and should not be relied upon as being, legal or regulatory advice. Users of this document will need to consider its contents in light of the specific circumstances of their particular transaction and should consult their own advisers before using, or taking any action based on, this document. No duty of care or liability whatsoever is accepted by the Law Society or the CLLS, by those involved in the preparation or approval of this document, or by the firms or organisations that they represent, to any firm, company or individual who relies on material in it and no representation or warranty is made as to its accuracy, suitability or completeness.

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1 Summary of Code provisions – cash confirmation statements

- 1.1 General Principle 5 (GP5) of the Code provides that a bidder must announce an offer only after (a) ensuring that it can fulfil in full any cash consideration and (b) taking all reasonable measures to secure the implementation of any other type of consideration.
- 1.2 Reflecting GP5, the Code also provides that a bidder should only announce its firm intention to make an offer after the most careful and responsible consideration and when it has every reason to believe that it can and will continue to be able to implement the offer (responsibility in this connection also rests on the bidder's financial adviser) (R2.7(a)).
- 1.3 Where an offer is for cash, or includes an element of cash, the Code requires the firm offer announcement and the offer document to include confirmation by the bidder's financial adviser (or another appropriate third party) that resources are available to the bidder sufficient to satisfy full acceptance of the offer (Cash Confirmation Statement) (R2.7(d) and R24.8). The Code expressly provides that the financial adviser making the Cash Confirmation Statement will not be expected to produce the cash itself if, in giving the confirmation it (a) acted responsibly and (b) took all reasonable steps to assure itself that the cash was available.
- 1.4 While there are no specific requirements set out in the Code as to the period for which the funds being used to finance the offer must be available, in discharging its obligations in giving a Cash Confirmation Statement, the relevant financial adviser making such statement must consider the requirements described above together with the specific circumstances of any case in satisfying itself of the adequacy of the timing of the availability of funds.

2 Summary of Code provisions – long-stop date (contractual offers)

- 2.1 On a contractual offer, under R12.1(a) a bidder must include a term in the firm offer announcement and in the offer document that the offer will not proceed, will lapse or will be withdrawn on a specific date (a long-stop date (Offer LD)):
 - (a) if sufficient acceptances have not been received so as to enable the acceptance condition to be satisfied (other than in the case of a pre-conditional offer) (R12.1(a)(i)); or

- (b) with the consent of the Panel, if a condition or pre-condition relating to an official authorisation or regulatory clearance has not been satisfied or waived (**R12.1(a)(ii)**).
- 2.2 Under **R12.2** the Panel will normally give its consent under **R12.1(a)(ii)** if it is satisfied, as at the Offer LD, that the outstanding official authorisation or regulatory clearance is a material official authorisation or regulatory clearance, and provided that either: (a) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained; or (b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the bidder in the context of the offer (see **R13.5(a)**).
- 2.3 The Note on R12 further provides that if a question as to whether the Panel will give its consent under **R12.1(a)(ii)** remains outstanding on the Offer LD, the bidder will not normally be permitted to lapse or withdraw the offer pending the final determination of the issue (**Note on R12**).
- 2.4 The Code Committee of the Panel expressly noted at the time of drafting and publishing these rules (emphasis added) that:
- “...other than in the case of a pre-conditional offer, the question of whether the offer should be permitted to lapse on account of an outstanding official authorisation or regulatory clearance will only be relevant if the offeror has received sufficient acceptances so as to enable the acceptance condition to be satisfied (in line with the new Rule 12.1(a)(i)). This will not be known until the long-stop date itself. Therefore, whilst the Code Committee expects that the parties will engage with the Panel in relation to the status of any outstanding authorisation or clearance prior to the long-stop date, it is likely that a final determination will not be made by the Panel until shortly after the long-stop date has passed. The Code Committee therefore considers it likely that the new Note on Rule 12 will be relevant in most contractual offers that reach their long-stop date and, accordingly, that offerors should take this into account when arranging their offer financing” (para 4.15 RS 2020/1).*
- 2.5 The Code Committee of the Panel also drew attention to the fact that if, at the Offer LD:
- “...sufficient acceptances have been received so as to enable the acceptance condition to be satisfied and the Panel does not consent to the offer lapsing under Rule 12.1(a)(ii) but, exceptionally, the offeror is not willing immediately to waive the outstanding condition(s) (for example, because remedial action must be taken before the relevant clearance can be obtained and the offeror is not willing to complete its offer without having done so), the Panel will consider what action to take at the time, which could include the offeror remaining subject to an ongoing obligation to satisfy the outstanding condition(s) and close its offer as soon as practicable” and that in this scenario “if the offer continues for a more substantial period of time following the long-stop date on the basis set out in paragraphs 4.21 to 4.24 [of RS 2020/1], this may require the offeror to extend its financing” (paras 4.38(e) and 4.40 RS 2020/1).*

3 Summary of Code provisions – long-stop date (schemes)

- 3.1 On a scheme of arrangement, the parties are permitted to include within the conditions to the scheme a long-stop date by which the scheme must be effective (**Scheme LD**) (**s3(b)(i) App.7**).
- 3.2 On a scheme of arrangement there is also a requirement that, except with the consent of the Panel, the bidder must take certain procedural steps prior to and at the court sanction hearing (**s3(g)(i) & (ii) App.7**). The requirement to take these procedural steps will not apply if a condition relating to a material official authorisation or regulatory clearance is outstanding provided that either:
- (a) it is not sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained (**s3(g)(A) App.7**); or

- (b) if it is sufficiently clear what action would be required to be taken in order for the authorisation or clearance to be obtained, the taking of that action would give rise to circumstances which are of material significance to the bidder in the context of the offer (see **R13.5(a)**) (**s3(g)(B) App.7**).
- 3.3 If a question as to whether the proviso to **s3(g) App.7** has been satisfied remains outstanding on the Scheme LD, the parties to the offer will normally be required to agree an extension to the Scheme LD pending the final determination of the issue (**Note on s3 App.7**).

3.4 The Code Committee of the Panel has noted (emphasis added) that:

“...the new Note on Section 3(g) of Appendix 7 (Where a determination under Section 3(g) remains outstanding on the long-stop date), similar to the new Note on Rule 12 in relation to contractual offers, is intended not as a basis for the Panel to require a lengthy extension to a long-stop date but rather to prevent an offeror from lapsing its offer whilst a dispute over the status of a condition relating to an outstanding official authorisation or regulatory clearance is resolved. The Code Committee considers that offerors should take this into account when arranging their financing and that the long-stop date of a scheme should be set accordingly” (para 4.54 RS 2020/1).

3.5 The Code Committee of the Panel has also noted (emphasis added) that:

“...if the Panel determined under Section 3(g) of Appendix 7 that:

- (a) *the remedial action required to be taken in order to obtain a material official authorisation or regulatory clearance was sufficiently clear; and*
- (b) *the taking of such action did not satisfy the material significance requirement in Rule 13.5(a),*

but the action could not be completed before the long-stop date and the offeror was not willing to allow the scheme to become effective until it had completed the action, the Panel may consider that the offeror should be subject to an ongoing obligation to satisfy the outstanding condition as soon as practicable. In this case, the only alternative open to the offeror would be to agree to extend the long-stop date for as long as is needed in order for the action to be completed and the condition satisfied (with the court sanction hearing being rearranged accordingly). Similar to the rationale set out in paragraph 4.24 [of RS 2020/1] in relation to contractual offers, given that in these circumstances (i) offeree company shareholders will have approved the scheme, (ii) the offeree company board will not have withdrawn its support for the scheme, and (iii) the Panel will have determined that the offeror does not have a basis for lapsing or withdrawing its offer, the Code Committee considers that the offeror should not be permitted to cause the offer to lapse (and may therefore be required to extend its financing, if it is not willing to waive the relevant condition)” (para 4.55 RS 2020/1).

4 Overview of historic market practice

4.1 It is customary for financial advisers to retain external legal counsel to assist and advise on the giving of the Cash Confirmation Statement, in particular given the sometimes intricate nature of the financing arrangements themselves and any relevant contractual arrangements a bidder and a financial adviser may enter into in relation to the provision of the financing for the purposes of the offer. In addition, it is common for a financial adviser to seek comfort from its counsel to the effect that, in its view, the financial adviser has acted responsibly and taken all reasonable steps to assure itself that the financing would remain available for the purposes of the offer. While recognising (a) that it is ultimately for the Panel to determine as to whether or not a financial adviser may have discharged its obligations in making the Cash Confirmation Statement and (b) the advice from its external counsel is not a legal opinion in lieu of that, given the nature and extent of the financing arrangements that are put in place for the purposes of financing an offer (and potentially serious ramifications for a financial adviser if problems later

emerge) this is nonetheless advice financial advisers consider important and customarily require prior to the release of an announcement of a firm intention to make an offer with the inclusion therein of the Cash Confirmation Statement.

- 4.2 Historically market practice on schemes of arrangement has generally been to set the Scheme LD by reference to the expected time required for satisfaction of conditions relating to official authorisations and regulatory clearances, with the certain funds period allowing for a further period to pay the consideration to offeree shareholders (recognising the consideration must be paid within 14 days of the scheme becoming effective under **s10 App.7**).
- 4.3 As contractual offers have not historically been required to include an Offer LD, the approach to calculating the maximum possible certain funds period for financing could previously be set by reference to the standard contractual offer timetable of 137 days – i.e. 28 days (maximum time to publish the offer document under **R24.1(a)**), plus 81 days (maximum time for offer to become wholly unconditional under **R31.7** assuming it becomes unconditional as to acceptances on D60), plus 14 days (minimum period for offer to remain open after it has become wholly unconditional/settlement of original acceptors), plus 14 days (for payment to be made to shareholders accepting during that period). The market however accommodated alternative approaches to the certain funds period reflecting the expected regulatory timetable, the circumstances of the offer and bidder requirements.

5 Joint Working Party views

- 5.1 In relation to the Panel's comment that bidders should take the **Note on R12** into account when arranging their financing on a contractual offer (see 2.4 above) and should take the **Note on s3(g) App.7** into account when arranging their financing on a scheme (see 3.4 above), the view of the Joint Working Party is that a certain funds period that extends for four weeks past the Offer LD/Scheme LD in order for the Panel to make its final determination should be sufficient to meet this requirement and should enable a financial adviser to conclude (in giving the Cash Confirmation Statement) that it is acting responsibly in accordance with **R2.7(d)** and **R24.8**. This reflects the Panel's comment that the Notes are not intended as a basis for a lengthy extension to a long-stop date but rather to prevent a bidder from lapsing its offer whilst a dispute over the status of a condition relating to an outstanding official authorisation or regulatory clearance is resolved.
- 5.2 In addition to the four week period referred to above, the view of the Joint Working Party is that it would be appropriate to add an additional period of:
- (a) up to 28 days in the case of a contractual offer – reflecting the fact that once an offer has become unconditional it must remain open for not less than 14 days and the bidder must give at least 14 days' notice before it is closed (**R31.2(b)**) and a further period of up to 14 days to allow for the consideration to be provided to accepting offeree shareholders within 14 days of the latest of D21, the date the offer becomes unconditional, and the date of receipt of an acceptance complete in all respects (**R31.9**).
 - (b) up to 14 days in the case of a scheme of arrangement – reflecting the fact that once a scheme has become effective consideration must be sent to target shareholders within 14 days (**s10 App.7**).
- 5.3 The combination of 5.1 and 5.2 above would result in a certain funds period that extends:
- (a) up to eight weeks beyond the Offer LD on a contractual offer; and
 - (b) up to six weeks beyond the Scheme LD on a scheme.
- 5.4 The Joint Working Party is of the view that it is not necessary to include any additional period to reflect the circumstances referred to in paragraphs 2.5 and 3.5 on the basis that these circumstances would, as the Panel notes, be exceptional. In addition, RS 2020/1 does not in

this context refer to the bidder taking this into account when arranging its financing but rather notes that in those circumstances the bidder may be required to extend its financing if it does not agree to waive the relevant condition.

- 5.5 There are a number of ways in which the end of the certain funds financing period could be defined in facility agreements, including (without limitation) by:
- (a) including a fixed date that is the end of the relevant period (i.e. up to eight weeks or up to six weeks as applicable) after the Offer/Scheme LD; or
 - (b) including a fixed date that mirrors the Offer/Scheme LD but providing that the fixed date will be extended if necessary to comply with the requirements of the Panel, with such extension in no event to exceed the relevant period (as referred to in paragraph 5.3) after the Offer/Scheme LD.

In the view of the Joint Working Party, either of the above approaches should customarily enable a bidder to conclude that it has satisfied GP 5 and R2.7(a) and a financial adviser to conclude that (in giving the Cash Confirmation Statement) it is acting responsibly in accordance with **R2.7(d)** and **R24.8**.

- 5.6 While this document is focused on debt financing (as one of the most common methods of securing cash payable under an offer), similar issues will arise in respect of the time for which alternative sources of financing for cash components of offers need to remain available, such as existing resources or equity financings.
- 5.7 This document does not focus on the approach to catering for changes to the timetable as a result of actions that the bidder may choose (but is not required by the Code) to take, such as switching offer structures, the impact of competitive scenarios, allowing for payments to be made under the squeeze-out procedure or the re-financing of existing offeree debt facilities.