

## DEVELOPMENTS IN THE LONDON LISTING MARKETS: CHANGES TO UK TAKEOVER CODE AND PROSPECTUS REGIME

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In this article, we focus on amendments to the UK Takeover Code (the “Code”) which came into force in December 2023, as well as the latest developments in relation to reform of the UK prospectus regime, including The Public Offers and Admissions to Trading Regulations 2024 made on 29 January 2024. We also discuss the proposed new trading platforms for private companies.

Our previous articles in relation to developments in the London listing markets can be found [here](#).

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## AMENDMENTS TO THE CODE

Following a public consultation by the UK Takeover Panel (the “Panel”) in May 2023 (PCP 2023/1), and the release of its response statement in October 2023 (RS 2023/1), several amendments to the Code became effective on 11 December 2023, which apply to all companies and transactions (whether ongoing or not).

### THE CHANGES

The amendments focus primarily on Rule 21 of the Code. The main purpose of Rule 21 is to restrict the ability of a target company subject to a takeover bid from taking frustrating actions (acting by its board) and ensure equality of information shared with competing bidders.

The key changes to Rule 21 include:

#### Rule 21.1 – restriction on actions by the board of the offeree company

##### *Restricted actions*

This rule has been revised to clarify that a target board is not prevented from taking the “restricted actions” listed in Rule 21.1 during the “relevant period” where:

- these actions are approved by the shareholders in a general meeting;

- the Panel has provided its consent to such actions being taken; or
- as a new carve out, such actions are taken in the ordinary course of business.

**"The main purpose of Rule 21 is to restrict the ability of a target company subject to a takeover bid from taking frustrating actions (acting by its board) and ensure equality of information shared with competing bidders."**

The substance of these "restricted actions" remains largely consistent with previous wording and include:

- issuing or transferring shares in the offeree company;
- purchasing or redeeming shares in the offeree company;
- granting options over shares in the offeree company;
- disposing of or acquiring assets of a material amount; and
- entering into, amending or terminating a material contract.

The amendments to the Rules and the newly issued Practice Statement 34 relating to Rule 21 also seek to clarify what is considered an action taken "in the ordinary course" and define materiality. For an intended disposal or acquisition of assets for a material amount, for example:

- the Rules now afford greater discretion to the Panel to consider the target's circumstances when determining whether an acquisition or disposal of its assets is "material"; and
- Practice Statement 34 provides further guidance on when an acquisition or disposal can reasonably be considered to have occurred in the ordinary course, requiring the Panel to consider whether:
  - *the proposed transaction falls within the established business model of the offeree company, taking into account:*
    - *the frequency of similar transactions and the size of the proposed transaction in comparison to previous similar transactions; and*
    - *how the offeree company describes its business strategy to its shareholders;*
  - *the terms of the proposed transaction and the basis of valuation are in line with normal practice by reference to either a broader market (for example, where the offeree company proposes to dispose of or acquire liquid securities) or previous transactions entered into by the offeree company or its peers; and*
  - *the proposed transaction is part of an ongoing strategy, rather than a strategic change.*

The obligation to consult the Panel to take a "restricted action" remains unchanged, as does its discretion to approve such actions, subject to the guidance and framework set out in Practice Statement 34.

"Rule 21.1 has also been extended to apply to actions intended to be taken by a bidder's board where a reverse takeover is contemplated."

## ***Relevant period***

Restricted actions are prevented from being taken during the newly defined "relevant period". Prior to the amendments, the restrictions applied from the moment the board of the offeree "has reason to believe a bona fide offer might be imminent" and were generally accepted to run until the offer period lapses, or where there is no offer period, until the second business day after the offer has been unequivocally rejected.

The amendments clarify that the "relevant period" commences from the earlier of (i) an approach by the bidder to the target board; or (ii) the start of the offer period and lasts until the end of the offer period. Where an approach is unequivocally rejected, the relevant period ends on the seventh day following that rejection. The former Practice Statement 32, which previously mapped out the application of Rule 21.1 post-rejection, has therefore been revoked.

## ***Application to reverse takeovers***

Rule 21.1 has also been extended to apply to actions intended to be taken by a bidder's board where a reverse takeover is contemplated. This reflects that it is considered inequitable for the board of the (larger) offeree company to be subject to the restrictions in Rule 21 yet be unable to impose equivalent restrictions on the board of the (smaller) offeror. In these circumstances, the rules apply to the bidder from the earlier of it making an approach to the target or being publicly identified in an announcement. Conversely, if the target company made the initial approach to the bidder proposing a reverse takeover, these restrictions apply from the date of said approach.

## **Rule 21.3 – equality of information to competing offerors**

The primary purpose of Rule 21.3 is to regulate the sharing of information with competitive bidders to ensure the information shared is equal and consistent. This Rule has been amended such that the *"board of the offeree company must, on request, equally and promptly provide an offeror or bona fide potential offeror with all information that it has provided, and that it provides in the seven days following the request, to another offeror or potential offeror"*, setting a clear timeline in which the target's board must respond to such requests and allowing competitive bidders to request any information that has been shared with other bidders.

A further amendment has been made to the note applying to Rule 21.3, providing for a right to make sharing information conditional upon the offeror or potential offeror committing not to share it with external providers or potential finance providers (equity or debt) without the offeree's consent. This is provided said consent may not be unreasonably withheld (in addition to the existing condition for respecting the confidentiality of the information shared).

## **COMMENTARY**

The amendments appear positive and should be helpful, providing clarity to target boards as to the:

- actions that they can and cannot undertake when the target is subject to an offer;

- period of time when they are restricted from taking such actions; and
- their obligations when a general information request is received from a bidder.

The amendments also provide the Panel greater clarity in deciding if it should approve target board actions which could be considered “restricted actions” and what to consider when making such a decision.

**"There will be a general prohibition on public offers of securities, unless they fall within a specified exemption."**

It should be noted that, even as amended, there remains some inherent subjectivity in Rule 21.1 as to whether an action has been carried out “in the ordinary course of business” and/or is sufficiently “material” to fall foul of the restrictions. It will be interesting to see how the amended Rules are interpreted by target directors and the Panel alike.

## NEW UK PROSPECTUS REGIME

The government has committed to promoting participation in the ownership of public companies and position the UK as a leading financial centre for global businesses and investors. To facilitate this, it consulted on changes to the legislative framework for listed companies, in particularly on the requirements for prospectuses and their content.

Effecting these changes will rely on the powers conferred by the Financial Services and Markets Act 2023 (“FSMA 2023”) to revoke the UK Prospectus Regulation (EU) 2017/1129. The majority of the changes were announced in the government’s near-final draft of the Public Offers and Admissions to Trading Regulations published in July 2023 as part of the Chancellor of the Exchequer’s ‘Mansion House’ reform package (“Mansion House Reforms”) which delegates greater responsibility to the Financial Conduct Authority (“FCA”). On 27 November 2023, the government published the draft Public Offers and Admissions to Trading Regulations (the “Regulations”) with an explanatory memorandum, which largely mirror the version published in July 2023.

The Regulations were made on 29 January 2024 and limited provisions came into force on 30 January 2024 to enable the FCA to exercise specific rule-making powers regarding the new prospectus regime. Provisions not yet in effect will become operative following the revocation of the UK Prospectus Regulation.

## KEY ELEMENTS OF THE REGULATIONS

- **New public offer architecture:** there will be a general prohibition on public offers of securities, unless they fall within a specified exemption including (i) offers of relevant securities to the public where the total consideration in the UK does not exceed £5m; and (ii) offers of transferable securities already admitted to trading on a regulated market or primary multilateral trading facility (“MTF”) or where the offer is conditional on such admission. Many exceptions that exist from the requirement to publish a prospectus under the current regime, such as offers to qualified investors and offers made to fewer than 150 persons, remain part of the Regulations as exceptions to the general prohibition on public offers of securities.

- **Admissions to trading on regulated markets or a primary MTF:** the current prospectus regime includes detailed requirements for securities admitted to trading on regulated markets. Under the new regime, the FCA is granted enhanced rulemaking responsibilities regarding the admission of securities to trading on a regulated marked or a primary MTF, which include specifying when a prospectus is required and its content.
- **Forward-looking information:** currently, forward-looking statements in prospectuses, such as statements of intention or forecasts, are subject to the same liability standards as statements of fact. The new regime will raise the liability threshold so that a person responsible for a prospectus is only liable to pay compensation if: (i) they knew the statement to be untrue or misleading; (ii) they were reckless as to whether it was untrue or misleading; or (iii) in the case of an omission, they knew the omission to be a dishonest concealment of a material fact.

## FCA FEEDBACK

In May-July 2023, the FCA published a series of enactment papers outlining those elements under the current regime considered worthy of change and welcoming feedback from market participants, which was published on 12 December 2023 ("FCA Feedback"). These provide a good indication of how the FCA intends to implement change and certain areas where it will make rules, including:

- **Primary MTFs:** admission of securities to trading on primary MTFs, including AIM or the AQSE Growth Market. The FCA will have rule-making powers requiring Primary MTF operators to determine rules and guidelines for issuers seeking admission to their markets to publish a prospectus document ("MTF admission prospectus") or a supplementary prospectus where retail investors participate.
- **Public offer platforms:** the Regulations will create a new regulated activity of operating a public offer platform through amendments to the Regulated Activities Order 2001 to facilitate public offers by private companies. This will require companies to use a regulated platform (such as an equity crowdfunding platform) where the total value of the offer exceeds £5m, unless another exemption is available. The FCA will have the power to authorise and supervise the public offer platform and prescribe rules relating to its operation and use.

"Under the new regime, the FCA is granted enhanced rulemaking responsibilities regarding the admission of securities to trading on a regulated marked or a primary MTF."

## COMMENTARY

It is clear from the FCA Feedback that ensuring changes are proportionate is a top priority for the FCA. Aligning with other domestic reporting standards and international regulations to avoid duplicating efforts is also important to make the UK a more attractive and less burdensome market for both investors and issuers, foreign and domestic.

The FCA will publish a consultation paper on these proposals in summer 2024 including draft rules and cost benefit analysis and, subject to consultation responses and final approval by the FCA Board, will seek to finalise its rules in the first half of 2025, at which time the UK Prospectus Regulation will be revoked.

## NEW PRIVATE MARKET TRADING PLATFORMS

**"Ensuring changes are proportionate is a top priority for the FCA."**

In July 2023, the Chancellor of the Exchequer announced the introduction of a new intermittent trading venue ("ITV") to improve private companies' access to capital markets prior to public listing. This was introduced as part of the Mansion House Reforms to incentivise companies to set up and develop in the UK and strengthen its position as a dynamic listing destination.

## WHAT IS THE ITV?

Established using the government's new powers under FSMA 2023 to set up regulatory sandboxes (spaces to experiment, learn and test financial market infrastructure), the ITV is a platform intended to facilitate the trading of existing shares in private companies by shareholders through auctions on an intermittent basis.

ITVs are expected to improve the growth of private companies in the UK by providing periodic liquidity in their shares, whilst also bridging the gap between private and public markets by enabling companies to engage in transactions using a regulated public trading market. Companies should be provided with greater choice for liquidity options, contingent upon their circumstances, life-cycle stage and growth and development plans.

## ITV KEY FEATURES

- ITVs should allow existing shareholders to sell their shares in private companies on a periodic basis. These include (a) ITV company founders looking to generate a return on their investments; (b) employees party to employee equity benefit schemes; and (c) early-stage ITV company investors looking to sell to later-stage investors;
- ITVs will be open to private companies that satisfy as yet undisclosed criteria. There is currently limited information available on the likely criteria for private companies joining ITVs. The London Stock Exchange Group ("LSEG") is expected to host the first ITV and its CEO has communicated he is unaware of any discussions on imposing a minimum or maximum market capitalisation requirement for companies intending to join the ITV;
- subject to meeting stipulated criteria, both domestic and international investors will be able to participate in ITVs, though retail investors will not; and
- ITVs are expected to have scheduled auction windows on a periodic basis (e.g., the LSEG ITV is expected to hold an auction monthly). ITV companies would not need to sell shares in each potential auction window and would instead be granted the option to elect the frequency of auction windows.

## COMMENTARY

ITVs should be transformative for UK private companies and facilitate secondary transactions at home rather than on overseas platforms. As such, their success will depend on the details (i.e., eligibility criteria) yet to be announced.

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HM Treasury and the FCA are expected to lead the ITV engagement initiative planned for Q2 2024, with the first ITV expected to launch before end 2024.

## CONCLUSION

A key area of the UK's financial services arena that will undergo a considerable 'refurb' as part of the government's aim of promoting the sector's competitiveness post-Brexit is the existing prospectus regime, with ITVs a further development to broaden UK market appeal.

It is also important to showcase continued market integrity and enforce good behaviour to maintain investor confidence. To that end, the Panel's ongoing review of the rules contained in the Code is welcome.

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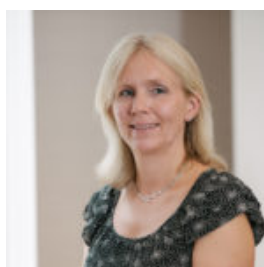
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