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Takeover Regulation in the UK

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In January, the Takeover Appeal Board clarified the deadline for a publicly identified potential competing offeror to clarify its intentions in relation to the offeree company in a rare appeal against a determination of the Takeover Panel Executive.

The UK's City Code on Takeovers and Mergers (the "Code") has generally been lauded as a system of self-regulation that offers the advantages of cost-efficient administration by experts, expediency, and flexibility. The Takeover Panel (the "Panel") is an independent body which regulates takeovers of companies that are subject to the Code. The Takeover Panel Executive administers the Code on a day to day basis, providing guidance on how the Code should be interpreted and applied and issuing prompt and binding decisions (unless appealed) with an emphasis on protecting shareholders' interests. The membership of the Panel is drawn from investors and companies subject to the Code and their advisers. This system of self-regulation rarely leads to appeals against determinations of the Panel Executive and the Hearings Committee. In 2015 the Takeover Panel Appeal Board was only required to issue one statement relating to an appeal on 25 February 2015.

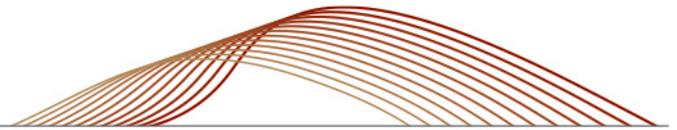
The Panel's consistent practice of encouraging companies subject to the Code, and their advisers, to keep an open dialogue and consult with the Executive often leads to consensus on the interpretation of the Code and its implications. However, the ambiguous drafting of Rule 2.6(d) of the Code led to a rare Takeover Appeal Board decision in January 2016.

Following a contentious takeover bid launched by U.S.-based Kraft for UK confectionary giant, Cadbury, in 2010, the Panel amended the Takeover Code requiring bidding firms to give more information about their intentions towards an offeree company and reducing periods of uncertainty for the offeree's shareholders.

One such amendment was the Rule 2.6 (d), which states that when an offeror has announced a firm intention to make an offer and it has also been announced that a publicly identified potential offeror might make a competing offer, the potential offeror must, by 5.00 pm on the 53rd day following the publication of the first offeror's initial offer document:

- announce a firm intention to make an offer in accordance with Rule 2.7 or
- announce that it does not intend to make an offer.

The Takeover Code did not provide any clarification as to how the words 'first offer' and 'first offer document' are to be construed in circumstances where there are multiple competing offers.



In January 2016, the Takeover Appeal Board heard an appeal from a Takeover Panel Hearings Committee ruling in relation to offers for Xchanging plc and the interpretation of Rule 2.6 (d) of the Takeover Code. The appeal was requested by Computer Sciences Corporation ("CSC").

The background to the hearing is as follows:

- Original bidder made an announcement of a firm intention to make an offer for Xchanging plc on 14 October 2015 (the "Original Offer").
- Based on the Original Offer, Rule 2.6 (d) would require a clarificatory announcement from a publicly identified potential offeror by 5.00pm on 9th December 2015 (53 days after the Original Offer was made).
- Xchanging plc subsequently announced, on the 12th and 16th November 2015 (respectively) that they had received approaches from CSC and Ebix, Inc ("Ebix"), publicly identifying them as potential offerors.
- CSC announced a firm intention to make an offer on 9 December 2015 (the "CSC Offer").
- Ebix did not make an offer before 5.00pm on 9th December 2015.

The question for consideration was therefore whether (1) Ebix had missed the deadline to make an announcement or (2) Rule 2.6 (d) could be interpreted such that the CSC Offer was now the benchmark against which Ebix had 53 days to make its announcement.

The Takeover Appeal Board agreed with the Takeover Panel Executive, who ruled that the CSC Offer effectively reset the timeline upon which Ebix was required to make an offer, and that the use of wording "first offer" and "first offer document" in Rule 2.6 (d) should be construed as referring to the offeror who establishes the offer timetable rather than the "first offeror" in time. Consequently, Ebix was ruled to have 53 days from the date of the CSC Offer to clarify its intention in relation to Xchanging plc.

This decision of the Takeover Appeal Board reinforces the Panel's emphasis on protecting shareholders' interests by providing a reasonable amount of time for all possible offers to be made to shareholders. The appeal, and the fact that it was due to the unusual ambiguity of Rule 2.6(d), serves as a reminder of how rare appeals against determinations of the Panel Executive are in the UK's self-regulating system.

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