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Takeover Panel Proposes to Refocus Takeover Code on Companies Registered and Listed in the UK

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On 24 April 2024, the UK's Takeover Panel proposed reforms aimed to narrow the scope of companies to which the Takeover Code applies. The Panel suggests establishing **a core principle that only companies that are, or were recently, both registered and listed in the UK should be subject to the Code.**

In pursuit of this core principle, and among a number of other matters set out for consultation, it is proposed that:

- UK-registered companies that have securities listed (only) on an overseas market, such as the New York Stock Exchange or Nasdaq, should no longer be subject to the Code – to be implemented through the abolition of the current 'residency test'.
- The run-off period for application of the Code to a company that has delisted in the UK will be shortened to three years (from the current 10-year period).
- A three-year transition period will apply to companies that would otherwise fall outside the scope of the Code under the new rules.

In this alert, we explore these aspects of the proposed changes to the Code. We look forward to engaging with interested clients and others regarding these proposals during the consultation period, which ends on 31 July 2024.

Abolition of the residency test

The proposed reforms would abolish the 'residency test' – relevant to UK-registered companies that have recently delisted securities from a UK-regulated market (delisted companies) and/or have securities listed solely overseas (UK companies listed overseas) – under which such companies can be subject to the Code if the place of central management and control of the company is in the UK, the Channel Islands or the Isle of Man.

Based on the established current practice of the Panel, the residency test is considered to be satisfied if a majority of the company's directors are resident in the UK, the Channel Islands or the Isle of Man. This gives rise to potential uncertainty, given that composition of boards and the residency of individuals may change from time to time, with the consequence that the application of the Code to a company also may fluctuate. Relevant companies, working with their advisers, may carefully monitor the composition of the board to ensure they are outside the scope of the Code. Nevertheless, there may be ambiguity for shareholders and other market participants in understanding whether the Code applies to such companies at any point in time.

Based on preliminary discussions with interested stakeholders, the Panel currently understands that in many cases, UK companies listed overseas do not necessarily expect or wish to be subject to the Code. The Panel suggests that such companies should be subject to provisions of the overseas market (if any) in relation to the conduct of takeover offers.

Transitional arrangements

At the same time, the Panel notes the potential value of the protections of the Code to companies, including UK companies listed overseas. The Panel proposes transitional arrangements through which UK companies listed overseas would have a three-year period from implementation of any new rules (transitional arrangements) in which to take steps to implement appropriate measures, such as adopting Code-like protections.

A typical way for a company to benefit from Code-like protections, as noted by the Panel, is to amend its articles of association to introduce near-equivalent provisions for key stipulations of the Code, such as the requirements of Rule 9 in relation to mandatory offers. The suitability and practical efficacy of such measures for UK companies listed overseas is an area of interest to the Panel within the consultation.

The Panel also suggests that shareholders of UK companies listed overseas might seek – and companies may wish to offer such shareholders – opportunities to exit their investment during the three-year transition period, if they do not want to be shareholders in a company without the protections afforded by the Code.

The effect of the transitional arrangements is that the residency test will continue to apply to delisted companies and UK companies listed overseas for a three-year period following implementation of any new rules.

Delisting and ceasing to be a Code company

Currently, there are a range of circumstances in which a UK company will continue to be subject to the Code even if it has delisted from a UK exchange and re-registered as a private company. In the consultation, the Panel proposes to both significantly reduce the circumstances in which the Code would continue to apply to delisted companies and shorten the run-off period for the application of the Code from the current 10-year rule to a three-year period. Under the transitional arrangements, a company that delists from a UK exchange prior to the implementation date of a revised Code will have a run-off period ending on the earlier of three years from the implementation date or 10 years from the date the company delisted.

Nevertheless, the proposed abolition of the residency test (discussed above) alongside the proposed adoption of a three-year run-off rule means that the Code will continue to apply to delisted companies for a period of three years from delisting, whether or not such companies satisfy the residency test. Currently, a delisted company is potentially subject to the Code for a period of up to 10 years but, as described above, can plan and take active steps to take itself outside the scope of the Code by establishing a board that does not meet the residency test. Under the proposed new arrangements, it will be possible for a delisted company to apply to the Panel for a waiver, disapplying some or all of the provisions of the Code – usually, at the time of an offer or other action that would otherwise activate the Code. The Panel has proposed retaining its discretion to grant such waivers.

Certainty regarding application of the Code

Overall, the proposals made in the consultation are aimed to refocus the application of the Code and the Panel's jurisdiction on **companies registered and listed, or recently listed, in the UK**.

This core principle will be underpinned by the following two concepts:

- A company is **UK-registered** if it has a registered office in the UK, the Channel Islands or the Isle of Man.
- Being **UK-listed** (or having been UK-listed at any time during a three-year period prior to a proposed or possible offer, or other event that activates the Code) means having securities admitted to trading on:
  - A UK-regulated market – currently, the London Stock Exchange Main Market or the Acquis Main Market.
  - A multilateral trading facility (MTF) – currently, the AIM market operated by the London Stock Exchange or the Acquis Growth Market.

- A stock exchange in the Channel Islands or the Isle of Man – currently, the International Stock Exchange in Guernsey (TISE).

Further, a revised Code would clarify that an MTF does not include matched-bargain facilities (such as Asset Match or JP Jenkins), intermittent multilateral trading by private companies to a selective (nonpublic) market on platforms, such as PISCES,[1] or, in usual circumstances, trading on secondary markets of crowdfunding platforms (such as Seedrs or Crowdcube).

Next steps

The consultation is open for comments until 31 July 2024, and the Panel is interested in hearing from companies affected by the changes and their advisers.

Following this, the Panel expects to publish its response statement in autumn 2024. Any changes made to the Code as a result of the consultation would take effect approximately one month after the publication of the response statement – subject to the transitional arrangements, currently proposed to last for three years.[2]

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[1] In March 2024, HM Treasury published proposals for a new platform that would, if implemented, allow private companies to trade their securities in a controlled environment and on an intermittent basis. This is referred to as the Private Intermittent Securities and Capital Exchange System (PISCES).

[2] Aspects of the transitional arrangements are mentioned in this alert. The transitional arrangements involve a number of other complexities which, if adopted, companies would need to consider for their individual circumstances.

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