The Secretary to the Code Committee
The Takeover Panel
10 Paternoster Square
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Date 26 May 2011
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Dear Sir

PCP 2011/1 Review of Certain Aspects of the Regulation of Takeover Bids: Proposed Amendments to the Takeover Code

I do not propose to respond to each of the questions posed in the Consultation Paper in detail, but set out below my general comments on those areas that I consider to be most significant together with responses to certain of the questions posed.

I appreciate that the consultation process as a whole has been particularly drawn out and that the Code Committee has had to contend with a number of competing interests in formulating the proposed new Rules. I also appreciate that given this lengthy consultation process it is unlikely that there will be significant change to the Rules as proposed in the Consultation Paper. Whilst I agree with the overarching aims of the proposed Rule changes, particularly in relation to "virtual bids", I believe that a number of the proposed Rule changes will have certain unintended consequences and are inappropriate in general terms. Irrespective of whether or not the Code Committee shares those views, there are certain proposed Rules which I feel are potentially inconsistent or require clarification.

There is a concern that the requirement to identify potential offerors in every possible offer announcement may deter certain potential offerors from making an approach to an offeree due to the reputational damage of being associated with a failed bid. This may not be in offeree shareholders' best interests. There is also a risk that certain potential offerors may leak their own interest in order to flush out any other potential offerors (or cause such parties to withdraw their interest). I am not persuaded by the argument that offeree boards should not have some discretion here as it may well be to their advantage not to have to name a potential offeror. Nor am I persuaded that, where coupled with the offeree board exercising its discretion not to name a potential offeror, a private "put up or shut up" regime would not work.

It is also a concern that the 28 day "put up or shut up" deadline does not provide sufficient time for announcing a firm intention to bid and that, together with the mechanism for seeking an extension to the deadline, this may tilt the balance too far in favour of the offeree. I believe that the Panel should retain some discretion to allow an offeror to seek an extension without offeree consent albeit that this would only be applied in limited circumstances e.g. where the offeree has voluntarily announced it has received an approach at a time when there has been neither an untoward share price movement

nor any rumour or speculation. The fact that an extension to a "put up or shut up" deadline will only be available towards the end of the 28 day period will also enable an offeree board to hold an offeror to ransom to a degree unless the Panel retains the discretion to permit an offeror only extension application in limited circumstances.

Again, I am broadly in favour of the prohibition on deal protection measures which I believe have been taken to extremes in recent years. However, I do feel that the prohibition on inducement fees in particular is a step too far and may have the consequence of deterring potential offerors from approaching an offeree which, again, may not be in offeree shareholders' best interests. I also feel that the dispensations from the prohibition contain certain inconsistencies e.g. why should the dispensation be available on a formal sale process only as opposed to an informal sale process and why should an offeree in financial distress be in a different position to any offeree that has approached an offeror with the intention of instigating an offer.

A further specific issue which I feel requires clarification concerns the inconsistency between the wording of the proposed new Rule 21.2(a), which prohibits persons acting in concert with the offeree from entering into offer related agreements, and the discussion at paragraph 3.12 of the Consultation Paper which simply indicates that directors of the offeree company (who would be acting in concert with the offeree) should "consider carefully whether the commitment might give rise to a conflict of interest".

In relation to the disclosure of financing fees, I believe there is a potential inconsistency between the statement that a bidder should not have to disclose commercially sensitive information – such as the lender's margin, or any additional headroom contained in its funding arrangements - and the Code Committee's view that any financing documents which are to be put on display should be in unredacted form.

The requirement to disclose any ratings on a party to the offer which have been provided by ratings agencies, together with commentary on any changes in the ratings since the commencement of the offer period seems to be a rather esoteric disclosure requirement. In particular, both offeror and target are asked to comment specifically on the opinion of a third party, which is contrary to the approach adopted in disclosure requirements, which are predominantly fact-based.

Finally, I agree with the proposed amendment that employee representatives are notified about the potential offer at the start of an offer period. However, I believe that the encouragement by the Code Committee for target boards to notify employee representatives of a potential bid in confidence prior to the commencement of an offer period, is potentially in conflict with the requirement in Rule 2.1 that all persons must conduct themselves in such a way so as to minimise a leak.

Should you have any questions on the above responses please do not hesitate to contact me on the above details.

Yours faithfully

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