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Our ref

Your ref

Date
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Dear Robert

I am writing on behalf of the Takeovers Joint Working Party of the City of London Law Society's Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law to set out our response to PCP 2011/1.

We support the approach taken in many of the clarifications provided in the PCP and the detailed draft Rules: a number of these will facilitate more effective implementation of the proposed changes. However, we have significant concerns which we wish to raise on two proposed changes in particular and this response focuses exclusively on these. We have also attached a note of additional points for consideration by you and your colleagues. If it would be helpful, we would be pleased to discuss further or clarify any of the points raised in this response or that additional note.

A. Context

We welcome a significant number of the clarifications which the PCP provides, in particular as regards:

(a) the position on extensions of time for bidders subject to the new PUSU timetable where the target supports the extension; and
(b) the position on break fees for "white knights".

Both of these support the Panel's objective of strengthening the position of offeree boards; we consider that the proposed clarifications which the Panel has put forward to its earlier proposals in these respects will be useful in practice in ensuring the interests of offeree shareholders are better protected and value opportunities for them are not inappropriately lost.

We also welcome the clarification of how scheme of arrangement timetables will be set and work and, subject to our points of detail on this, again we see this as consistent with the principle of enhancing target board control, whilst ensuring that a structured timetable will generally be pursued by targets.

Our two significant concerns relate to:

- the requirement for all potential offerors to be named at the time of any Rule 2.4 announcement (or, as an alternative for any potential offeror wishing to avoid being named, for it to withdraw, assuming no naming is then required for market disclosure purposes); and

- the imposition of a formalised private lock-out of potential offerors which have withdrawn, rather than be the subject of identification in a possible offer announcement.

We are concerned that in seeking to protect offeree companies from unsolicited " virtual bidders" these proposed changes present material impediments to the ability of offeree companies to negotiate recommended transactions with offerors who are welcome and provide an outcome for shareholders that the offeree board believes is the best available. Our proposed solution is in each case to restore the role of the offeree board in making determinations of whether the requirements should be imposed. We recognise that this may in some cases require the offeree board to make "a potentially difficult and contentious decision" but:

(a) those few cases should be balanced against the (we think very many more) cases where an offeree board wishes to manage an orderly process;

(b) offeree boards should not feel unduly vulnerable to pressure in making this determination; if, as we suggest, the rule is set up so that the default option is to require disclosure or impose the lock-out, the offeree board will be able more easily to defend a decision not to request confidentiality.

Our comments below include references to illustrations of situations which we foresee arising if no change is made to the proposals. These are appended as examples.

B. <u>Key Issues</u>

1. <u>Proposed requirement to name all potential offerors</u>

Proposed new Rule 2.4(a) provides for the naming of "any potential offeror with whom the offeree company is in talks or from whom an approach has been received (and not unequivocally rejected)". This requirement to name potential offerors is new.

We see a number of objections to this requirement as proposed:

- it will be open to abuse by offerors;

- it is inconsistent with the approach elsewhere

- it introduces new and unhelpful complexity.

The PCP considers the implications of this proposal both where there is only one potential offeror and where there are multiple offerors.

These objections to the proposal would be overcome if the rule was subject to a general carve-out where the offeree does not wish the potential offeror to be named and disclosure is not otherwise

required. Accordingly, we believe that the "alternative approach" set out at paragraph 2.22 of the PCP should be adopted. The advantage of this approach is that it allows the board of the offeree to ensure that a potential offeror (or offerors) with which it is in friendly talks is (are) not forced to walk away to avoid disclosure of their identity, thereby diminishing the options available to the offeree board and its ability to achieve the best deal for its shareholders. Adopting the "alternative approach" in this way would be a major contribution to the "offeree board empowerment" objective. See, by way of illustration, Examples 1 and 2 attached.

The objections made to the "alternative approach" in the PCP are unconvincing:

(i) application of PUSU: the discussion in paragraph 2.23 proceeds on the basis that the 28 day deadline will be enforced in respect of a potential offeror whose identity is not disclosed *at the request of the offeree*. We think this unlikely. If the offeree is sufficiently enthusiastic for the talks to continue without disclosure, it seems most likely that the conditions for an extension will have been met. In the more limited number of cases where there is no extension, the solution proposed in paragraph 2.23 seems reasonable;

(ii) in relation to the points made in paragraph 2.24, we disagree with the proposition that "the chances of an offeror not being publicly identified would only be marginally less under the alternative approach". There are many examples that under the current regime of friendly talks that continue after a 2.4 announcement that does not disclose the potential offeror's identity (and which have often led to a recommended offer).

The further objections we have heard expressed to the alternative approach are equally unconvincing:

(iii) "it lacks transparency and the market needs to know the identity of the potential offeror to evaluate the prospects of an offer being made": as set out at section (d) below, the Code will continue to allow potential offerors to remain unidentified and shares to trade without knowledge of a possible bid, (1) where there has been no leak and (2) after an offer period has commenced: it is clear therefore (rightly) that the regime does not demand disclosure of all potential offerors at all times and the policy justification for avoiding disclosure at those stages (deterrence effect on welcomed transactions, if identity disclosure was required early) applies equally to avoiding naming at the start of the offer period, where the target wishes to avoid naming of the offeror; if, in a particular case there are special reasons requiring disclosure (e.g. speculation regarding the identity of the potential offeror), the Panel could insist on it;

(iv) "it will lead to exploding offers," ie offers which will be deemed withdrawn either on a particular date, or on a leak or rumour appearing in the market that would or might require announcement: we consider that the new disclosure obligation will in any event lead to such an approach, but that the need for it will be moderated if targets can choose to allow offerors not to be named. We do not see any disadvantage, in any event, in practice moving to a clearer status as to whether an offeror is still pursuing an approach or not;

(v) "it is unfair on the target", which is in the public focus when the offeror may not be: an offeree consent regime would permit non-identification of potential offerors (with presumption of disclosure) would allow offerees to decide whether non-disclosure was

unfair or in their interests, rather than face the the unfairness of being deprived of an opportunity which the offeree wants to pursue.

Set against the advantage of allowing the offeree to manage the process to encourage potential offerors to remain interested are the claimed advantages of the proposed approach set out in (a) to (d) of paragraph 2.24. Of these, we do not see how offerors have a tactical advantage if the offeree controls the question of disclosure (on the contrary, we see tactical advantages for some offerors if the offeree does not (see further below)); for the reasons explained above, we think the PUSU regime will operate satisfactorily under the "alternative approach"; and we do not think the offeree board has a difficult decision. In this context we suggest that the "alternative approach" be implemented in a way that makes disclosure the default position, with anonymity maintained only if requested by the offeree. Although we recognise that shareholders and the market would like to know the identity of potential offerors, if the consequence of the rule is that offerors are driven to withdraw, are shareholders' interests best served? We think not.

(a) Scope for abuse by offerors

We believe that the proposed requirement for all offerors to be named when an announcement of a possible offer is made will be open to abuse, by some potential offerors (in particular some of those "virtual offerors" which the changes are intended to restrict) to the disadvantage of offeree boards and shareholders.

A possible offeror that has made an approach could by a leak trigger an announcement by the offeree in order to force the other potential offerors to accept public disclosure of their interest, or to withdraw and be precluded from continuing to work on developing an offer, as set out at paragraphs 2.56 to 2.58 of the PCP.

Furthermore, it is clearly the case, based on our experience, that a substantial proportion of possible offerors, in particular those offerors which are undecided about whether or not to proceed, or reluctant to be seen to be interested in an offer but then to "fail", or reluctant to have to explain to their own shareholders their interest before transaction terms are agreed, are not willing to be named as possible offerors and will break off talks/their plans, if to continue would require them to be named. They would not be allowed under the proposed new regime to re-engage within three to six months, unless a formal offer is launched by a third party (or one of the equivalent exemptions is triggered).

Accordingly, any possible offeror, in particular an unsolicited one seeking to put the offeree "in play" and to maximise its own advantage, will under the proposed new Rule have a direct incentive once it is confident that it will be in a position to launch a bid within four weeks, to approach the offeree and then leak its interest. See Example 3 attached, by way of illustration.

We acknowledge that any other potential offeror that might compete with the named first potential offeror but which withdraws without being named can then re-commence its interest if the first potential offeror launches an offer. But by then it may be too late: the first offeror could for example have obtained irrevocable undertakings to accept its offer from shareholders, which effectively preclude any new competing offer, or diligence or regulatory timetables may leave the competing potential offeror too far behind to be able to compete.

(b) Inconsistency of approach

(i) Parallel with offeree support for PUSU extensions

The proposed approach to extensions of time under the new PUSU regime reflects the broader principle and objective of enhancing offeree board control in takeovers through the acknowledgement that the offeree's view is in general to be determinative of the position, subject to the Panel's own ability to check abuse and intervene where it believes appropriate. We see no difference in principle between the offeree board's decision on extension and the offeree board's view on naming a potential offeror: each is a decision that may deprive shareholders of the opportunity for a particular potential offeror to develop into a formal offer: we do not see a difference in the degree of difficulty in the offeree board's decision.

(ii) Post offer disclosed but unidentified potential offerors

Under the proposed new regime, it would be accepted that a potential offeror would not necessarily be required to be named (or, as an alternative, to agree to withdraw and be locked out for three to six months) after the announcement of a firm intention to make an offer by a third party – this demonstrates that the regime continues to accept (rightly, we believe) that the existence of potential offerors may be publicly known during an offer period, without requiring identification of such potential offerors.

This leads to inconsistency and arbitrariness which is easily demonstrated by an illustration: see Example 4 attached.

The inconsistency on the alternate facts of the example seems to us to speak for itself as giving rise to arbitrary and unsatisfactory outcomes. This would not arise if the offeree has the power to determine whether the obligation to name each potential offeror can be relaxed.

(c) Complexity

The proposed new approach to identifying potential offerors is too complicated and will result in market confusion:

- additional potential offerors do not need to be named where a possible offer announcement is made by a first potential offeror, but do where the announcement is made by the offeree: the circumstances behind the regime as to which party has a duty to announce are already complicated and not universally understood by investors;

- a potential offeror does not need to be identified in a formal sale process situation, notwithstanding the announcement by the target of that situation;

- a potential offeror does not need to be named, even where its (unidentified) existence is in the public domain, once a formal offer announcement has been made, but would do prior to such period.

Whilst of course a rationale for each of these distinctions can be articulated, in practice it would be far simpler to provide that potential offerors should be publicly identified save with offeree consent or, if necessary, with offeree consent and subject to Panel approval, as per extensions to the

PUSU deadline. The inconsistency of approach proposed demonstrates the flaw in the argument that disclosure of offeror identity is required for transparency (ie, it is just required some of the time and it will be hard to follow when it is and is not so required).

(d) What constitutes a "potential offeror"?

The proposed approach to identification will result in even greater focus on what constitutes a potential offeror. We assume that the Panel intends that a party ceases to be a potential offeror not only on "unequivocal rejection" by the offeree but also upon "withdrawal" or "unequivocal withdrawal" by the potential offeror. The disclosure obligation on its face only applies to a "potential offer or: ie "offeror" a person who has made an approach but genuinely withdrawn, does not seem to us to be capable of being said to be still a "potential offeror", otherwise it would seem unworkable. Increasing focus on such a distinction, as opposed to on the offeree's wishes, will simply lead to potential offerors after each step of engagement introducing withdrawal notices, or requiring rejection notices pending the next contact. Again the "alternative approach" substantially avoids such issues.

(e) Conclusion

The above issues, we strongly believe, demonstrate that any perceived advantages in flushing out publicly all potential offerors (for example where there has been a leak by a potential offeror, but it is unclear by which one), are more than outweighed by the disadvantages if no flexibility is introduced. In particular, we anticipate that this new approach to identification will impede credible "real" value accretive offers, welcomed or solicited by offeree boards more than it will affect hostile "virtual bids" or similar proposal.

There is no doubt in our experience that hostile virtual bidders are typically more likely to be happy to be identified publicly than credible bidders, which are often more likely to be deterred and to withdraw (and then be locked out for three to six months, often following a leak in which they had no part), directly contrary to the clear wishes and interests of the offeree and its shareholders. Again, these problems can all be successfully and substantially mitigated, consistent with the overall approach of enhancing offeree board influence, by adopting an approach along the lines of the alternative approach canvassed in the PCP. Indeed such a provision would self evidently support offeree board empowerment.

2. Proposed lock-out of potential offerors withdrawing to avoid being named

The PCP sets out a description both of the Panel's view of the current position where a "dispensation" is granted from the requirement for an announcement under Rule 2.2(c) or 2.2(d): i.e. where, at the time of the relevant share price movement or rumour and speculation occurs, the relevant potential offeror has ceased actively to consider an offer.

We do not entirely agree with the description of its current application of the regime described in paragraph 2.62 to 2.64: we suspect this arises from focus by the Panel on situations where an obligation to announce under Rule 2.2(c) or (d) is clearly triggered and the decision not to require an announcement is clearly a dispensation by the Panel (when terms can legitimately be imposed by agreement on the relevant potential offeror): the Code currently contains no power for the Panel to impose a shut-out of a potential offeror from making an offer otherwise than where it has unsuccessfully made an offer or where it has been named as a potential offeror.

We have two principal concerns with this proposal:

(a) The risk of being forced into a withdrawal and a lock out, in order to avoid premature public disclosure, will be a material impediment to significant numbers of bona fide offers, welcomed by targets; the problem will be particularly severe for a potential offeror that is consistently the subject of speculation on a transaction (for example, by virtue of reasons of self evident commercial rationale), which will be discouraged from making an approach even where the approach would be welcomed by the offeree, increasing the number of potential offerors which have to withdraw in order to avoid being named; and

(b) the six months lock-out (or three months with offeree support) seems wholly disproportionate to an entity which ceased to be a potential offeror before any rumour or speculation occurred, or for example in a situation where the relevant rumour or speculation did not trigger any material share price movement, or there was a subsequent share price movement without rumour or speculation. It also runs counter to the offeree board empowerment principle, that a minimum three month period to re-engage be imposed.

Yours sincerely

James Palmer
Herbert Smith

Example 1

Day 1: Company A approaches Target X about a possible offer. Talks commence but it is unclear whether A can offer a sufficient price.

Day 15: Target X decides to approach Company B in case Company A's offer falls below a level sufficient for a recommendation, as a possible white knight. Company B is listed and sensitive to publicity regarding its interest in Target X before it can explain detailed rationale and impact to its own shareholders.

Day 20: Company A's approach is leaked. A rule 2.4 announcement is made. Company B withdraws, contrary to Target X's strong wishes.

Day 48: Company A launches a hostile bid. The market is not aware of any possible counter bid. Company A buys a 20 per cent block of shares on the market. Company B decides to remain withdrawn, either given the stake now held by company A, or on the basis that Company A has too much momentum and Company B does not wish to enter a prolonged contested bid, with risk of losing, as distinct from its preferred outcome of being the first and recommended bidder.

Company B would have paid more than Company A.

Example 2

Day 1: Target X and Company B enter into agreed merger discussions, under which Company B would be offeror. Target X has a strategic choice: combine with Company B, or sell its business which fits with Company B's to a third party within two months, Third Party D.

Company B is listed and sensitive to publicity regarding its interest in Target X before it can explain detailed rationale and impact to its own shareholders.

Day 7: Company A, which has no financing available and is one-third of the size of Target X, approaches Company A. The approach is immediately leaked.

Company B withdraws and is precluded from bidding for 6 months, or at least 3 months with Target X's consent.

Day 35: Company A has been unable to announce a firm intention to make an offer and announces its withdrawal.

Target X is unable to engage with Company B, so has to pursue the disposal of assets to Third Party D.

The transaction with Third Party D provides lesser value to Target X than a merger with Company B would have done, in the view of the board of Target X, but is under the circumstances the more certain choice.

Example 3

Day 1: Target X's board decides to explore value options. Acknowledgement of need to sell Target X would undermine confidence in its business, so no public auction is launched. However X instructs its financial advisers to sound out interest from a small number of possible acquirors of Target X.

Day 7: Company A and Private Equity Firm B are approached. Company A is a strategic bidder with cash resources. A and B are each told a handful of possible acquirors have been approached, with a view to moving within two weeks proceeding with a preferred offeror, or terminating discussions.

Day 14: Company A's identity as leaked to a potential offeror for Target X. Private Equity firm B withdraws rather than be named. Discussions between Target X and Company A continue as does Company A's due diligence.

Day 42: Target X supports an extension of 2 weeks to Company A's timetable.

Day 56: Company A makes a recommended offer for Target X. The Board of Target X believes that Private Equity Firm B would have been the preferred fit, but could not clarify if it would bid or raise the financing required.

Private Equity Firm B will not re-enter by launching a contested bid. It could have financed a higher bid with 4 to 6 weeks of due diligence.

It is suspected by all that Company A leaked its interest to see if that deterred other more publicity-shy potential offerors.

Example 4

Day 1: Consortium B approaches Company A with a takeover proposal.

Day 16: After ostensibly informed rumours of Consortium B's interest in Company A are reported in the press, a possible offer announcement is made identifying Consortium B. Consortium B is well progressed in its approach and keen to be able to engage shareholders, so they in turn may apply pressure to the board of Company A to allow an offer to proceed on a recommended basis.

Alternative (1)

Company A's chairman and the chairman of Company C "on the golf course", on day 15 (i.e. the day before public disclosure of B's interest) have a discussion, initiated by the chairman of Company A (the offeree) about C's interest in combining with A. The chairman of Company C confirms that his company has always been interested in acquiring/merging with A and suggests meetings in three or four weeks time to progress matters.

The leak of Consortium B's interest would require Company C either to be named as a potential offeror, or to withdraw and be precluded from bidding for three to six months or until an earlier formal offer announcement by Consortium B.

Alternative (2)

As per (1), but the "golf course" discussion occurs on day 17, i.e. the day following the possible offer announcement triggered by rumours of Consortium B's interest.

In that situation Company C is not required to be identified publicly and its existence as a potential offeror need not be publicly disclosed on a named or unidentified basis.

Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law

Further comments on PCP 2011/1

1. **Do you have any comments on the proposed new Rule 2.4 and the proposed new Note 3 on Rule 2.2?**

   See the comments in our main response.

   We consider that the words "or withdrawn" should be inserted after "and not unequivocally rejected" as an offeree should not be required to announce an approach from a potential offeror which was withdrawn before any announcement obligation under Rule 2.4(a) arose and an offeror which has clearly withdrawn is not a potential offeror.

2. **Do you have any comments on the proposed new Rule 2.6(a)?**

   As intended by the Code Committee, proposed Rule 2.6(c) makes it clear that it is the offeree alone which has the right to seek an extension of the 28 day PUSU deadline and not the potential offeror. Rule 2.6(a), however, suggests (because of the way it is drafted i.e. the obligations of the potential offeror) that it is a bilateral process (which clearly it is not). It would be helpful if Rule 2.6(a) could be reworded to clarify that seeking an extension is a unilateral process within the absolute control of the offeree but with the potential offeror being required to co-operate in that process.

3. **Do you have any comments on the possible alternative approach to the identification of potential offerors?**

   See the comments in our main response.

4. **Do you have any comments on the proposed new Rules 2.6(b), (d) and (e) and Rule 2.3(d)?**

   No comment.

5. **Do you have any comments on the proposed new Note 2 on Rule 2.6?**

   We note that, in order for the formal sale process exemption to apply, the offeree must say in its announcement that it is seeking potential offerors by means of a formal sale process. We consider this wording to be prescriptive as offerees will typically want to keep their options open in such an announcement by referring to a range of options which might include a formal sale process (more akin to a strategic review announcement as envisaged by Practice Statement No. 6). We believe that the Panel is aware that this will make this an exemption of only limited use in practice.

6. Do you have any comments on the proposed new Rule 2.6(c) and Note 1 on Rule 2.6?

We welcome the drafting in Rule 2.6 (c) (and the comment at paragraph 2.37 of the PCP) which make clear that the Panel will normally consent to an extension of the 28 day deadline if requested by the offeree. We also welcome the proposed wording in Note 1 on Rule 2.6 and note that it gives some flexibility on when such a request can be made. Both of these provisions give an important degree of control and flexibility to offeree companies.

We are concerned about the requirement for the offeree to announce the status of negotiations and the anticipated timetable for completion in any announcement about a new deadline. These matters (particularly the status of negotiations) are likely to be commercially sensitive and offerees will be concerned about making such information public, particularly vis a vis other potential bidders. We propose that instead of disclosing the status of negotiations, which could lead to a debate as to whether extensive disclosure is required, offerees be required to "comment on" the status of negotiations.

See also the comment made in answer to Question 2 above.

7. Do you have any comments on the proposed amendments to Rule 2.8 and to the Note on Rules 35.1 and 35.2?

We do not consider that a party which has made a statement to which Rule 2.8 applies should need the Panel's consent for the restrictions to fall away in the event that one of the standard carve-outs (particularly those in paragraphs 2(a)–(c)) applies. This is a real change of substance from the current rules which we do not consider to be necessary or desirable. We prefer the current approach of the restrictions falling away if one of the standard carve-outs applies, provided that the potential offeror has included the relevant carve out in its Rule 2.8 announcement. We see that the circumstances in note (d) should require Panel consent, but not those in notes (a), (b), (c) or (e).

8. Do you have any comments on the proposed framework to be applied in circumstances where, following a requirement to make an offer being triggered under Rule 2.2(c) or (d), a potential offeror ceases actively to consider making an offer, or on the proposed new Note 4 on Rule 2.2?

See the comments in our main response. Note 4 on Rule 2.2 seems to us problematic. It is one thing if the relevant "potential offeror" was such at the moment of the leak or immediately before (and where a dispensation can be said to be granted by the Panel if no disclosure is required) but quite another if the potential offeror is no longer a potential offeror (eg it ceased to be such some days, weeks, months or even longer beforehand). We suggest that it should be clear that a party that is able to demonstrate that it is clearly not a potential offeror, that no work has been undertaken by it on its behalf at all on a transaction since the relevant rejection or withdrawal, should not be subject to those provisions; it is not a "potential offeror". If this is not accepted, then in respect of a person in this category the three month period applicable where the offeree requests that dispensation be given should not apply.

Other comments on proposed changes to Rule 2 and related amendments (there is no specific question on these):

- How does the proposed additional wording to Note 1 on new Rule 2.5 (that, once an offeror has announced a firm intention to make an offer, it can no longer exercise any right to set aside a statement on the level of consideration or any right to vary the form or mix of consideration) inter-relate with an offeror's right to revise its offer? We assume that this is not intended to preclude the availability of a consideration for a period only, eg via mix and match opportunities or for example an underwritten cash alternative which is closed after a period?

- Why is the proposed amendment to Rule 7.1 limited to potential offerors when named by an offeree? Should it not also apply to when a potential offeror announces a possible offer? The amendments should be consistent with new Note 1 to Rule 2.4 and Note 12 on Rule 8).

9. Do you have any comments on the proposed new Rule 21.2?

We are concerned that the restrictions on offer-related arrangements will operate unfairly on a takeover which is a true "merger of equals" which could be structured so that either party is technically the offeree or the offeror. It would be unsatisfactory and inequitable in these situations for arrangements which impose obligations on the offeror to be permitted but not for reciprocal arrangements to be permitted to be imposed on the offeree. It would be useful if the Panel could reserve the right in such circumstances to give consent to disapplying the restriction (as envisaged by the opening words of proposed Rule 21.2 (a)).

We believe a number of undertakings given by offerees should not be caught under the prohibition.

- undertakings by offerees to provide information to offerors regarding the satisfaction of conditions or the offerors' ability to waive conditions (eg a confirmation on a closing date that no material adverse change has arisen), should be permitted: these commitments pre-date "virtual bids" and implementation agreements and under no circumstances could impede a competing bid or other offeree action

- agreements relating to discretion to be exercised by the offeree in relation to employee share schemes and bonuses are innocuous agreements given that Rule 21.1 will continue to prevent share issues and unusual grants. Again, they could never impede a competing bid or other offeree action beyond their limited remit but the position on discretion exercise is relevant for cash confirmation assumptions so frequently needs clarity up front

- an agreement by an offeree that it will cease to pursue a possible acquisition or disposal should not be prohibited, nor other conduct of offeree business commitments, where the offeror's approach was contingent on that: the frustrating action rules are not broad enough to catch all such circumstances where an offeror could properly need protection to proceed at a particular price with a recommended offer; and

- offeree companies are on occasions asked by potential offerors not to disclose price sensitive information to the offeror during the due diligence process, so as not to prevent the potential offeror from making market purchases as a result of the insider dealing regime. This should, we suggest, be added as another permissible offeree undertaking.

In addition to the examples above, there may well be others and we suggest therefore that there should be an express discretion for the Panel to allow other kinds of agreements on a case-by-case basis. This could be achieved by a new paragraph (f): "(f) any agreement or arrangement entered into with the agreement of the Panel".

The confirmation in paragraph 3.8 of the PCP that the Panel does not intend for agreements which the offeror and offeree enter into in the ordinary course of their businesses to be subject to the general prohibition on offer-related arrangements is helpful and we would ask that it be included in the Code, together with a confirmation that these documents will not need to be disclosed or put on display.

10. Do you have any comments on the proposed new Note 1 on Rule 21.2?

Whilst we welcome the "white knight" exemption, we consider that it should not be limited to one potential white knight. If, for example, offeror 1 makes a hostile announcement of a firm intention to make an offer, the offeree will be able to offer an inducement fee to white knight offeror 2 at the time it makes an announcement of a firm intention to make an offer. If an offeror 3 emerges (whether or not offeror 2 is still an offeror) we see no reason why the offeree should not also be able to offer that offeror an inducement fee at the time it makes an announcement of a firm intention to make an offer, subject to ensuring that the aggregate paid by the offeree does not exceed 1%.

11. Do you have any comments on the proposed new Note 2 on Rule 21.2?

See the comments on the formal sale process exemption made in response to Question 5.

12. Do you have any comments on the proposed new Note 3 on Rule 21.2?

A number of agreements which could fall within the definition of "offer-related arrangement" are usually entered into on a whitewash, for example a placing agreement. We note the comments in paragraph 3.25 of the PCP about sale and purchase and subscription agreements but whitewashes also arise in a number of other situations, for example on a share buyback. We do not think it is satisfactory for the parties to such transactions to have to seek a derogation in order to enter into the agreements and suggest therefore that the proposed Note 3 be amended with an express carve out whereby ordinary course arrangements giving rise to the whitewash will normally be permitted.

13. Do you have any comments on the proposed new Note 4 on Rule 21.2?

No comment.

14. Do you have any comments on the proposed amendments to Appendix 7?

We have a number of comments on the proposed amendments to Section 3 of Appendix 7:

- Paragraph (a) provides that where the offeree board withdraws its recommendation it will have no obligation to send an offer document to shareholders and others. Note 2 on Section 8 provides that in this situation, the offeror will be free to switch to an offer but provides no timetable or long-stop date for doing so.

- Paragraphs (d) and (e) are unclear. Paragraph (d) provides that the requirement on the offeree to implement the scheme in accordance with the published timetable will cease on the occurrence of specified events. Paragraph (e) goes on to provide that if the offeree wants to announce a revised timetable, it must obtain the approval of the offeror. There seem to us to be several points that need to be addressed or clarified. Would the fact that the original timetable will not be adhered to in itself constitute a "new timetable"? Should the announcement of a revised timetable need offeror approval when the announcement of the original timetable does not? What happens if there is a change to the timetable for a reason other than those set out in (d), for example, an event outside of the offeree's control or a change to the timetable after the court sanction hearing? The is a particularly important circumstance to address (ie offeror consent should not always be needed).

On proposed new Section 14, should the references to Rule 13.5(a) and 13.6 be to 13.4(a) and 13.5 respectively?

15. Do you have any comments on the proposed new Note 1 on Rule 25.2 or the related amendments?

No comment.

16. Do you have any comments on the proposed new Rules 24.16(a) and 25.8?

It would be clearer if proposed Rule 24.16(a)(vii) referred to fees and expenses expected to be incurred in relation to "other services". Otherwise it will be unclear if it is opening up detailed disclosure of, for example, post offer integration expenses.

17. Do you have any comments on the proposed new Note 1 on Rule 24.16?

No comment: this is a matter for financing bank comments.

18. Do you have any comments on the proposed new Rule 24.16(b) and Note 2 on Rule 24.16?

No further comment.

19. Do you have any comments on the proposed new Rules 24.16(c) and (d)?

Our members have requested further guidance on the determination of "materiality" under Rules 24.16(c) and (d).

20. Do you have any comments on the proposed deletion of Rule 24.2(b) and Note 6 on Rule 24.2 and the related amendments?

We query whether reference to the "company" in (a) is inappropriate? Should not all offerors be caught?

21. Do you have any comments on the proposed new Rule 24.3(a) and the related amendments?

We query the rationale for deleting the second and third paragraphs of the current definition of "regulated market"? Is the deletion of the second paragraph due to the fact that all relevant countries have implemented Directive 2004/39/EC? We consider that the references to the lists of regulated markets maintained on the EU Commission and Panel websites are useful.

22. Do you have any comments on the decision not to require *pro forma* balance sheets to be included in offer documents?

We support the decision.

23. Do you have any comments on the proposed new Rule 24.3(c) regarding the disclosure of ratings and outlooks?

No comment.

24. Do you have any comments on the proposed new Rule 24.3(f)?

It would be useful to reflect in the Notes to the Code on this Rule the confirmation given in paragraph 6.30 of the PCP about the level of financing disclosure required by private equity bidders.

25. Do you have any comments on the proposed new Rules 26.1 and 26.2 or the related amendments?

We consider that the new requirement in proposed Rule 26.1 to publish a number of documents on the website "from the time of the announcement of a firm intention to make an offer" will be difficult to comply with in practice and believe it should be extended to noon on the next business day (consistent with current Rule 19.11 website requirements) or at least the close of business on the day of announcement.

The comment in paragraph 6.34 of the PCP that financing documents should be put on display without redaction seems to us unduly to fetter the Panel's discretion in this area and is a stricter policy than that applying to other display documents. We believe the Panel should say that this will "generally" be its policy.

26. Do you have any comments on the proposed new Rule 24.2?

No comment.

27. Do you have any comments on the proposed new Note 3 on Rule 19.1?

We consider that requiring a party to adhere to a statement of intention is the wrong approach and instead consider that the rules should reflect the actual test applied by the Panel, namely (as set out in paragraph 7.10 of the PCP) whether, on the basis of the information available to the party and its advisers when the statement was made, it was reasonable for the party to make the statement at that time. We believe that the consequence of this requirement will be to reduce disclosure regarding intentions. This is clearly a "post Kraft" rule, which is unnecessary in policy terms and inappropriate in particular in fettering disclosure of plans for places of business and employees required to be disclosed under the Takeovers Directive. It also risks cutting across merger benefit statements, which reflect intentions but which cannot be guaranteed absent full information.

We think it is important that the Code remains clear that circumstances can arise unexpectedly which justify change of intention.

The reference to "public statement" needs to be clarified. In paragraphs 7.7 and 7.8 of PCP 2011/1, the Code Committee states that the "holding true" requirement should, where appropriate, also apply to statements made … in the offer document/circular, an announcement **or otherwise** (emphasis added). Could a statement made during discussions with a trade union and/or workforce amount to a "public statement"?

28. Do you have any comments on the proposed new structure for the obligations in relation to the publication, content and display of documents?

We believe the references in new Rule 24.1, Rule 25.1 and Rule 32.1 should probably be to Rule 30.1 (instead of Rule 19.8) and Rule 30.4 (instead of Rule 19.11).

29. Do you have any comments on the proposed new definition of "employee representative"?

This proposed new definition is too wide. Larger companies in particular may, under this definition, have a large number of employee representatives around the world and become under disproportionate obligations to circulate (and pay the costs of) statements. Complying with the Code requirements for informing employee representatives and making documents available to them could prove to be unduly expensive and cumbersome. We recommend that the definition provide that where the obligation would impose disproportionate obligations on the offeree, it can consult the Panel which may grant a dispensation.

30. Do you have any comments on the proposed new Note 6 on Rule 20.1?

No comments

31. Do you have any comments on the proposed new Rules 2.12(a) and (d) and second sentence of Rule 32.1(b)?

No comment.

32. Do you have any comments on the proposed new Rule 25.9 and amendments to Rule 32.6?

The proposed wording in Rule 25.9 and Rule 32.6 is unclear. An offeree will not necessarily know at the time that it receives an employee representative's opinion whether it is within 14 days of the offer becoming or being declared unconditional. It would be clearer for the deadline date to be 14 days before Day 81.

33. Do you have any comments on the proposed new Rule 19.2(a)(iii)?

Changes agreed.

34. Do you agree that the suggested amendments to section 2(a) of the Introduction to the Code would be consistent with the amendments to the Code proposed in this PCP?

Yes.

35. Do you have any comments on the proposed new definition of "offer period"?

Changes agreed.

36. Do you have any comments on the proposed new Rule 13.4?

Changes agreed.

Date: 31 May 2011