



# Takeover Code Proposed Amendments – TUC response

TUC response to Takeover Panel Consultation PCP 2011/1

## Introduction

1.1 The TUC welcomes this opportunity to respond to the Takeover Panel's consultation on its proposed amendments to the Takeover Code. The TUC represents over six million workers in 55 trade unions. Takeovers have had a major impact on the lives of our members over the years, and many have been on the sharp end of post-merger job cuts. Unions working to protect and represent their members' interests during takeovers have found themselves with scant or no information from either company on the likely impact of the bid on employment, despite their rights under the existing Takeover Code to this information. The TUC's primary concern with takeovers relates to their impact on workers. However, we are also concerned about the way in which takeovers frequently lead to large amounts of debt used to finance the bid being saddled to the target company, and the fact that so many takeovers (especially hostile ones) destroy value in the long and medium term.

1.2 The TUC does not believe that the proposals in this consultation paper will address our fundamental concerns with takeovers, which relate to the decision making process which determines the outcome of bids. In our view, it is inappropriate that decisions about mergers and takeovers should be made by shareholders alone. Shareholders, especially short-term shareholders but increasingly also so-called long-term shareholders, generally base their decision about whether or not to accept a takeover offer on the share price they are offered: offer a high enough price, and they will accept. Yet a high share offer price often results in more debt being attached to the target company, which is likely to hamper its future prospects and those of its workforce. The interests of the shareholders, whether long-term or short-term, and the interests of the company itself, are simply not aligned in the case of mergers and takeovers, and for this reason the TUC believes it is essential that the regulation of mergers and takeovers is reformed to ensure that takeover bids are subject to the long-term interests of the target company. The TUC believes that it is vital that the Government addresses the fundamental problems with the current decision-making regime for mergers and takeovers when it publishes the outcome of its call for evidence on economic short-termism later this year.

1.3 Nonetheless, the TUC believes that there is still an important role for the Takeover Panel in formulating amendments to the Takeover Code to improve the existing takeover regime. We believe that many of the proposals in the consultation document represent an improvement on the existing Takeover Code and, while they will not fundamentally change the existing system, we believe they should help to make it work better. Our detailed comments follow below. Our response focuses mainly on the proposals relating to employees.

Section D: providing greater recognition of the interests of the offeree company employees

### **Proposed new Rule 24.2**

1.4 The TUC welcomes the proposal to require offerors to make negative statements if it has no plans regarding the offeree's employees, business locations

and fixed assets. However, the TUC is concerned that this amendment, while an improvement on the existing Code, will not be sufficient to address the very poor quality of information that has in the past been submitted by offerors on their plans for employment and other issues. This will be returned to below.

### **New note 3 on Rule 19.1 – offerors expected to adhere to statements for 12 months**

1.5 The TUC strongly welcomes the intention to hold offerors to all statements they make during the offer period for a period of 12 months, or whatever other time period such statements specify. We have no comments on the wording for proposed new note 3 on Rule 19.1 that aims to put this in place. However, the TUC is concerned that the enforcement powers that the Takeover Panel has at its disposal are insufficient to ensure that this new rule is adhered to. The TUC believes that strong enforcement powers will be necessary to ensure that this provision is adhered to by offeror companies, and believes that the Takeover Panel needs additional enforcement powers to ensure that this new rule is complied with.

### **Additional guidance on content of statements necessary**

1.6 In our response to the Takeover Panel's consultation last year (attached as an appendix to this response), we argued that to address the poor quality of information on employment, locations of business and so on typical of offerors' documents, the Panel should set out guidance as to what is expected on these issues. This could be done in a Practice Statement as suggested by Takeover Panel's previous consultation paper. The TUC is disappointed that the Takeover Panel is not proposing to act upon this suggestion, and would urge the Panel to reconsider. We are concerned that the proposed amendments discussed above, while welcome, may not be sufficient alone to produce the step-change in the quality of employment information that we believe is vital for employees and their representatives to understand the likely impact of the bid on their future interests. Similarly, we believe that equivalent guidance should be produced on the contents of the board's opinion of the bid and its impact on employment. This is returned to below.

1.7 It will be essential to monitor the impact of these changes to the Code on the quality of information on employment and business plans provided by offerors. We believe that the Takeover Panel should publicly state its intention to monitor the quality of these statements. If the amendments do not bring about sufficient improvement, then further amendments will be needed.

### **New Rule 24.1 – definition of 'readily available'**

1.8 The TUC notes the discussion in paragraph 7.22 about the ways in which information may be made available to employees. The TUC understands the case for some flexibility in terms of how companies inform employees and their representatives, but we believe that it is important that safeguards exist to address situations where employees may not easily be able to access the documents, for example where they do not have easy access to printers that can cope with large documents and files. We believe that the Takeover Code should stipulate that

when the offeree company informs employee representatives or employees that information concerning the bid is available, the offeree company should also make clear that documents will be provided in hard copy to employee representatives and employees on request. In many instances, employee representatives and employees will have access to workplace computers and printers, and clearly it would be unacceptable for the offeree company to object to the use of workplace facilities for the use of printing out these documents. However, there may be instances, especially where a company does not have employee representatives and so employees have to get to grips with the takeover bid themselves, where employees do not have access to equipment that would allow them to print out large documents cheaply and easily. Therefore we believe that the offeree company should include an offer to provide hard copies of all documents at the request of an employee representative or an employee.

### **New Rule 25.2 – views of the board on the offer**

1.9 The TUC welcomes the proposal to require boards to include the substance of the advice given by the independent advisor to the board. We believe that this will provide valuable information for shareholders and other stakeholders.

1.10 We remain concerned about the poor quality of information offered by boards under the existing requirement for them to circulate their opinion of the bid on the company's interests, including employment. In the Kraft-Cadbury bid, the Cadbury board simply noted Kraft's very brief statements, and failed to make any comment on them at all, despite the significant differences between Kraft's stated plans on employment and those of the Cadbury board. Their response was patently inadequate in respect of the requirements that existed at the time, and the TUC does not believe that simply requiring boards to circulate the substance of the advice they have received is sufficient to address this deficiency. The TUC regrets that the Panel has not taken up the suggestion made in our previous submission that a Practice Statement should be drawn up setting out guidance as to what is expected of boards to fulfil these requirements. We continue to believe that such guidance would be useful and urge the Panel to reconsider its response on this point.

1.11 In addition, TUC believes that it is essential that the Panel takes greater steps to ensure that the offeree board's responsibility to set out their opinion of the bid fully and in good faith is properly enforced. In the past, boards have been able to get away with cursory statements which in no way fulfilled the requirements of the Code with no action taken to remedy these deficiencies. This deprives shareholders and other stakeholders of important information that could affect their response to the takeover offer. The TUC believes that the Takeover Panel should publicly state its intention to monitor the quality of these statements.

### **Definition of employee representative**

1.12 The TUC proposes the following changes to the definition of an employee representative suggested in the consultation:

“Employee representative

An employee representative is:

- (a) a representative of an independent trade union, where such independent trade union has been recognised by the offeror or the offeree company in respect of some or all of its employees; and
- (b) any other person who has been elected by employees to represent employees for the purposes of information and consultation” (italics added to emphasise additions).

1.13 The reason for inserting the word ‘independent’ is make clear that what is meant here is a union independent of the employer, and not an organisation established by the employer. All existing information and consultation rights in the workplace apply to independent trade unions.

1.14 We do not believe that it is appropriate that people should be ‘appointed’ for the purposes of information and consultation; such people should always be elected by the workforce. The notion of people being appointed for the purposes of information and consultation is open to abuse and should not in the TUC’s view be included in the definition.

#### **New note 6 on Rule 20.1 – sharing information with employee representatives**

1.15 Trade unions have time and time again been told by employers that they cannot be given meaningful information about a takeover bid because the Takeover Code prevents it. This has also led to workers learning through the media that their jobs will be cut following a merger or takeover, with all the usual channels of information and, crucially, consultation circumvented in the name of the Takeover Code.

1.16 The TUC therefore strongly welcomes the Panel’s intention to clarify in the Code that the Takeover Code does not prevent offerors or offerees sharing information in confidence with their own employee representatives, or the offeror sharing information in confidence with employee representatives of the offeree company. The sharing of information with employee representatives is essential in order for employee representatives to be able to fulfil their role of protecting their members’ interests and to enable them to take up their right for their opinion of the likely impact of the bid on employment to be circulated to shareholders.

1.17 However, we remain concerned that there is a lack of clarity about how the requirements to consult over collective redundancies operate in the case of mergers and takeovers. We would recommend that a note in the Code clarifies that where there are plans to make staff redundant following a takeover, the company is still required to follow the legal requirements to consult with staff in good faith over whether those redundancies can be avoided. This means that consultation should take place before redundancies have become inevitable as a result of other decisions and actions.

#### **New Rule 2.12 (a) and (d) and Rule 32.1 (b)**

1.18 The TUC welcomes the proposal make it a requirement under the Code that the offeree company should inform employee representatives of their right to have their opinion of the bid’s likely impact on employment appended to the board’s

circular. As we argued in our previous submission to the Panel, it is not realistic to expect trade union representatives to be familiar with the contents of the Takeover Code (and therefore to be aware of this right) and this amendment will ensure that employee representatives have the opportunity to take up the rights offered to them in this regard under the Code.

1.19 We also support the proposal to require that employee representatives are informed of the commencement of the offer period, given access to all relevant document and informed their right for their opinion on employment to be circulated to shareholders at the earliest opportunity, and therefore support the new Rule 2.12. We likewise support the new Rule 32.6, which requires that where a revised offer is received, employee representatives are informed of their right for their opinion of the revised offer on employment to be circulated.

### **Publication of the employee representatives' opinion and responsibility of the offeree company for costs**

1.20 The TUC welcomes the proposal that the offeree company should cover the costs of any advice required for verification of the employee representatives' opinion. As we noted in our previous submission, there have been instances where trade unions have experienced difficulties with the contents of their opinion because of the standards expected by the Takeover Code, and this provision should help to address this issue.

1.21 We also welcome the proposed clarification within the Code that the offeree company is responsible for the costs of the employee opinion.

1.22 We understand the proposal that, if the employee opinion is not received 'in good time', the offeree company must publish the employee opinion on a website and announce via a RIS that it has done so. We remain concerned that the timing is very tight for employee representatives to absorb the information in the offer documents, discuss them with employees, form their opinion of the likely impact on employment and seek verification if necessary.

### **Other proposals**

1.23 Generally, the TUC believes that the majority of the other amendments proposed in the consultation document are an improvement on the existing Takeover Code. However, there are some areas where we believe the Panel's proposals are too limited and should be extended.

### **Offer-related arrangements**

1.24 The TUC strongly supports the proposal to extend the prohibition on deal protection measures and inducement fees to any "offer-related arrangement".

1.25 However, the TUC believes that it would be wrong to exclude letters of intent from directors acting in their capacity as shareholders from this prohibition. The TUC does not believe that the Panel's note that directors need to consider whether such commitments or letters of intent will lead to conflicts of interest with their role as directors is sufficient. At the present time, conflicts of interests for directors feature significantly in mergers and takeovers, and we believe that stronger measures than those proposed are necessary to address this.

The TUC believes that directors should not be able to make personal gains from their company being taken over. We believe that directors should not be able to enter into any offer-related agreements with the offeror company without resigning their position as directors.

1.26 We believe that it is essential that any offer-related arrangements that are entered into are publicly disclosed.

### **Schemes of arrangement**

1.27 We believe that it is essential that information on scheme timetables is included in the information which companies are required to give to employee representatives and, where the latter do not exist, to employees themselves.

### **Clarifying factors that boards may take account of in reaching their opinion of the bid**

1.28 The TUC supports the proposal to clarify in the Code the fact that directors are not required to consider the share price as the determining factor in their opinion of the bid. However, we are disappointed that the Panel has not taken up our suggestion of referring directly to directors' duties under the Companies Act and in particular to section 172 which sets out matters which directors are required to take into account in carrying out their duties. The TUC would urge the Panel to reconsider its proposal on this point.

1.29 As argued above, in many instances the quality of information given in directors' opinion of the bid is currently extremely poor. It is essential that this addressed. In addition to clarifying the issues to which directors may have regard in formulating their opinion, the TUC believes that it is essential that the quality of information circulated under this provision is monitored by the Panel. The TUC believes that provision should be established for shareholders and employee representatives to make complaints to the Panel if they believe that the directors' opinion is inadequate. If directors do not fulfil their requirements under the Code, enforcement proceedings should be implemented.

### **Offer-related fees and expenses**

1.30 The TUC supports the proposals to require disclosure of offer-related fees and expenses as a step in the right direction. However, we continue to believe, as argued in our previous submission to the Panel, that such fees very frequently create conflicts of interests for those concerned as well as representing a poor use of company resources. We support disclosure, but do not believe that this will be sufficient to address these issues and believe that in addition fee caps should be introduced.

1.31 It is essential that the level of fees and expenses is monitored by the Panel and that the question of whether such fees are influencing the outcome of takeover bids is returned to in the near future.

### **Disclosure of financial information**

1.32 The TUC agrees with the proposal to require the same financial information regarding the offeror and the financing of the offer regardless of the nature of the offer.

### **Pro-forma balance sheets**

1.33 The TUC is disappointed that the Panel is proposing not to take forward its previous proposal to require a pro-forma balance sheet for the combined group to be included in the offer documents. The TUC notes the reasons why the Panel believes that this requirement could be difficult for offerors to comply with, but believes that if the offeror is not able to produce a pro-forma balance sheet, it does not have enough information to put forward a viable proposal to shareholders and stakeholders. The Panel's assertion in paragraph 6.28 that the information provided in respect of offeror and offeree companies should "assist the reader in forming an analysis of the balance sheet and debt of the combined group following the completion of the transaction" indicates that producing a pro-forma balance sheet should be possible. The TUC would urge the Panel to reconsider its view on this point.

### **Offer financing**

1.34 The TUC notes the Panel's discussion in paragraph 6.30 about the degree of disclosure that should be required from private equity vehicles in relation to the different layers of debt financing that they are proposing use to finance the bid, but disagrees strongly with its conclusion. The TUC is very concerned about the potential for private equity funds to buy companies, load them with debt and then extract value from them over many years with repeated 'dividend' payments and other financial transfers. The TUC considers that in many cases such financial transfers represent the extraction of value from the target company for the benefit of the private equity fund and its general and limited partners and to the detraction of the long-term prospects and value of the target company. The way in which private equity funds structure their funding for takeover bids is relevant to the way in which funds will be transferred post-bid from the target company to the private equity fund, and for this reason the TUC believes that full disclosure of complex financing structures including the layers of debt, balance with equity from a fund etc, should be required.

### **Documents to be put on display**

1.35 The TUC believes that, as argued above in relation to offer and other documents, the documents to be put on display should be made available in hard copy to employees and/or their representatives on request. This is because, as pointed out above, employees and their representatives may not always have access to technology that would allow them to print out such documents cheaply and easily.