



UNITE RESPONSE TO TAKEOVER PANEL CONSULTATION: The Takeover Panel's Code Committee review of certain aspects of the regulation of takeover bids – Proposed amendments to the Takeover Code

This response is submitted by Unite the union. Unite is the UK's largest trade union with over 1.5 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, energy, construction, transport, local government, education, health and not for profit sectors.

Executive Summary

Unite welcomes the amendments as outlined in the consultation document but serious concerns remain about the fact that no one involved in determining the outcome of a takeover bid is required to take account of the long-term interest of the target company. While the amendments do contain greater recognition of the interests of offeree company employees, Unite still feels more can be done in order to provide greater clarity and stability for these stakeholders in the long term.

Unite's previous response to the PCP 2010/2 should still be classed as relevant as this response is applicable to the proposed amendments to the Takeover Code but some of the wider concerns as outlined previously still remain.

As stated in the comments to Consultation paper 2010/2, shareholders are not the only stakeholders in a business; those working in the business have a very important interest in the outcome of a takeover. In a takeover, by selling their shares, shareholders can exit a company, but other stakeholders, especially employees cannot get out, they are the ones that stay. Employees in a company have at least an equal interest in the outcome of a takeover as shareholders.

Unite therefore still believes that the following changes need to be introduced:

1. The establishment of a Takeover Commission.
2. Any takeover which significantly increases the level of debt increases the risk of the company and is, de facto, a deterioration in terms and conditions. Through their trade unions, workers should have the right, equivalent to that of pension fund trustees, to seek fair compensation and protection should substantially greater levels of leverage be part of a takeover. Banks are able to charge risk adjusted rates of interest, pension trustees exercise the right to

- demand greater up-front funding to compensate for added risk, but currently workers are not consulted, let alone protected or compensated.
3. Effective remedies for employees detrimentally affected by breach of the Code.
 4. Effective removal of perceived barriers in the Code to ensure clarity over the ability of companies to share non public information with employee representatives; and negotiate safeguards and guarantees with employee representatives for employees' jobs and terms and conditions.
 5. Improved facilitation of the opinion of employee representatives on a bid.
 8. The facility for the Takeover Panel to intervene during the course of a bid if employee representatives make a complaint about breach of any of the above in order to compel the parties to comply.
 9. The Takeover Code, along with the changes Unite is seeking, to be applied to all private and public companies involved in takeovers.

1. Introduction

1.1. Unite welcomes the opportunity to respond to the Takeover Panel Consultation reviewing certain aspects of the proposed amendments to the Takeover Code.

1.2. Unite is still of the opinion that the Takeover Panel role may be wider than is being interpreted throughout the consultation document. The Companies Act 2006 states:

(1) The Panel must make rules giving effect to Articles 3.1, 4.2, 5, 6.1 to 6.3, 7 to 9 and 13 of the Takeovers Directive.

(2) Rules made by the Panel may also make other provision—

(a) for or in connection with the regulation of—

(i) takeover bids,

(ii) merger transactions, and

(iii) transactions (not falling within sub-paragraph (i) or (ii)) that have or may have, directly or indirectly, an effect on the ownership or control of companies;

(b) for or in connection with the regulation of things done in consequence of, or otherwise in relation to, any such bid or transaction;

(c) about cases where—

(i) any such bid or transaction is, or has been, contemplated or apprehended, or

(ii) an announcement is made denying that any such bid or transaction is intended.

1.3 The Code also includes obligations to employees on the part of both the bidding and the target companies, such as the circulation of employee representatives' opinion to shareholders and of providing information to employees. The Panel should fully recognise the responsibility it has towards employment issues and employees in a takeover. The Panel should fully enforce these or propose that this responsibility should be allocated elsewhere.

2. Comments On Questions

Q1 Do you have any comments on the proposed new Rule 2.4 and the proposed new note 3 on Rule 2.2?

Unite would be in support the new Rule 2.4 in reference to identifying any potential offeror with whom the offeree company is in talks with or from whom it has received an approach (which has not been unequivocally rejected) with regard to a possible offer. This information must be announced to employees and employee representatives in order to ascertain the likelihood of the potential takeover succeeding and will assist in identifying any possible threats to employment.

If there are rumour and speculation which affect the offer it is right and correct that the company should deal with this speculation by making further announcements regarding any potential offeror. This should again be made direct to employees or employee representatives as they are significant stakeholders for both the offeree company and the offeror to consider.

Q2 Do you have any comments on the proposed new Rule 2.6 (a)?

The 28 day rule with which to announce a firm intention to make an offer in accordance with Rule 2.7 or otherwise (ii), (iii) is essential and should result in punitive measures if not adhered to. It would be for the Takeover Panel to decide on appropriate measures with which to prevent the companies involved from ignoring.

Q3 Do you have any comments on the possible alternative approach to the identification of potential offerors?

Unite fully support the decision of the Code Committee not to pursue the alternative approach as we feel it is vitally important that any bids adhere to the 28 day rule and are therefore publicly identified. It would be of grave concern if negotiations that are going to affect any number of employees could be conducted in complete secrecy without any announcements being made.

Q4 Do you have any comments on the proposed new Rules 2.6 (b), (d) and (e) and Rule 2.3 (d)?

Unite would be in support of the new rules on the basis that there is clarification for employees and employee representatives as to the intentions of the potential offeror as in line the previous consultation comments.

Q5 Do you have any comments on the proposed new note 2 on Rule 2.6?

As Q4

Q6 Do you have any comments on the proposed new Rule 2.6 (c) and Note 1 on Rule 2.6?

Unite would be of the opinion that in any case where an extension of a deadline set in accordance with Rule 2.6 (a) or any previously extended deadline the concerns of employees and employee representatives would be taken into consideration.

Q7 Do you have any comments on the proposed amendments to Rule 2.8 and to the Note on Rules 35.1 and 35.2?

It is essential that in not making an offer for a company the person is completely clear and unambiguous with the statement being made. The Rule that would prevent this person from making any offer within six months of the statement must be enforced rigidly in the public interest and also to give substance to the overall Takeover Code.

Q8 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?

As in Q4

Q9 Do you have any comments on the proposed new Rule 21.2?

It would be highly important for the New Rule 21.2 to be upheld and measures be brought in should this rule be broken. The credibility of any offer could be called into question should deals be attempted to be struck with other stakeholders prior to any formal takeover taking place.

Q10 Do you have any comments on the proposed new note 1 on Rule 21.2?

As per Q4 and Q9

Q11 Do you have any comments on proposed new note 2 on Rule 21.2?

As per Q4 and Q9

Q12 Do you have any comments on the proposed new note 3 on Rule 21.2?

As per Q4 and Q9

Q13 Do you have any comments on the proposed new note 4 on Rule 21.2?

As per Q4 and Q9

Q14 Do you have any comments on the proposed amendments to appendix 7?

As with the previous consultation document (2010/2) and the response from Unite, our opinion is that the provision of information is vital not just to shareholders but to employees and employee representatives, especially in the case of 'Scheme Timetables'. The expected timetable, including the expected dates and times for the principal stages of the scheme process, should be set out in the scheme circular when published and this should be made available to all those impacted by any takeover process, i.e. employees.

Q15 Do you have any comments on the proposed new Note 1 on Rule 25.2 or the related amendments?

No

Q16 Do you have any comments on the proposed new Rules 24.16 (a) and 25.8?

Unite welcomes the new Rule 24.16 in relation to fees and expenses as there is a need for transparency in this area. It is certainly in the public interest to have access to information on financial and corporate broking advice, financing arrangements, legal advice, accounting advice, public relations advice, other professional services (including for example management consultants, actuaries and specialist valuers) and other costs and expenses. As outlined in Unite's previous response to the Takeover Code consultation document (2010/2) workers and their representatives should be informed and consulted on the

business and financing plan of any takeover prior to the acquisition. This should include details of fees and expenses.

Q17 Do you have any comments on the proposed new note 1 on Rule 24.16?

As Q4, Q9 and Q16

Q18 Do you have any comments on the proposed new Rule 24.16 (b) and Note 2 on Rule 24.16 (b)?

As Q4, Q9 and Q16

Q19 Do you have any comments on the proposed new Rules 24.16 © and (d)?

As Q4, Q9 and Q 16

Q20 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?

As Q16

Q21 Do you have any comments on the proposed Rule 24.3(a) and the related amendments?

As Q4

Q22 Do you have any comments on the decision not to require pro-forma balance sheets to be included in offer documents?

Unite feel strongly that it would be of benefit to include a pro-forma balance sheet as part of the provision of full disclosure which would assist employees and employee representatives in understanding the financial status of the offeror. Although Unite understands that the provision of any forward looking business plan along with the disclosure of all fees associated would go some way in providing employees and employee representatives with a rounded view of the potential offer there is concern about the lack of clarity regarding the actual accounting information that will be made available in the offer documents.

Q23 Do you have any comments on the proposed new Rule 24.3(c) regarding the disclosure of ratings and outlooks?

As Q4

Q24 Do you have any comments on the proposed new Rule 24.3 (f)?

Unite welcomes the clarity provided by the new Rule 24.3 (f) surrounding the financing of any offer and in particular the breakdown for (i) to (vii). Again, Unite feel this information must be made available to employees and employee representatives.

Q25 Do you have any comments on the proposed new Rules 26.1 and 26.2 or the related amendments?

Rule 26.1 goes some way in addressing the problems of lack of clarity in the provision of information during the bid process but there needs to be clear direction as to where the information will be published and who has access to this information. The statement '*documents must be published on a website*' does not help to clarify this.

Any documents that are deemed important enough to be governed by the Code and in particular Rules 24.3(f) and 26.1 should not only be made available to employees and employee representatives but they should be provided with these materials directly.

Q26 Do you have any comments on the proposed new Rule 24.2?

The proposed new Rule 24.2 does go some way in accepting the concerns in the original Unite response to the CPC 2010/22 document. Unite would particularly welcome the changes regarding (i) the offeror's intentions with regard to the continued employment of the employees and management of the offeree company and of its subsidiaries, especially considering the statements that were made by the Kraft management team in trying to secure support from UK employees surrounding the Somerdale Plant (App.1).

The more information provided considering the business plan and plans for various aspects of the offeree company the better.

However, concerns are raised regarding the fact that the Code only holds that these 'statements to hold true for at least one year' and Unite would ask what penalties would be applicable in any case which found the offeror breaking this rule.

Q27 Do you have comments on the proposed new Note 3 on Rule 19.1?

Unite raises concerns regarding the fact that the Code only holds that these 'statements to hold true for at least one year' and Unite would ask what penalties would be applicable in any case which found the offeror breaking this rule.

Q28 Do you have any comments on the proposed new structure for the obligations in relation to the publication, content and display of documents?

Unite welcomes the new structures and in particular 24.1 (c) in which employees and employee representatives are provided with the offer document at the same time as shareholders because, as previously stated, employees are certainly significant stakeholders who retain a right to access to all offer documents, strategic plans for the offeree company and any other information relevant to the takeover bid process. Employee representatives need the right to negotiate protection of jobs and terms and conditions in line with the actions others can take to protect their interests. A key component of this is the ability to have access to the information as outlined in the Code amendments.

Q29 Do you have any comments on the proposed new definition of "employee representative"?

The fact that the Code Commission considers that the definition should embrace representatives of a trade union, where such a trade union has been recognized by the offeror or the offeree company in respect of some or all of its employees, is welcomed as there is clarity on who has the right, under the existing Rule 30.2 (b), to have a separate opinion on the effects of employment appended to the offeree board's circular.

Q30 Do you have any comments on the proposed new Note 6 on Rule 20.1?

Note 6 is quite vague in that it does not provide guidance to the offeror or offeree company in ensuring that information is shared with employees or employee representatives. However, Rule 2.12 goes some way in ensuring that these stakeholders are recognized in the bid process and the necessary information is made available.

Q31 Do you have any comments on the proposed new Rules 2.12 (a) and (d) and second sentence of Rule 32.1 (b)?

Unite welcomes new Rule 2.12 (a) and (d) and the second sentence of Rule 32.1 (b) as they highlight the importance of provision of all information to those with information rights.

Q32 Do you have any comments on the proposed new Rule 25.9 and amendments to Rule 32.6?

Again, Unite welcomes the proposed new rule and amendments. However, there should be clarity as to what constitutes 'good time before publication of the circular'.

Q33 Do you have any comments on the proposed new Rule 19.2 (a)(iii)?

The importance of the opinion of employees and employee representatives cannot be underestimated and the new rule highlights this.

Q34 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

Q35 Do you have any comments on the proposed new definition of "offer period"?

No

Q36 Do you have any comments on the proposed new Rule 13.4?

No

Conclusion

Unite welcome the amendments to the Code in which employees and employee representatives are granted more recognition. Unite would hope that the changes to the rules and accompanying notes will be adhered to by any companies involved in any UK takeovers.

However, concerns are raised regarding the penalties and measures applicable to any company that does not adhere to the Code and rules and there should be firmer guidance as to what these penalties are.

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(Appendix 1)

UNITE NEWS RELEASE

For immediate issue, Monday, May 23rd, 2011

Kraft's secrecy will risk Cadbury's future unless the government acts, warns Unite

More than one year on from Kraft's controversial takeover of Cadbury, the global's intentions towards thousands of UK workers remain shrouded in mystery - and we are still no closer to a Cadbury Law to defend UK-based companies against predatory purchases.

So says Unite, the union representing Kraft workers, voicing its fears on the day (Monday) that the influential select committee on business publishes its report into the conduct of Kraft since its 2010 swoop for Cadbury.

Unite welcomes the committee's scrutiny of Kraft, in particular the recommendation that the UK urgently needs a new takeover regime. The committee also says a repeat of that Kraft's behaviour over Cadbury's Somerdale plant - which it promised to relieve from closure then subsequently reneged on this once it had purchased the confectionary firm - must be guarded against by ensuring that promises made during bids are made binding.

So concerned has Unite been about Kraft's failure to disclose basic information since the takeover that it is now seeking to use international agreements to ensure the corporate informs the union about its plans. Unite says Kraft must come clean on plans for the next five year period at least to reassure the workforce of its commitment to the UK.

Jennie Formby, Unite's national officer for the food and drink sector, warns that the UK government must not sit on the sidelines: *"One year on from Kraft's predatory purchase of Cadbury the workers are still none the wiser about the company's commitments to its UK businesses. In fact, we now have less information about the company's current state and future intentions than before the takeover.*

"Workers look at Kraft's horrendous multi-billion debt, consider its record in other countries where jobs have gone, plants have shut and wages have been cut, and rightly worry about what the future holds for them.

"Only guarantees on jobs and investment will prove that Kraft is in the UK for the long haul.

"We are extremely thankful that the committee continues to scrutinise Kraft's conduct and to push for changes to the UK takeover regime. Takeover and corporate law in this country are too weak, offering workers no help and providing little or no protection for UK companies against predatory purchases. This must change.

"As global companies continue to see acquisition as a key plank of their growth plans, they will look at the UK and see how easy it is to swoop. Countless other UK workers could find themselves in the same uncertain situation as Cadbury and Kraft workers unless the government acts.

"Worryingly, however, it seems that the government has lost the appetite for the Cadbury Law promised by Vince Cable - but it must not shy away from giving our remaining industrial base desperately need protection."

The BIS select committee publishes their report on Monday on the Kraft inquiry - 'Is Kraft working for Cadbury'.

Kraft's colossal debt coupled with its secrecy gives rise to real fears for the future, warns Unite. Since the takeover, 6000 Cadbury workers based in the UK as well as thousands of Kraft workers now find themselves subject to US corporate regulation under the aegis of the Securities and Exchange Commission. This means a lighter touch on business conduct and even poorer disclosure of business plans.

Unite supports the committee's recommendations on future takeovers including that statements on keeping factories for defined periods and these statements should be binding. It also says that Kraft must maintain employment levels and inform the committee of any change in their plans, again welcomed by Unite.