WHITE & CASE

Takeover Panel PCP 2011/1 Issued on 21 March 2011

REVIEW OF CERTAIN ASPECTS OF THE REGULATION OF TAKEOVER BIDS

PROPOSED AMENDMENTS TO THE TAKEOVER CODE

WHITE & CASE RESPONSES

Dated: 26 May 2011

Comments being sent by e-mail to: supportgroup@thetakeoverpanel.org.uk

Please note that we have only listed those questions in Appendix B to which we are providing a response.

Increasing protection for offeree companies against protracted "virtual bid" periods

Q1 Do you have any comments on the proposed new Rule 2.4 and the proposed new Note 3 on Rule 2.2? [*Announcement of possible offerors, p.10*]

With regard to the naming of all potential offerors who have approached the Target where an announcement by the target starts an offer period we are concerned that some categories of potential bidder may be more disadvantaged than others by being publicly named. Where they have been careful about leaks and are not the subject of rumour or speculation requiring an announcement to be made, the Panel's proposed approach may therefore be a disproportionate response and discourage those bidders. Bidders that may be more seriously disadvantaged might include those where the transaction would constitute a reverse takeover, as the fact that the shares may be suspended as a result may affect adversely the share price, or where a bidder will be required to raise public money through issues of equity or bonds in order to raise finance. Being named may increase the risk of the market shorting them/pricing the market against them in the case of a publicly listed company, and significantly increase the cost to them of the acquisition.

In addition, once an announcement has been made, but before a firm intention to make an offer has been announced, any new potential offeror (which we will call for these purposes a "follow up" bidder) will not be required to be named, unless it is the subject of rumour or speculation, or the target so wishes. As a result a follow up bidder will not be subject to the 28 day PUSU to which the earlier potential offerors will be subject. It does not seem to be fair that whether a potential bidder risks being named or not named depends on whether or not another potential bidder happens to be in talks with the target which then leak. In addition, follow up bidders may put pressure on the target not to name them publicly so as to avoid them being subject to the effect of naming and the PUSU.

There is also a concern that where a potential bidder suspects that the target may be in talks with other potential bidders, and feels that it would secure a tactical advantage by triggering the 28 day PUSU in light of its state of readiness and the nature of a bid, it may consider triggering a tactical leak.

Also might the intended additional incentive to observe secrecy and keep confidential be diluted by knowledge that you may be inadvertently disclosed through a leak concerning another potential bidder?

Q3 Do you have any comments on the possible alternative approach to the identification of potential offerors? [*Target decision to name, p.15*]

We note the representations received by the Code Committee regarding the potential deterrent effect of new Rule 2.4 and concerns around "fairness" where the triggering rumour or speculation does not relate to and was not caused by some named potential bidders. As an alternative to the proposal that the decision as to whether a potential offeror (not the subject of rumour or speculation) is named should lie with the target, we suggest that decision might rest instead with the Panel taking into account the nature and, to the extent possible to identify, the source of the triggering leak; the views of the target; and the status of negotiations between the parties including the nature of the potential bidder and the structure of the proposed bid. The default position would be that all potential bidders would be subject to a private 28 day PUSU anyway, which would fall away in the event of a firm intention announcement. We suggest that it would still be open to the Panel to reconsider this approach in the future should it conclude that, in practice, the benefits of public identification (also in view of the lack of parity in treatment of bidders approaching a target before and after the start of the offer period) would outweigh the risks of deterring possible bidders.

Q5 Do you have any comments on the proposed new Note 2 on Rule 2.6? [*Formal sale process exception, p.20*]

We consider that a situation may arise where a target is approached by one or more bidders who subsequently announce that they do not wish to proceed, thus ending the offer period. If, in the following period, the Target decided to put itself up for sale presumably it would be able to take the benefit of this dispensation no matter how soon after the end of the previous offer period the formal sale process is commenced, allowing those earlier potential bidders who had made no intentions statements under Rule 2.8 to come back in under the exemption in Note 2(a) to that Rule. If that is the Panel's view, please could it be confirmed.

Q6 Do you have any comments on the proposed new Rule 2.6(c) and Note 1 on Rule 2.6? [*Extension of 28 day deadline, p.24*]

We would welcome clarification of the processes around requesting an extension i.e. how early could the target and potential bidder make an initial approach to speak to the Panel e.g. if it is clear from the nature of the bid/likely sources of funding that the 28 day deadline will be impossible to meet (regardless of the fact that a decision will only be being given towards the end of the 28 day period)? How do you reconcile the statement that, if the target requests it, an extension will normally be given, with the statement regarding the factors the Panel will take into account – do the latter go to the length of the extension to be granted as opposed to whether or not to consent? Further clarification around the parameters of "status of negotiations" and "anticipated timetable" may be helpful. This topic might merit a note or practice statement.

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? (*p.34)*

We would welcome clarification of why the language used in the proposed new Note "provided that at least three months have expired since the dispensation was granted" is different to the wording in Note 6 to Rule 2.4 and paragraph (a)(i) of the Note on Rules 35.1 and 35.2 being "Such consent will not normally be granted within three months…"? We suggest that the new Note should follow the wording in Rules 2.4 and 35.1 Also the Rule 2.8 dispensation at request of target does not appear to refer to three months, so is this route to be favoured?

Strengthening the position of the offeree company *(p.34)*

Q9 Do you have any comments on the proposed new Rule 21.2? [*Prohibition of inducement fees and other offer-related arrangements, p.44*]

We note that one of the exclusions from the prohibition on offer-related arrangements is a commitment to provide information or assistance for the purposes of obtaining "any official authorisation or regulatory clearance". In practice such assistance will only be granted on a recommended bid, and arguably an offeror in this context does not need it to be backed up by a contractual obligation. However, we believe that if an express exclusion is made for "regulatory clearances" (which suggests matters of merger control or national approvals of takeovers) the exclusion should be extended to cover assistance with producing a prospectus, including working capital statement and expert's report where applicable, or equivalent public document required in relation to the offeror's funding arrangements in order to meet regulatory requirements. In our opinion it is inappropriate to distinguish for this purpose between regulatory requirements relating to merger control and those regulatory requirements relating to funding arrangements.

A number of Code companies are holding companies for oil & gas or mining assets in countries whose regimes impose change of control requirements. Some of the requirements are achieved through regulation, others through the terms of the licence or the exploration, extraction or services contract. We believe that the exclusion for assistance for regulatory matters should cover all these types.

Q10 Do you have any comments on the proposed new Note 1 on Rule 21.2? [*Competing offeror exception, p. 46*]

The wording of the narrative on page 45 of PCP 2011/1 at paragraph (b) could be interpreted to mean that an inducement fee may only be payable to a white knight if a third competing offeror succeeds, and not if the original hostile offeror succeeds. We believe that it should be clarified that an inducement fee may be payable equally where the original non-recommended offer becomes or is declared wholly unconditional (whether or not revised), for example by inserting at the end of the proposed new rule note at the top of page 46 (paragraph (b)) the words ", including for this purpose an offer made by the original non-recommended offeror". In our opinion it would be inappropriate to distinguish between a third competing offeror succeeding and the original hostile offeror succeeding for the purposes of the trigger for payment of the inducement fee.

Q11 Do you have any comments on the proposed new Note 2 on Rule 21.2? [*Formal sale process exception, p.46*]

We agree in principle with the proposal that the winner of a formal sale process should be allowed deal protection. However, we believe that the Panel should monitor future market practice to ensure that this is not used by offerors as a new way to obtain an unfair advantage. It would be a concern if this right became used by the winner of a formal sale process to pressurise the target into implementing the process within a particular timeframe or to exert other pressure on the target, with the leverage that a suite of deal protection measures would otherwise be triggered, or by an offeror as a path to "locking up" a target.

We appreciate the argument that allowing the Panel to grant dispensations from the prohibition on deal protection measures where the target is in serious financial distress is designed to permit an individual discretion by the Panel to help secure a deal for a distressed company where there is not much interest. However, we believe that where there is only one potential offer available for the target deal protection may well be unnecessary. Further, arguably there may be little justification for the payment of an inducement fee by a distressed company in these circumstances. In our opinion there is a risk that allowing deal protection in the case of a distressed target may reduce the opportunity for other refinancing options to be considered, if a potential bidder effectively shuts off other routes to refinancing as a price of its participation. This could ultimately increase the number of distressed companies becoming insolvent.

We note that the proposed approach in relation to distressed companies is referred to in the narrative in PCP 2011/1 rather than included in a Rule change. We believe that some further indication would still be helpful of the circumstances in which the Panel might grant dispensations from the prohibition on deal protection in the case of a distressed target and also of the yardstick for measuring serious financial distress for this purpose.

Q14 Do you have any comments on the proposed amendments to Appendix 7? [*Expected scheme timetable, in circular etc, p.55*]

We believe that the drafting should be clarified to specify that the circumstances in which the target is not obliged to implement the scheme should include where the court order is not granted or the requisite shareholder resolutions are not passed or the requisite conditions are not satisfied (currently not specified, at (d) on page 54).

Increased transparency and improving the quality of disclosure *(p.58)*

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

Clarification on how to determine which of the covenants are "key" would be welcomed – would this for example include financial covenants? Which other covenants would be considered "key"? There is a concern that to the extent that financial and other covenants are disclosed pursuant to Rule 24.3(f) and/or Rule 26.1 then the business plan of the offeror for the period extending beyond the 12 months reflected in the "statements to hold true for at least one year" will be on display.

We believe the Panel should provide some clarification, perhaps by note or Practice Statement, of the type of covenant considered to be key and that only disclosure of covenants applicable to the 12 month period should be displayed. (For example, financial covenants for

future years should be redacted.) Lack of clarity will probably result in either or both of material inconsistencies in market practice and repeated questions to the Executive.

Q25 Do you have any comments on the proposed new Rules 26.1 and 26.2 or the related amendments? [*Documents on display and material changes, p.82*]

The Code Committee has acknowledged that headroom provisions to allow an offeror to revise its offer may be commercially sensitive and should therefore not be required to be put on display or disclosed in the offer document. However, there is a concern that disclosure of financing documentation and key covenants will result in inadvertent disclosure of other commercially sensitive information e.g. levels of expected EBITDA beyond the initial 12 months, restructuring costs etc from which the long term plans for the business could be deduced. It is not uncommon for facilities to have a specific allowance for restructuring costs, which could be highly sensitive.

Clarification that 26.1(a) is not intended to include financing commitment letters would be welcomed.

Providing greater recognition of the interests of offeree company employees *(p.83)*

Q27 Do you have any comments on the proposed new Note 3 on Rule 19.1? [*Adherence to statements of intention, p.87*]

We agree with the extension of Rule 19.1 to require the target as well as the offeror to stand by any public statement made during the offer period for 12 months. We believe that it would be helpful to supplement this with a Practice Statement giving more detailed guidance on disclosure obligations, including the extent of the target's response to the bidder's statement of intentions.

Q29 Do you have any comments on the proposed new definition of "employee representative"? (*p.95*)

We suggest considering clarifying that the definition of "employee representative" only catches those representatives of UK group companies of the target. If the definition were to extend to overseas group companies, this could increase the risk of obstacles arising to the completion of transactions, particularly in those European and American jurisdictions where employee representatives have established rights to consent before a transaction can be implemented (and related protections) as well as some practice of using them. This risk would not necessarily be visible to the market, thereby creating a false market risk as well as a transactional problem.

We also believe that the number of separate groups of employee representatives could be very high if overseas group companies are brought within the definition. For example, we acted recently on a transaction where the target had interests in approximately 70 countries. These included manufacturing operations in 40 countries and 3 main lines of business, many of which were conducted in more than one country. In this type of scenario there could be 60 or 70 different groups of employee representatives representing separate interests.

We also note that in this part of PCP 2011/1 the Panel appears to be moving away from its traditional role of protecting the market and the interests of target shareholders into

safeguarding the interests of wider constituencies, and we believe that this raises questions of where the boundaries lie for the Panel. We understand the social and economic point that a takeover can affect stakeholders other than shareholders, but we consider that, not least because of the potential global impact of these rules, the policies are better decided upon by Government. There is a delicate balance of policies in this area. Our provisional suggestion is that the Code provide for information access globally, as proposed, but not for target payment of advisers.

Q30 Do you have any comments on the proposed new Note 6 on Rule 20.1? [*Sharing information with employee representatives or employees, p.96*]

We appreciate the importance of emphasising that the Code does not prevent the passing of information in confidence to employee representatives or employees. However, we believe that it would help to clarify that the requirement specified in the narrative to PCP 2011/1 for target boards to inform employee representatives or, if none, the employees themselves, "at the earliest opportunity" of the right of employee representatives to circulate an opinion (and any other information rights) does not arise pre-announcement. We note that the new Rule 2.12 only requires this after the offer period commences (below), but the reference in new Note 6 to Rule 20.1 to the separate Rule 2.1 (on secrecy before announcements) may imply otherwise. We believe that earlier information rights to employee representatives could increase the risk of leaks and an early trigger of the 28-day PUSU deadline, and be undesirable.

Q31 Do you have any comments on the proposed new Rules 2.12(a) and (d) and second sentence of Rule 32.1(b)? [*Sending announcements to shareholders and making available to employee reps. or, if none, employees*]

Please see our timing comments above about only approaching employee representatives or employees post-announcement.

Q32 Do you have any comments on the proposed new Rule 25.9 and amendments to Rule 32.6? [*Employee representatives' opinion, p.102*]

We believe that either the suggested obligation on targets to pay costs should be dropped or that Note 1 to Rule 25.9 should be clarified to specify expressly that not only is the target's obligation to pay the costs limited to verification of the information in the employee representatives' opinion, but also that it should be confined to payment of legal costs. We are concerned that some employee representatives might otherwise use this as an opportunity to obtain advice at the target's cost on the implications for employees of the offeror's business plan and financing plans and also significantly increase the management time required in relation to the employee representatives' participation.