



MAKINSON COWELL

**The Secretary of the Code Committee
The Takeover Panel
10 Paternoster Square
London
EC4M 7DY**

22 August 2012

Dear Sir/Madam

PROFIT FORECASTS AND QUANTIFIED FINANCIAL BENEFITS STATEMENTS

Makinson Cowell

Makinson Cowell is a capital markets advisory firm specialising in investor relations. We advise large quoted companies on how to communicate with the market, including advice on current practice in terms of provision of forecast information. We work for more than one third of the FTSE 100.

We fully support the Panel's commitment to keep the Code up to date and to tackle emerging practice. We note this is a major change, removing a much cited obstacle to UK companies producing forecast information. It is a well thought out and proportionate set of reliefs of which we support the vast majority.

There follow our comments and suggestions on the Consultation Paper. For those questions not mentioned we support the Panel's proposals.

Q7 Profit forecasts for future periods – requirement for forecasts for intervening periods

While we agree that the relief from the requirement for reports on future periods is reasonable, and agree that generally companies should be discouraged from using this relief to produce unsupported future forecasts, we can envisage circumstances in which production of near term forecasts may be more difficult than for the future period. We note that 28.2 b) includes an option for the Panel to waive the requirement for intermediate period forecasts and think this may be useful for instance in the circumstance of a company building a major new facility or undergoing a transition in regulatory regime, though we agree that such circumstances would be unusual. Perhaps some indication of the circumstances in which a waiver might be considered could be offered to encourage the provision of information like this where it is useful. As noted, one such circumstance might be where a major change in the facilities, business model or regulatory environment is expected but not yet complete.

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Q15 Forecasts for part of the business

We agree that profit forecasts for part of a business should generally be caught by the Panel's rules and it should not be possible to avoid the intent of the rules by publishing forecasts for substantial parts of a business whilst claiming that no profit forecast has been produced. We note that the Panel has retained the express ability to waive compliance with rule 28 in this case. We think this may be a more common circumstance than the Panel appears to envisage, as size may not be the only grounds for a business profit forecast being material. This could arise where a forecast is made for a new or emerging business which is important strategically but has no significant effect on the profits of the listed entity as a whole. The new rule might oblige a group forecast to be made and reported on in the event of a bid, where the original partial forecast itself was immaterial in group terms. An example of this might be Tesco forecasting a break-even date for Tesco US. This information would be of little use for forecasting the profit of Tesco as a group, but important to investors in judging Tesco's strategic commitment to the US business. Such a future forecast might also interact with the partial relief on future forecasts offered by the proposed amendments noted in Q6 and Q7. In such a circumstance we think it would be appropriate for the Panel to grant a waiver. Note Tesco is not, and has never been, a client and we have no special knowledge of this situation.

Q16 Websites

We feel that providing consensus on a company's website is best practice and that the basis of calculation of the consensus should be clear and objective. If this is done we feel that this information is valuable to investors. We therefore feel it is not appropriate to require offerees to remove consensus forecasts from their websites at the outset of an offer. We feel, instead, that companies should remove forecasts from parties connected to the offer from their consensus number and recalculate it accordingly whilst otherwise maintaining the same basis for calculation as prior to the bid.

We feel that this information could well be of value to investors in the course of the offer and also that it is, in any case, available elsewhere and that if the company can improve on the quality of the consensus number this is a benefit to the market. We would also suggest that allowing a consensus to be maintained on the website during a bid might encourage companies to police consensus forecasts better and this could be of benefit to the market even outside bid periods.

Treatment of third party profit forecasts in respect of own profits

We do not feel that consensus or average of analysts' forecasts should be treated in the same way as forecasts by the company itself. Consensus forecasts are generally averages of forecasts and additionally the user or preparer may not have full information on the component forecasts. This would make it impossible for auditors or financial advisers to report on consensus numbers as a forecast in the same way as for a forecast by the company itself.

As a result, and because, as noted above, we feel that publication of consensus forecasts is best practice, we believe these could reasonably be exempted from the reporting requirements as envisaged for pre bid forecasts elsewhere in this consultation, subject to having been made public by the company regularly on a clear and consistent basis prior to the bid. Any such use should clearly be referenced as to its source and definition. We believe that the risk to objectivity here would be reduced by the requirement to have produced and justified the basis of the data historically. We also note that the information is already available in the market and an exemption such as this may improve its quality.

Q17 Rule 28.7 c) Right of reply

We feel that there is a risk that the “right of reply” envisaged in this consultation may be inadequate in the case of errors or omissions in the major consensus providers’ data. The current right of reply does not include any ability to challenge the accuracy or reasonableness of the offerors’ selection or use of “consensus”. This data is often of poor quality and we here at Makinson Cowell have seen examples of forecasts included in an average despite being in incorrect currencies or on radically different bases. It may be difficult for an offeror to detect this or, perhaps worse, an offeror may be able to claim ignorance of an error to its benefit.

If an offeree company were to contact consensus gatherers to remove incorrect or outdated forecasts from a consensus during an offer period, how would this be treated by the Panel?

Source and basis of compilation of consensus

In the proposed note 4 a) ii) on rule 28.7 it is not clear to us from where the exhaustive list of analysts available might come in order to determine all those analysts excluded. The reason for exclusion might, for example, be being an outlier from the consensus, having inadequate information available on the analyst’s basis of forecast or being out of date. Would these be acceptable reasons for the Panel?

Yours faithfully



Andrew Jones
Partner, Head of Research
Makinson Cowell