

RESPONSE TO TAKE-OVER PANEL'S CONSULTATION PAPER OF 5 JULY 2012 RE PENSION SCHEME TRUSTEE ISSUES, BY SCOTTISH & NEWCASTLE PENSIONS GROUP

INTRODUCTION

The Scottish & Newcastle Pensions Group (SNPG) was formed to represent the interests of the members of the Scottish & Newcastle Pensions Scheme in respect of their rights accrued prior to 1997, following the decision by Heineken not to honour the public undertaking given by them in 2008 in order to facilitate their acquisition of Scottish & Newcastle plc (S&N). This undertaking was that Heineken intended to continue the long-established practise of S&N that all pensions in payment would be increased each year in line with the RPI, up to a limit of 5%. The undertaking affected only pensions accrued prior to 1997, when the law changed to give this protection to all pensions rights subsequently accrued, and had the effect of giving all pensioners the same degree of basic protection against inflation regardless of when their pension rights accrued.

Heineken have subsequently reinterpreted their own 2008 undertaking to suggest that they only ever intended to consider the matter each year, with no presumption that the relevant pensions would actually be increased. SNPG believe that the original undertaking was unambiguous; and does not mean what Heineken now claim that it means. Following a complaint to the Pensions Ombudsman, the Ombudsman ruled on 26 September 2012 that SNPG's interpretation was correct and that Heineken were wrong.

The board of S&N at the time accepted the public undertaking given by Heineken, on the basis that Heineken was a long established business with a good reputation for acting with integrity. The frustration now of SNPG is that there is no reasonable way of requiring Heineken to comply with its undertaking. Inability to pay the extra cost is not an issue in this case – the incremental cost to Heineken of complying with its undertaking would be trivial, in the context of its overall financial position.

The undertaking was given by Heineken NV, the parent company of the group. But as Heineken NV is not a UK company itself, the Ombudsman has found that it is outside his jurisdiction. Clearly, this is very

unsatisfactory both for the pensioners involved, and for the wider integrity of UK take over bids involving non UK companies.

The S&N Pension Scheme has about 45,000 members in total, of whom about 18,000 are affected by this issue.

The average annual pension paid by this scheme is under £6,000. The approach taken by Heineken, if continued, is likely to have a material adverse affect upon the future welfare of the members of this scheme as they find that their modest pensions no longer have the inflation protection that they had repeatedly been told to expect, and which Heineken had seemed to confirm.

COMMENTS ON THE PROPOSED CHANGES

SNPG welcomes the proposed changes. They will not ensure that a problem of this sort will not arise in future, but they will make it less likely.

In relation to the individual questions we have the following comments

Q1 We support the proposal that the intentions of the offeror in relation to the offeree company's pensions scheme should be made clear.

Q2 We support the proposal that the Board of the offeree company publishes its views on the impact of the offer on the company's pension scheme.

In relation to the remarks in paragraphs 3.6 and 3.7 although no question is asked we have the following comment. We accept the rationale for placing a limit of 12 months on the time during which any such statement of intention would remain subject to the Code. However it must be recognised that pension matters, particularly for members in the later stage of employment or in retirement are by their nature of long term and serious consequence for those concerned. This seems to us to argue strongly that agreement between an offeror and the trustee of an offeree's pension scheme should be an expected part of any takeover. This is returned to in Q6 below.

Q3 We have no comment on question 3

Q4 We have no comment on question 4

Q5 We have no comment on question 5

Q6 As noted above we believe that the changes could be improved to good effect in relation to agreements between offeror and trustee. The Panel's proposal discusses a possible agreement between the offeror and the trustees regarding pensions issues – we support such agreements. The proposal also, rightly in our view, rejects any absolute requirement for such an agreement to be negotiated or for there to be an automatic reference to the Pensions Regulator by the Panel, if there is no such agreement. However the proposal effectively concludes that such agreements are permitted, but not required. This seems unnecessarily weak.

We suggest that the Code should make it clear that such agreements should be a normal part of a bid process, and that the offeror is under an obligation to attempt in good faith to negotiate such an agreement with the trustees. If it cannot be negotiated for any reason, the fact of it not having been negotiated should be disclosed during the bid process. It would then be open to the trustees to make representations themselves to the Pensions Regulator, if they felt that the offeror were being unreasonable.

This would make it more likely that the parties would actually deal properly with pensions issues themselves during the course of the bid, but without requiring the Panel to become involved, and without delaying or stopping the bid. It would not allow the trustees to be unreasonable, and thereby frustrate the bid.

Our purpose with this suggestion is to put the onus firmly upon the parties directly involved to discuss and settle pensions issues within the current bid timetable; to have this recorded in a proper written agreement that is intended to bind the parties; and to give the trustees a proper basis for making a reference to the Pensions Regulator, if they feel that the offeror is being uncooperative or acting unreasonably.

The Code should not be shy of making it clear that offerors are required to address pensions issues in a proper and serious manner – but without prescribing what may or may not be appropriate, in any particular circumstances.

In addition we believe that any such agreement should be disclosed in full so that shareholders and pension scheme members are fully informed of

what has and has not been agreed upon. We refer to our own experience where over four years after the takeover the agreement entered into between Heinenken and the Trustee of the S&N plan has still not been disclosed, on the grounds of supposed commercial sensitivity. This seems to us to be a spurious argument.

FURTHER INFORMATION

SNPG would be pleased to discuss with the Panel any issues that may arise from this submission. SNPG have no objection to the publication of this submission by the Panel.

Submitted by Thomas Ward, on behalf of SNPG.

27 September 2012.