



TUC response to Takeover Panel consultation on pension scheme issues

Introduction

The TUC welcomes this opportunity to comment on the Takeover Panel's consultation on pension scheme trustee issues. The TUC represents over six million workers in 54 unions. Our members in the private sector are affected both as workers and as pension scheme members by takeover proposals, as mergers and takeovers can have very major impacts on company pensions as well as on employment at the company.

An example that illustrates the difficulties that takeovers can cause in relation to company pensions is that of BMI. BMI was bought by Lufthansa in 2008 and then bought by IAG from Lufthansa earlier this year. When IAG bought BMI, Lufthansa agreed to continue to support the company pension scheme, but the Pensions Regulator rejected the plan and accepted the scheme into the Pension Protection Fund. The TUC has been working with its affiliates BALPA, Prospect and the GMB to try to ensure that the interests of pension fund beneficiaries are protected. One of the key issues has been the extent to which Lufthansa took formal responsibility for the scheme when it bought BMI back in 2008.

In general, the TUC warmly supports the proposals to require a statement of intention from the offeror in relation to the company's pension scheme/s and the extension of the rights the Takeover Code gives to employee representatives to pension scheme trustees. We believe these reforms will provide pension scheme trustees with tools to enable them better to protect the interests of pension scheme beneficiaries in relation to company takeovers. Our detailed comments on the proposals are given below.

However, we are concerned that some of the proposals as drafted will only apply to those pension schemes that are trust based and therefore have pension scheme trustees. Unfortunately, a large proportion of private sector workplace pension schemes are now contract based, and do not have trustees. The two areas where the proposals apply only to trust-based pension schemes are the right of pension scheme trustees for their opinion of the impact of the offer to be circulated; and the right (conferred by implication rather than directly set out in the Code) to enter into agreements with the offeror company relating to pension provision.

In both cases, where employee representatives exist, the TUC believes that it would be appropriate for employee representatives to fill this gap. Pensions are deferred pay and an important employment benefit, so changes to pensions clearly constitute an employment impact, upon which employee representatives already have the right to comment in relation to the offer. Similarly, in the absence of pension scheme trustees, it would be appropriate for the employee representatives to enter into any agreement with the offeror company over pensions.

The TUC believes that employee representatives would be acting comfortably within their current rights in fulfilling these roles. Nonetheless, we believe that for the avoidance of doubt it would be useful to clarify explicitly that this is the case. It is important that the benefits of the proposals in the document should apply to the beneficiaries of all offeree pension schemes, whether or not they are trust

based. The TUC is very happy to engage in further discussions on this issue with the Code Committee.

Q1. Do you have any comments on the proposed amendments to Rules 24.2(a) and (b) relating to the requirement for an offeror to disclose, among other matters, its intentions with regard to the offeree company's pension scheme(s)?

The TUC warmly welcomes this proposal. Pension scheme beneficiaries have the right to know what a company merger or takeover will mean for their pension. It is therefore very important that the offeror company should be required to make its intentions regarding the company's pension scheme/s known so that pension scheme beneficiaries and their representatives can assess this information and have the opportunity to raise any issues of concern.

The TUC has no comments on the suggested wording of these amendments.

Q2. Do you have any comments on the proposed amendments to Rule 25.2(a) relating to the requirement for the offeree board to include in the offeree board circular its views on, among other matters, the effects of implementation of the offer on the offeree company's pension scheme(s)?

The TUC warmly welcomes this proposal. The offeree board's experience and knowledge of its pension scheme/s should enable it to make an informed comment on the offeror's statement of intention regarding the company's pension scheme/s. The TUC has no comments on the suggested wording.

Q3. Do you have any comments on the proposed amendments to Rules 2.12(a), 2.12(b), 24.1, 25.1, 32.1, 32.6(a) and 27.1(b), and to Note 6 on Rule 20.1, in each case relating to the information to be disclosed to the trustees of an offeree company's pensions scheme(s)?

The TUC supports the proposal that any statement made by an offeror or the board of the offeree company in relation to the company's pension scheme should be binding for a given period. However, we believe that this period should be three years rather than one year.

Issues regarding pensions are often of a less immediate and more long-term nature than many other aspects of company decision-making. For example, decisions on pension funding may have a significant impact on company finances over time, but a more limited impact in any given year. Pension provision is a complex area which requires detailed knowledge and understanding, some of which is generic and some of which is scheme specific. It is not appropriate to take decisions on pension provision – which will have major implications for the retirement income of pension scheme members for many years into the future – quickly or lightly.

There is a danger that, notwithstanding the one year binding period, offeror companies implement detrimental changes to company pension scheme/s that stem directly from the merger after the one year period has elapsed. The TUC would therefore support a longer binding period for statements of intention on

pension schemes, which we suggest should be three years. One year is not a sufficient timeframe for issues regarding pensions to be identified and alternative options to be explored in consultation with pension fund trustees and trade union representatives. In addition, a period of one year does not provide an adequate lead-in time for employees close to retirement who will be most immediately affected by any changes. We believe that three years would provide a more realistic timeframe in these regards. If an offeror company were to seek to alter the company's pension scheme only one year after a takeover, it is fair to presume that such plans would have been in place in advance of the takeover and should have been disclosed to trustees at the time of the offer.

If the binding period were to be one year only, it would be very important for implementation to be monitored to assess whether there is a tendency for companies to wait for one year and then implement pension scheme reforms that are detrimental to the interests of pension scheme members.

The TUC welcomes the proposal to require the offeror and offeree companies to make available to the trustees of the company's pension scheme/s all the documents that they are required to make available to the offeree company's employee representatives, and has no comments on the proposed wording of these amendments.

Q4. Do you have any comments on the proposed amendments to Rule 25.9 (and Note 1 on that Rule) and to Rule 32.6 regarding the rights of the trustees of an offeree company's pension scheme(s) to make known their views on the effects of the offer on the scheme(s)?

The TUC agrees that the trustees of the offeree company's pension scheme/s should be granted the right for their opinion of the impact of the takeover on the company's pension scheme/s to be circulated to shareholders appended to the offeree board circular. However, the TUC believes that the offeree company should be required to pay any reasonable costs that may be required for pension fund trustees to verify their opinion, as is the case with the opinion of employee representatives on employment impacts of the offer. The TUC does not see why pension scheme members, who are in no way responsible for initiating or facilitating the offer, should be responsible for paying for the analysis of how their pensions will be affected by the offer.

We do not accept the Code Committee's arguments for its view that pension schemes should carry these costs themselves. Firstly, we do not agree that 'there might be considerable dispute as to whether such costs were incurred reasonably'. In reality, many schemes will use the services of their existing advisers and actuaries to advise them in this matter. As the sponsor of the company's pension scheme/s, the offeree company will already have some knowledge and experience of these organisations, and will be able to discuss the proposed advice charges with them. If there is concern on this area, the TUC suggests that the Code Committee should ask the Pensions Regulator to issue some guidance on the issue, rather than make pension schemes responsible for paying the costs. The argument that the costs may be considerable does not have any bearing on who be

responsible for paying the costs; it merely illustrates the fact that decisions on pension provision are complex and require detailed knowledge and understanding, some of which is scheme specific, and therefore, as argued above, should not be entered into quickly or lightly.

The argument that ‘in practice a sponsoring company will normally be responsible for paying costs reasonably incurred by the trustees of the scheme/s’ is not an argument against this being made a requirement. Rather, it supports the argument that it is appropriate for these costs to be paid by the sponsoring company and that therefore to ensure that this takes place in all, rather than just some cases, this should be a requirement under the Code.

As noted in the introduction, contract-based pension schemes do not have pension fund trustees. In the absence of pension fund trustees, the TUC believes that it would be appropriate for employee representatives to include the impact on the company pension scheme/s in their opinion of the impact of the offer, should they wish to do so.

Q5. Do you have any comments on the proposed amendments to Rule 2.12(d) and to Rule 32.1 regarding the requirement for the trustees of the offeree company’s pension scheme(s) to be informed of their rights under the Code to make known the effects of the offer on the scheme(s)? Do you have any comments on the proposed amendment to Rule 19.2 relating to directors’ responsibility statements?

The TUC supports the proposal that the offeree company should be required to inform the trustees of the company’s pension scheme/s of their right to circulate their opinion of the impact of the offer on the pension scheme/s to shareholders. It would not be reasonable to expect pension fund trustees to be aware of all their rights under the Takeover Code, and this requirement is necessary to ensure that pension fund trustees are aware of their rights and therefore have the opportunity to make use of them. The TUC has no comments on the proposed wording of these amendments.

Q6. Do you have any comments on the proposed new Rule 24.3(d)(xvi) and new Rule 26.2(i) relating to the requirement for the offer document to include a summary of any agreement between the offeror and the offeree company’s employee representatives or the trustees of the offeree company’s pension scheme(s) in relation to any of the matters described in Rule 24.2 and to the requirement for any such agreement(s) to be put on display?

The TUC welcomes this proposal, which is necessary to ensure full transparency of any agreements entered into between the offeror and the offeree company’s trade union representatives and/or pension scheme/s trustee. This requirement will help to ensure that those directly affected by such agreements are aware of them. In addition, the TUC believes there is a wider public interest benefit in ensuring that such agreements are in the public domain so that all those affected by or involved in the offer have easy access to the agreements. It will also arguably

make it less likely that disputes will arise after a merger has taken place over the precise terms of an offer-related agreement.

As noted in the introduction, the TUC believes that in the absence of pension scheme trustees, it would be appropriate for employee representatives to enter into an agreement with the offeror in relation to the company's pension scheme/s.

Acting in concert and offer-related agreements

The TUC has some concerns about the Code Committee's arguments as set out in paragraphs 3.19 and 3.20 that it is unlikely that any issues relating to 'acting in concert' will arise from agreements relating to the company's pension scheme/s. While it is the case that a company and its pension scheme/s are distinct legal entities, the statement that 'pension scheme trustees are normally independent of the sponsoring company' is not accurate. In practice, there will be key individuals who have a high degree of involvement in both a company and its pension scheme. While pension scheme members have the right to nominate one third of the trustees of a pension scheme, the trust deed of a pension scheme usually gives the sponsoring employer the right to appoint trustees¹. In many cases, some, if not all, of the employer-nominated trustees will be senior company employees. For example, it is quite common for the company Finance Director to be a trustee of the company's pension scheme/s on the basis that s/he is likely to have skills and experience that are highly relevant for this role. It is also very likely that some, if not all, of the member-nominated trustees will be company employees (this is not a requirement but reflects the practicalities of attending meetings and so on).

The TUC is therefore concerned that individuals who are both company employees and pension fund trustees could be put in a difficult position in terms of the legal situation surrounding the issue of agreements and acting in concert. This would be especially the case for senior company employees such as the Finance Director or other company directors, who will have a key role in determining the Board's opinion of the impact of the offer on the company. The TUC is concerned that concerns over acting in concert could deprive the trustee body of key expertise and input in its discussions on pension scheme agreements. In addition, the TUC is aware that acting in concert is an area which already causes a degree of concern and confusion; for example, investors continue to cite the rules over acting in concert as a brake on collective engagement with companies, despite statements from the Code Committee clarifying that there is no need for this to be the case.

The TUC therefore requests that the Code Committee looks again at this area with a view to the avoidance of doubt over the relationship between the rules on acting in concert and agreements between the offeror and pension fund trustees by amending Rule 21.2. It should be noted that this would not in any way reduce the need to ensure that no conflicts of interest existed in relation to the role of those involved in discussing pension scheme agreements.

¹ See guidance from the Pensions Regulator on appointing and removing trustees at <http://www.thepensionsregulator.gov.uk/guidance/guidance-for-trustees.aspx#s1544>